

adopted. Were we to be influenced by it we practically would be making the witnesses co-ordinate with ourselves in the interpretation of the contract. Knowing, then, that there is a river and that there is a gulf, is the warranty plain or is it ambiguous? My opinion is that the meaning of the warranty is plain. If there had been only a river, or if there had been only a gulf, there could have been no ambiguity; and although there is a river and there is a gulf the warranty is as plain as it would have been in the case which I have supposed—"No St Lawrence," from the comprehension of the negative, meaning, according to the natural import of the words, neither river nor gulf."

The Lord Ordinary has entered at length upon a review of the proof, and the various considerations by which he has been led to the judgment he has pronounced. I agree with him in the result, and in the reasons he has given for his judgment, and therefore think it necessary only to add that I think his interlocutor ought to be affirmed.

LORD RUTHERFURD CLARK—I have felt very considerable difficulty in this case. I am satisfied, however, that the words "No St Lawrence" have no technical meaning or trade meaning; and that being so, and as your Lordships look upon the phrase as an ambiguous phrase, I am, on the whole, disposed to hold that the words must be construed strictly against the insurer, and to concur in the judgment which your Lordship has proposed.

The Court recalled the Lord Ordinary's interlocutor, and decerned against the defenders in terms of the conclusions of the summons.

Counsel for Pursuers—Trayner—M'Kechnie. Agents—Archibald & Cuninghame, W.S.

Counsel for Defenders—Solicitor-General (Asher, Q.C.)—Jameson. Agents—J. & J. Ross, W.S.

Friday, February 9.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

SNODY'S TRUSTEES v. MILLAR AND OTHERS.

Succession—Legitim.

By his trust-settlement a testator directed his trustees to divide the residue of his estate into three equal portions. One portion was to be paid to the issue of a daughter who had predeceased him, another to another daughter who had survived him, whom failing to her children equally among them, and the remaining one-third, from which was to be deducted certain advances made during the testator's life (which advances were to be reckoned into the general amount of the residue before making the division), was to be held by the trustees for the only remaining daughter, a widow, who also survived him, in liferent allanarly, the capital to be paid after her death in certain proportions to her two children; the right of those child-

ren to these sums was declared to vest at the testator's death. The deed provided that the provisions in favour of the testator's "daughters and grandchildren" should be in full implement of any obligations he might have come under by other deeds, and also of all legitim and other claims competent in any manner of way. The last-mentioned daughter renounced the provisions of the settlement and took her legal rights. *Held* (following *Fisher v. Dixon*, 6 W. & S. 431, from which the case was held indistinguishable) that the children of the daughter who took her legitim had a separate and independent right under the settlement which was not affected by their mother's election to take legitim.

Mr Andrew Snody, S.S.C., died on 18th March 1881. He was predeceased by his only son John Morison Snody, and by one of his daughters Isabella Snody or Mrs Wallace, who was survived by her husband and three sons. Mr Snody had two other daughters who survived him. One of them married a Mr Gibson and had issue, who, as well as their parents, survived Mr Snody. The other became Mrs Millar; at the date of Mr Snody's death she was a widow with two children, a son and daughter. For some time before his death Mr and Mrs Gibson and their children resided with him. By his trust-disposition and settlement, dated 8th October 1880, and recorded 9th May 1881, Mr Snody assigned and conveyed to the persons therein named, as trustees for the ends and purposes mentioned in the deed, his whole estates, heritable and moveable. The trust purposes were (1) payment of debts; (2) a special provision to Mrs Gibson of the household furniture, books, and silver plate. In the third place, the trustees were directed to sell the heritable property of the deceased, and to divide the whole residue of the estate (including certain sums advanced to Mrs Millar amounting to about £1800, and sums advanced to one of the children of Mrs Wallace) into three equal parts, one of which parts, under deduction of the £1800 just mentioned, was to be held by them for the liferent behoof of Mrs Millar, and at her death was to be divided by them as follows:—"They shall pay the sum of £1000 to her daughter Helen Lewins Millar, and her heirs and assignees whomsoever, and they shall pay the remainder to her son William Somerville Millar, and his heirs and assignees whomsoever, the legacies to my grandchildren being intended to vest at my death." The second share of the residue was to be divided among the children of Mrs Wallace, the trustor's predeceasing daughter, in certain proportions mentioned in the deed. The remaining share was to be paid over by the trustees to the trustor's daughter Mrs Gibson, already referred to, whom failing to her children equally, and the survivors and survivor of them, share and share alike. The deed further went on to declare "that the provisions in favour of my daughters and grandchildren hereinbefore written shall be accepted by them in full implement of any sums of money which I may have undertaken to pay to any of my daughters or their issue under their contracts of marriage or otherwise, and also in full satisfaction to them of all legitim, bairns' part of gear, or other claim competent to them on my death in any manner of way."

Mrs Gibson died in September 1881, leaving a trust-disposition by which she gave the annual income of her estate to her husband and the capital to her children equally.

Mr Snody's trustees proceeded to realise and divide the estate in terms of the trust-deed, but the truster's daughter Mrs Millar intimated to them her rejection of the provisions in her favour contained in the said trust-disposition and settlement, and her determination to claim her legal rights in the truster's estate, and she further disputed the right of the trustees to deduct from her interest in the estate the advances made to her by the truster and referred to in his said settlement.

Other claims not material to the question here decided were also made against the trustees, and the present action of multiplepointing was accordingly raised by them.

It was pleaded for Mrs Millar, *inter alia*, that she was entitled to renounce the provision in her favour contained in the truster's settlements, and to claim her share of legitim, which was one-fourth of his moveable estate. Mrs Millar's children claimed that one-third of the residue should be paid to them, in the proportion of £1000 to Helen Lewins Millar, the remainder to William Somerville Millar, as provided by the passage of Mr Snody's deed quoted above, or otherwise that the said one-third should be invested for payment to them on the death of their mother.

It was pleaded, *inter alia*, for Mrs Gibson's trustees—"On a sound construction of Mr Snody's trust-deed, the provisions in favour of Mrs Millar and her family was a single and indivisible gift conditional on Mrs Millar's surrender of legitim, and she having claimed legitim her children cannot also claim the fee of the provision.

Other claims were made which need not here be detailed.

On the 3d November 1882 the Lord Ordinary (M'LAREN) pronounced the following interlocutor:—"Finds that in consequence of the truster's daughter Mrs Anne Somerville Snody or Millar having claimed her legitim, the income of the share of residue destined to her and her family vests in the trustees during her lifetime, and is to be applied by them in compensation of the legitim received by her: Finds that the children of the said Mrs Anne Somerville or Millar have a separate and independent interest in the fee of said provision, and that their interest is not affected by their mother's election, and to that extent repels the pleas of the claimants Gibson's trustees: On the other points of the case, which depend on fact, allows to each of the claimants a proof before answer of their respective averments, reserving in the meantime the question of expenses; and grants leave to reclaim.

"*Opinion.*—The chief question which was argued in this case arises upon the fifth plea for the trustees of Mrs Gibson. They contend that the truster's provision for his daughter Mrs Millar and her children is a single and indivisible gift, conditional on Mrs Millar's surrender of her legitim; and they say that as Mrs Millar has claimed her legitim, she has incurred a forfeiture, not only of her life interest in the provision, but also of her children's right of fee or reversionary

interest in the fund. They endeavour to distinguish the case from *Fisher v. Dixon*, 6 W. and S. 431, on the ground that under the terms of Mr Snody's trust-deed his daughter's children are not instituted as independent legatees, but take only a derivative interest through their mother, conditional on her acceptance of the provision.

"Now, the true ground of decision in *Fisher v. Dixon*, as explained by the present Lord President in a case cited (*Jack's Trustees*, 6 R. 543), is that in a family provision the children have a separate and independent interest, which is not affected by the acts of the parent derogating from the authority of the will. It is not necessary that the gift to the children should be separate in form; if it is substantially a separate and independent interest, the law will protect it, and will not involve the children in the consequences of the parent's election to claim legitim. Now, on referring to the provision itself, I find that there is a gift to Mrs Millar's children after the death of their mother, separate in form and substance from the gift to the mother for life. They are not to take in substitution to their mother (which would raise a very different question), but they are to take as institutes their right vesting at the truster's death, subject to the burden of the mother's life interest.

"An argument was also founded on a clause in which the truster declares that the provisions in favour of his 'daughters and grandchildren' shall be accepted by them in satisfaction of legitim or other claims. It is not very clear what was the truster's motive or reason for the reference to grandchildren contained in this clause; but I cannot accept the suggestion that he meant to impose on his grandchildren an obligation to satisfy legitim which it clearly was not in their power to fulfil. If the expressions in this clause mean anything more than a descriptive reference to the foregoing provision, I think the clause must be construed distributively—a mode of construction which is at any rate rendered necessary by the circumstance that the provisions are declared to be in satisfaction of marriage-contract obligations as well as of legitim. The sentence, when thus explained, means that the provisions in favour of the truster's daughters are to satisfy any claim they may have upon him, either in respect of his accession to their marriage-contracts, or in respect of their right to legitim, as the case may be, and that the provisions to his grandchildren are to be accepted in satisfaction of anything he may have promised on the occasion of their mother's marriage. This is, I think, the true reading of the clause, and it displaces the argument founded on it with respect to legitim. I have only further to add, that I do not find in Mr Snody's deed anything which can be considered to import a forfeiture of the children's rights in case of the parent's claiming legitim. If such a case had arisen, I should not consider that the doctrine laid down in *Fisher v. Dixon* was necessarily conclusive on the question.

"The other questions argued in this process are those raised by Dr Wallace in his condescendence, namely—[*His Lordship here narrated certain other claims*]. On these questions I propose to allow a proof before answer."

The claimants Mrs Gibson's trustees reclaimed, and argued—This was not a case of ordi-

nary fee and liferent, for the provision in favour of Mrs Millar and her family was a single and indivisible gift conditional on Mrs Millar's surrender of legitim. The question was one purely of intention, to be gathered from a sound construction of the trust-deed; various considerations favoured equality among the three families—the general scheme of the deed, the treatment of the advances made to Mrs Millar and her family as part payment of her share, the description of the portion which the children were to get; this was not to be the fee of the estate. In the construction of this deed, its tripartite division was of the greatest importance, to be kept in mind as demonstrating the intention of the truster, which was clearly equality among the sets of beneficiaries. No doubt legitim is a debt payable *prima facie* out of the whole executry, but in the present case it was clearly the intention of the truster, by separating his estate into three parts, to prevent any claim like the present from emerging—the provision to each set of beneficiaries was to be in full of all legal rights.

Authorities—*Hutchison v. Anderson's Trustees*, Mar. 18, 1853, 15 D. 570, *rev.* 2 M'Q. 492; *Macfarlane's Trustees v. Macfarlane*, July 20, 1882, 19 Scot. Law Rep. 850.

Argued for claimants W. S. Millar and H. L. Millar—Legitim was a claim against the whole free executry. The legacies to the children of Mrs Millar vested at the death of the testator, and their interest in these legacies could not be prejudiced by their mother claiming her legal rights, for the provision was divisible, and the children's interest was clearly separable.

Authorities—*Ewan v. Watt*, July 10, 1828, 6 Sh. 1125; *Collier v. Collier*, July 6, 1833, 11 Sh. 912; *Wilson v. Gibson*, June 30, 1840, 2 D. 1236; *Sinclair's Executors v. Rorison*, Dec. 11, 1852, 15 D. 212; *Baird v. Harvey's Trustees*, July 6, 1858, 20 D. 1220.

At advising—

LORD PRESIDENT—The question before us arises on the construction of the residue clause in the trust-disposition and settlement of the late Mr Andrew Snody, and there are some peculiarities undoubtedly in that portion of his settlement, but none such, in my opinion, as to prevent the application, in the circumstances of the present case, of a very well settled rule of law. The testator had apparently four children. There was a son who died some time before himself, and of whom it is not necessary to take any notice in this question. He had a daughter, Mrs Millar, who was alive at the time of his settlement and at the date of his death. She was a widow, and had two children. He had another daughter named Mrs Gibson, who with her husband and family survived him; and he had a third daughter, Mrs Wallace, who was dead at the date of the settlement, and for whose children he made provision in place of the daughter herself. These three branches of his family therefore stood each of them in a perfectly different position from the others. Mrs Gibson being a woman with a living husband and children, was of course in the position of a lady who had children of an uncertain number. On the other hand, Mrs Millar was a lady who had two children, and never could have any more unless she married again. Then, in regard to the other family, that of the Wallaces,

there were three sons in that family, sons of the daughter Isabella, and they represented that family. Now the purpose of his settlement generally is to divide the residue of his estate into three parts. That is very clearly and distinctly set forth, and to that principle of the settlement we are bound to give full effect. But he had made advances to some of these daughters and grandchildren, and he charges the advances against those who have had them. In particular, in the case of Mrs Millar, he charges her with an advance of £1800, which is to be deducted from her one-third part and thrown into the general estate. And, in regard to Mr James Walker Wallace, the eldest son of the deceased daughter Isabella, he had advanced to him £274, which in like manner is to be deducted from his share and thrown into the general residue. But, under these deductions, the division is to be equal. Now, I shall take the provision in favour of Mrs Gibson first, as raising one of the purest cases for construction under this residuary clause that there could very well be. It is provided—"My trustees shall pay and make over the remaining third part of the residue of my means and estate, including, as aforesaid, to my daughter, the said Mrs Helen Snody or Gibson, whom failing to her children, equally, and the survivors and survivor of them, share and share alike, declaring that the receipt and discharge of my said daughter alone, or of her assignees, shall be a sufficient exoneration to my trustees for payment of the said provision, and that my said daughter shall hold the same at her own absolute disposal." Now, there is a case in which one-third part of the free residue of the estate is given unconditionally to one of the children, and if any question had arisen in regard to Mrs Gibson's share, there could have been no doubt whatever, because there follows a clause excluding legitim, and declaring the provision absolute. Mrs Gibson could not have claimed her legitim and at the same time have taken benefit under this clause. The children of Mrs Gibson had no vested interest in the settlement; they had the mere expectance of succession to their mother. The case of the Wallace family is also very simple, because the third part of the residue which is set apart for it is divided equally among the three brothers who represent that family, and, as regards them, no question like the present could possibly arise, because in that family there was no claim to legitim, the mother being dead, and there being nobody to make the claim. Then we come to the sole remaining case of Mrs Millar. Now, in regard to Mrs Millar, the provision is that the trustees shall "hold one of said parts," that is to say, one-third of the residue "for the liferent behoof of my daughter Mrs Anne Sommerville Snody or Millar, widow of Andrew Millar," and so forth, under certain deductions, which it really is not of importance to observe in the meantime, amounting altogether to £1800, as I have already said, and that being deducted and paid into the general fund, she is to have the one-third of that general fund of the residue of the estate, and "my trustees are hereby appointed to invest the same in their own names, and to make payments by quarterly instalments to my said daughter of the free annual income and revenue received by them on the sums so invested; declaring, as it is hereby declared, that

the said quarterly instalments shall be strictly alimentary and shall not be assignable by my said daughter or attachable for her debts, or subject to the diligence of her creditors; and on the death of my said daughter my trustees shall divide between and among her children after named, the moneys held for her liferent behoof as aforesaid, and that in the following proportions, *videlicet*, they shall pay the sum of £1000 to her daughter Helen Lewins Millar, and her heirs and assignees whomsoever, and they shall pay the remainder to her son William Somerville Millar, and his heirs and assignees whomsoever, the legacies to my said grandchildren being intended to vest at my death." Now, the legacies as he calls them here—it does not matter very much whether the real name is provision rather than legacy—but whatever is given, the subject of the gift here to these two named children of Mrs Millar is to vest in them at the death of the testator, subject only to the money remaining in the hands of the trustees for the purpose of their paying the interest accruing upon the same to Mrs Millar during her life. Now, Mrs Millar has claimed her legitim and having thereby, of course, lost her claim under the deed, the question arises whether her claim of legitim can have any effect—any direct effect I mean—upon the interests of her children? And I apprehend that is a question which has been settled, and certainly is not to be opened up, nor are the decisions on the point to be frittered away, upon very slender grounds. We can suppose that there may occur a deed in which there are considerations so adverse to the doctrine of *Fisher v. Dixon* that it may not be given effect to, but I confess I find no such consideration on the face of this deed. The argument, as I understand it, maintained by the reclaimers was this—in the first place it is said that the clause which declares that the provisions are to be accepted in lieu of legitim is expressed in a peculiar way. It is a declaration "that the provisions in favour of my daughters and grandchildren shall be accepted by them in full implement of any sums of money which I may have undertaken to pay to any of my daughters or their issue under their contract of marriage or otherwise, and also in full satisfaction to them of all legitim, bairns' part of gear, or other claim competent to them on my death," implying, as it is argued, that the claim of legitim is one that may be made with special reference to the provision in favour of the grandchildren as well as of their mother. I confess that construction is, in the first place, to my mind not altogether intelligible; but, in the second place, I think it is entirely inadmissible. The introduction of the grandchildren there in addition to the daughters is quite sufficiently accounted for by his reference to previous deeds settling sums of money, marriage-contracts, and the like. It turns out in point of fact that there were no such deeds, but it is quite plain on the other hand that the framer of this deed either thought there were such pre-existing deeds in favour of the daughters and children, or that there might be such although Mr Snody might not be aware. Therefore he inserted this clause, and that accounts for the introduction of grandchildren along with the daughters. But can anything be more absurd than to say that the provision to the grandchildren shall be to them in full of legitim? Why! they had no claim to legitim, and cannot discharge legitim

any more than they can claim it. Now, to declare that a person shall not have legitim who has no right to it and cannot discharge it, is on the face of it mere absurdity; and therefore the interpretation of this clause which is contended for is I think entirely inadmissible. In connection with this Mr Gloag argued that when he gives Mrs Millar and her family the one-third of the estate in the terms which I have read, he means to include her share of the legitim fund. In one sense I think that may be conceded at once, because if a man conveys his whole estate to trustees, including the legitim fund as well as the dead's part, and if he proceeds to dispose of the whole estate, then each part of that estate that he gives to the child necessarily includes the portion of the legitim fund that belonged to that child. There is no peculiarity in that. It necessarily occurs in every deed of the kind; and therefore if we put in, as Mr Gloag says we should do, the words "including their share of the legitim fund," the deed would not mean more than every deed of the kind means. It just means that they shall have one-third of the estate along with the other daughters and representatives, the estate consisting not merely of the dead's part, which he had a right to dispose of, but also the legitim fund which he could only dispose of subject to certain contingencies and provisions. The result of the argument would be that the legitim claimed by Mrs Millar would be paid out of a part of the estate which is specially settled upon Mrs Millar's children. That is the object of the argument. Now, surely if there was anything clearer than another in the law of succession it is this—that legitim is a debt due by the entire free executry, and does not constitute a burden upon one part of the estate more than another. And if that be so, would it not require an express provision in the settlement to say either that the legitim or a part of it, if claimed by one of the children, is to be paid out of a certain part of the estate and not out of the whole? It is quite in the power of the testator to say "My debts shall be paid out of one part of the estate and one only." The natural thing is that they be paid out of the whole estate; but he may provide if he likes that the debts be paid out of the heritable estate. But if such a thing is to be done it must be expressly directed, and in the absence of express directions the debt which is claimable against the estate will just come to be claimed in due order of law upon the whole estate or that part of the estate which owes the debt. Now, the part of the estate which owes the debt called legitim is the entire executry, and it would be a very extraordinary result certainly if in the absence of anything controlling that general rule of law in this deed we were to hold that the portion of legitim now payable to Mrs Millar—that is to say, one-fourth of the moveable estate—is to be paid by Helen Millar and William Millar, her daughter and son, to whom certain provisions are made in fee which are declared to be intended by the testator to vest at his death. I do not go back at all on the general argument with regard to the rule established in *Fisher v. Dixon*. We have had so much consideration of that that I think it would be a waste of time to try and expound it further; but undoubtedly the interests of mother and children as liferenter or far are about as marked and independent here as in any case.

LORD DEAS—This case has been very ably argued on both sides, and it was pleaded by counsel on the one side, whether successfully or not, that there was such a distinction as to bring it out of the rule laid down in *Fisher v. Dixon*. It was necessary for them that it should be distinguished. If such distinction could have been successfully established this would have become a case of great importance; but I do not think a sound distinction can be drawn. After all the erudition and labour bestowed on it, I do not think, any more than your Lordship, that in the end there is any exception. The case depends on Mr Snody's deed, and that deed depends I may say altogether upon the clauses thereof in which he discloses his intention in favour in the first place of Mrs Gibson, and in the second place of the three branches of his family. Having appointed trustees and made a special provision as to furniture for Mrs Gibson and others, and then explained the mode of distribution of the residue in a manner which your Lordship has explained, he goes on to make certain provisions, on which alone are founded, so far as I followed the argument, the distinctions which are said to exist between this case and *Fisher v. Dixon*; and if this clause had not been here I do not think any ingenuity could have succeeded in showing any distinction at all. There are provisions in favour of Mr Snody's own family and likewise in favour of certain grandchildren; and then he says—"And I hereby declare that the provisions in favour of my daughters and grandchildren hereinbefore written shall be accepted by them in full implement of any sums of money which I may have undertaken to pay to any of my daughters or their issue under their contracts of marriage or otherwise, and also in full satisfaction to them of all legitim, bairns' part of gear, or other claim competent to them on my death in any manner of way." Now, it is said that there are no provisions in favour of the grandchildren such as are there alluded to. I think the answer to that is quite sufficient—I took the liberty of suggesting it in the course of the argument—that the man of business naturally and very properly provides for that. He does not know all the deeds that a man has executed in the course of a long life, and he often makes such a general provision as that here which shall over-ride and apply to any deed whatever. That in itself may go a long way to account for this clause. But when he says—"In full implement of any sums of money," and so on, I think the plain reading of that is just as if the word "respectively" had been introduced into it at the beginning of it, and it had run—"I hereby declare that the provisions in favour of my daughters and grandchildren shall be accepted by them *respectively* in full implement of the provisions in favour of my daughters in contracts of marriage or any other way which exist or may exist; and likewise by those of my daughters who may have these in their marriage-contracts; and also in full satisfaction to them of all legitim, bairns' part of gear, or other claim competent to them on my death in any manner of way." The rights of my children and grandchildren respectively he means are that those of them who have rights by contracts of marriage or any other deeds shall accept of the provisions of this deed in full of these; and those of them who happen to have claims for legitim or bairns' part of gear, or any-

thing of that kind, are also to accept them in full of claims of that kind. But he does not mean that the daughters are to accept these provisions in full of claims that they have not or that the grandchildren are to accept of the provisions as in full of claims that they never had or never could have had. That would be most unreasonable. I see no difficulty in construing the clause in the way which I have explained, as meaning that the children and grandchildren shall *respectively* accept these provisions. That explains to my mind the whole matter quite intelligibly, and I have no doubt that was the testator's intention.

LORD MURE—All that the Lord Ordinary has actually decided in this case, as explained in his note, is that there is nothing in the terms of the provisions in favour of the truster's family to take the case out of the rule laid down in *Fisher v. Dixon*. Now in all such cases I understand the rule to be, that where the interests of the children are separate and independent from those of the parent, the repudiation of the settlement by the parent who elects to take legitim does not operate as a forfeiture of the interests of the children. Here the interests of the children are separate and distinct, and are declared to vest *a morte testatoris*, by the express provision of the clause by which the payment is appointed to be made. In these circumstances I can see no reason why the ordinary rule should not apply. In that matter, therefore, I quite concur in the opinion of your Lordship in the chair. What is to be the effect of this in working out the directions as to the distribution of the shares of the residue, and as affecting the interests of the beneficiaries other than Mrs Millar herself, is not now before us. I abstain therefore from indicating any opinion on that point further than to say that I think it would be desirable to make some qualification of the nature suggested by your Lordship in the course of the discussion, in the terms of the Lord Ordinary's finding as to the interests of the children, in order to prevent the possibility of misapprehension on that question.

LORD SHAND—I am of the same opinion. I think it is clear that there is a marked distinction between the provision of this deed which is made in favour of Mrs Gibson and her children, and that in favour of Mrs Millar and her children. In the former case, the case of Mrs Gibson, any interest which the children may derive from Mr Snody's estate they must take through their mother, assuming that the mother survive the testator. It is a derivative interest only. The mother is the legatee, and on her receiving the share of the estate the children would have the mere hope of succession. In the case of Mrs Millar and her family the provision is quite otherwise. Their right is given in the language of a distinct bequest in favour of themselves—a right independent of the mother—a right in fee in the property of which the mother has only the life-rent. That being so, the case of *Fisher v. Dixon* unquestionably *prima facie* applies, and the argument that has been addressed by the complainers has been directed very properly to the point of endeavouring to distinguish the case from the case of *Fisher v. Dixon*. There is no language in the deed that could support an argument in favour of the view that there is any provision which

expressly directs that if Mrs Millar should resort to legitim, and so forfeit her rights under the deed—her right of liferent—by her so doing her children, who have independent rights, as I have said, under the deed shall forfeit these rights also. It has not been suggested that any language in this deed could be represented as having that effect from its express terms. So the argument comes to be reduced to this, that a provision to that effect is implied somehow within the four corners of this deed. Now, with reference to the argument founded on implication, to which I think I have reduced the contention of the reclaimer, I do not think it necessary to say a single word more about the clause at the close of all these provisions declaring that the provisions in the deed shall be in full of all sums of money which the testator had undertaken to pay to any of his daughters or their issue, and in full satisfaction of legitim or other claims, because your Lordships who preceded me have so fully disposed of that point. I think it is plain that no implication of the kind desired can be derived from that source. That being so, there are only two elements left in the deed founding the argument. One of these is that the estate has been divided into three shares, and that obviously the truster intended that each of the three families should get an equal share of this money I concede that to be the case. I think Mr Snody did so intend. But Mr Snody I say intended to include the legitim as part of the general estate, and obviously did not contemplate the case that has occurred, that one of the daughters would repudiate the provision in her favour and resort to legitim; and therefore the argument that he meant the estate to go into three parts does not go very far. We are asked to take a step further, and to hold that because he intended the estate to go into three parts, and that intention has been defeated by one of his daughters, her children are to suffer. I am not prepared by implication to go that length from the mere circumstance that he intended the estate to be divided into three parts, and that each family should get one share. The only other argument founded upon implication from this deed is—that we find that in estimating what the share of Mrs Millar and her children of his estate should be, the trustees are directed to deduct a sum of £1500 which had been paid partly to the mother and partly to her son, and £300 advanced to Mrs Millar by her grandaunt, and in the event of her claiming payment of an annuity which had been bequeathed to her by that grandaunt, also to charge interest on that sum of £300. I am not prepared from that circumstance—because he has treated this provision as one in regard to the mother and children in this respect, that to that extent there shall be a deduction in estimating that share—to say that therefore it follows that if the mother takes the legitim the children are to lose the fee. I think, as I said in the argument, that the circumstance that these two sums were to be deducted may be turned the other way and put in this way—that as we find Mr Snody did carefully provide that these particular sums should be deducted from that share of the estate, if he meant that to be done in the event of Mrs Mrs Millar taking her legitim he would have made the same provision. It is not easy to say which of these arguments is sound, but on the

whole matter it appears to me that there is not enough in this deed to bear the implications we were asked to find, or to take the case out of the general rule of *Fisher v. Dixon*. I do not say cases may not occur in which a special provision in the deed may be so clear as to show that if one of the children takes the legitim, the children of that child may lose the fee. But I think it would be difficult to get that from implication. I should think after the rule being so deeply rooted in our law and so clearly stated in *Fisher v. Dixon*, it can be set aside only by words to that effect, and it could be done by a few words in the deed. However that may be, I am of opinion with your Lordships—it being admitted that in this deed there is no express statement, I am unable to find anything like that by implication.

The Court pronounced this interlocutor:—

“The Lords having heard counsel on the reclaiming-note for Mrs Helen Snody and Gibson's trustees, against Lord M'Laren's interlocutor of 3d November 1882, Adhere to the interlocutor with this variation, that the second finding is qualified by adding thereto, after the words ‘mother's election,’ the words ‘except in so far as their share of the free residue may be required to contribute along with the other shares of the free residue to satisfy their mother's claim of legitim.’”

Counsel for Gibson's Trustees—Gloag—Darling, Agents—Scott Moncrieff & Trail, W.S.

Counsel for Claimants W. S. Millar & H. L. Millar—Pearson—Shaw. Agent—William Asher, S.S.C.

Wednesday, February 21.

SECOND DIVISION.

[Sheriff of the Lothians.

SCOEGIE V. LAWRIE

Reparation—Excessive Punishment of Pupil by Schoolmistress—Assault.

In an action of damages against the teacher of a class of girls by one of her pupils on the ground that she had inflicted an excessive punishment, resulting in permanent disablement of the hand, it was proved that the defender had inflicted one blow with a cane upon the hand of each of thirteen girls; that the pursuer was the only one who suffered injury; that she received just such a blow as the others; that the cane was the instrument of punishment recognised in the school; and that the blow was inflicted without any intention of injuring the pursuer. *Held (diss. Lord Rutherford Clark)* that in the circumstances the defender was not liable in damages for an assault upon the girl.

Observed per curiam that while the mere use of a cane in such circumstances did not amount to assault, it was extremely improper.

Agnes Ross or Seorgie, residing at No. 8 Ferrier Street, Leith, with the consent and concurrence