

On these grounds I agree that we should adhere to the interlocutor of the Lord Ordinary.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Comrie Thomson—Lorimer. Agent—John Tawse, W.S.

Counsel for the Defenders and Respondents—H. Johnston—Dundas. Agents—Carmont, Wedderburn, & Watson, W.S.

Friday, June 13.

## FIRST DIVISION.

[Lord Kinnear, Ordinary.]

EVANS AND OTHERS v. HARKNESS.

*Succession—Testament—Testamentary Provisions—Deed of Discharge—Modification of Testamentary Provisions by Deed of Discharge—Obligation on Heir to Sell House and Divide Proceeds “whenever required”—Claim for Back Rents against Heir’s Representative.*

A testator directed his executors to pay the annual income of half his moveable estate to his widow, who also was to have a power of apportionment over the capital of this half. The income of the other half and the capital if necessary was to be expended equally in the maintenance and education of each of his children till they respectively attained the age of twenty-one, when their shares were to be paid to them. The testator further declared it to be his intention by separate deed to provide that his wife should have the liferent use of the house in which he lived, and to provide for its sale at her death, so that the proceeds should be equally divided among his children in manner before mentioned, and declared that should he omit to carry this intention into effect and his eldest son succeed as heir-at-law, and refuse to account for the value to the other children, such son should forfeit all benefit or advantage under the will.

The testator was survived by a widow and two children, a son and a daughter. Before the children came of age the whole of the capital of the shares of their moveable estate had been expended in their maintenance and education. After the youngest child had come of age, the children along with their mother granted a deed of discharge, in which after reciting the provisions of the testament, and declaring that the whole of the executry funds had been paid to the granters of the discharge entitled to receive them, they discharged the testator’s executors of all their intromissions. The deed further provided that the son should be found “whenever required” to make up a title to the house as heir of his

father, and to sell and dispose of the same in terms of the directions in the will.

After the mother’s death the son, and after his death his widow, remained in beneficial possession of the house for twenty-six years before a demand was made by the children of the daughter for payment of their share of the value of the house.

Held that they were not entitled to demand from the son’s widow the back rents of the house, in respect that under the deed of discharge the son had a right to the beneficial possession of the house till required to sell it in terms of the will.

### *Bona fide Consumption.*

Observed by Lord Shand that there might be room for a plea of *bona fide* consumption where a person had possessed on a title which might be reasonably construed as giving him the right to possession.

Opinion per Lord M’Laren that the question of *bona fide* consumption could only arise between parties contending on competing titles.

Mr Thomas Harkness, writer in Dumfries, died on 31st October 1832. He was survived by a widow Mrs Janet Harkness and two children, William and Catherine. Another son Thomas James Harkness, who was blind, was born after his father’s death on 29th November 1832. By his last will and testament, dated 24th August 1831, and recorded 15th May 1833, Thomas Harkness, “in the second place, directed his executors to allow his wife, Mrs Janet Comrie or Harkness, but for her liferent use only, his household furniture, including plate and linens of all kinds. In the fifth place, he directed his executors to invest the residue of his moveable and personal estate and effects, and to pay one-half of the annual income to his wife during all the days of her life for her own use and support, and the other half was to be expended in the upbringing, maintenance, and education of all his children, and that as equally as circumstances would permit, until they respectively arrived at the age of twenty-one years complete, when their several shares were to vest and become payable to them. In respect of the other half of his estate, which was to be liferented by his wife as aforesaid, he empowered her to divide and proportion one moiety thereof among his children as she might think proper and direct by any writing under her hand, and failing such appointment, then he directed that the same, as well as the other moiety of said half, should at her death vest and be equally divided among all his children, share and share alike, and be paid to them as they respectively attained the age of twenty-one years complete. The settlement then proceeds thus:—“Further, it is my intention by a separate deed to provide my said dear wife in the liferent of the house in which I now live, or such other as may belong to and be occupied by me at my death, . . . and to provide for the sale there-

of at her death, and of any other real property that may belong to me at or as soon after my death as convenient, so that the proceeds thereof may be equally divided among all my children in manner before mentioned, so it is my will; and I do hereby declare that should I fail or omit to carry this intention into full effect, and my eldest son alive at my death succeed in consequence thereto as heir-at-law, and refuse when of age to account for the value thereof to my other children, or to sell the same for his own and their joint behoofs, such son so succeeding and refusing shall forfeit all benefit and advantage under this my will, it being my wish and intention that all my children shall share equally, except in so far as is hereinbefore expressed."

The executors of Thomas Harkness, one of whom was his widow, gave up an inventory of his personal estate, and were duly confirmed by the Commissary of Dumfries on 7th June 1834. The amount of the personal estate contained therein was £2190, 7s. 5d., and embraced the household furniture, including plate and linen, belonging to the deceased, which was valued at £134, 4s. 9d. The only heritable property which belonged to Mr Harkness at his death was the house referred to in his settlement, situated at No. 10 George Street, Dumfries. William Harkness, the testator's eldest son, died in September 1844 without making up a title to this house. The income of the shares destined to the children being insufficient for their maintenance and education, the capital of these shares was expended for these purposes.

Shortly after Thomas James Harkness attained majority, he, his mother, and his sister Catherine, then Mrs Evans, granted a discharge in favour of Thomas Harkness' executors dated 30th June and 6th July 1855 and recorded 12th July 1855. In this discharge the provisions of Thomas Harkness' settlement are narrated, and it is stated that the executors had realised the estate, invested the proceeds thereof, and made payment of the interest, produce, or dividends arising therefrom, all in terms of and as directed by the said settlement, and that Thomas James Harkness had recently attained majority, whereby he became entitled to receive payment of the share of his father's estate destined to him so far as then payable, and that the whole executry funds of the deceased intromitted with by his accepting executors had been accounted for and paid over to the granters of said discharge entitled to receive them in terms of the deceased's last will, therefore they granted a general discharge in favour of the surviving executors, including Mrs Harkness as an executor, not only of the whole interest, produce, or dividends arising from the proceeds of the said moveable or personal estate, but also of the whole executry funds themselves, realised or intromitted with by them or any of them. The discharge also contained the following clause with reference to the house in George Street, Dumfries:—"Providing and declaring always that I, the said Thomas (James) Harkness, shall be bound,

whenever required, either during the lifetime of my mother, the said Mrs Janet Comrie or Harkness, or after her decease, to make up a title in my person as heir of my deceased father to the house in George Street, Dumfries, which belonged to him at the time of his death, and in regard to which he executed no separate deed, and to sell or dispose of the same in terms of the directions and wishes contained in his said last will."

Mrs Janet Harkness died on 12th February 1862. Down to the date of her death she had enjoyed the liferent of the house in George Street. Thereafter Thomas James Harkness entered into possession of the house, and on 4th June 1869 was served nearest and lawful heir-in-special to his deceased father in the house.

Thomas James Harkness was married in 1869 to Miss Amelia Webster. By an antenuptial contract dated 13th April 1869 he conveyed to her, and her heirs, executors, and assignees whomsoever his heritable and moveable estate of whatsoever nature the same might be which should belong or be addebted to him at his death, with the whole writs, vouchers, and instructions thereof, such estate to be her sole property and at her absolute disposal subject to payment of his debts. Thomas James Harkness remained in possession of the house till his death in 1871. His widow then made up a title to his estate, as universal disponee under the antenuptial contract; she completed her title to the house in George Street, by notarial instrument recorded in the register of sasines &c. for the burgh of Dumfries on 21st February 1872. Mrs Amelia Harkness thereafter remained in peaceable possession of the house till 11th August 1888, either occupying it herself or letting it and drawing the rents.

On 11th August 1888 John Evans and others, five out of six of the surviving children of Mrs Evans, who had died in 1857,—the residence of one son William Robert Evans being unknown—and Mary Nickels and others, the children of a deceased daughter of Mrs Evans, called upon Mrs Amelia Harkness to account to them for their share of the house in George Street Dumfries, and for the rents since the date of Mrs Thomas Harkness' death. On her refusing to admit this claim, the present action was raised by them against her.

The pursuers pleaded—“(1) The said Mrs Evans having been entitled to half the value of the said house in George Street, Dumfries, in which the defender is infeft, the pursuers are entitled to a conveyance to them and to the said William Robert Evans of the half of the said property *pro indiviso*, or otherwise to a conveyance to them of six-fourteenths *pro indiviso* of the said house, or otherwise to payment of the sum of £500. (2) The late Thomas James Harkness having drawn the rents from the said property after the date of his mother's death, to half of which rents the said Mrs Evans was entitled, and the defender since his death having also had the full beneficial enjoyment of the property, the defender is liable as executrix-dative foresaid, and as

an individual to make payment to the pursuers of the second sum contained in the first conclusion of the summons, with interest thereon."

The defender pleaded—"(3) The said Thomas James Harkness never having been required to sell the said house and divide the price, the pursuers have no claim for arrears of rent. (4) In any view, the representatives of Mrs Evans are only entitled to one-half of the value of said house, and one-half of the rents thereof from the date when intimation of the present claim was made, and the defender is entitled to be kept safe against any claim at the instance of the said William Robert Evans."

On 16th July 1889 the Lord Ordinary (KINNEAR) pronounced this interlocutor;—"Finds that the defender, as representing the late Thomas James Harkness, is liable to make payment to the pursuers of a sum equal to 6-14ths of the value of the subjects libelled, and also a sum equal to a like proportion of the rents of the said subjects since the death of the late Mrs Janet Comrie or Harkness in January 1862, and grants leave to reclaim."

"*Note.*—It does not appear to me to be doubtful that the late Thomas Harkness, by taking benefit under his father's will, came under the same obligation as would have attached to his elder brother to account to the other children of the testator for their share of the value of the house in question. But it is said that, by the terms of the discharge to which he and his sister were parties, he was not bound to sell or account for the value of the house until he should be required to do so by her or her heirs. If the obligation had been created by the discharge, there might have been room for this construction. But it was created by the father's will, and the *proviso* in the discharge on which the defender relies is a mere declaration of the son's obligation to perform the condition on which he had taken benefit under the will, 'in terms of the directions and wishes' of the testator. A declaration referring in terms to the directions of the will cannot, in my opinion, be read as imputing a contract between the beneficiaries to innovate on the obligations which the will imposes on the heir-at-law.

"It is unnecessary to consider whether the defender could have pleaded acquiescence against Mrs Evans, if she had lived and allowed Thomas Harkness to remain in possession. She died before the liferentrix, and it is not alleged that her children were aware of their right or intended to depart from it. From the death of the liferentrix Thomas Harkness held in trust for himself and the representatives of his sister, and it is not maintained that mere lapse of time could extinguish their right.

"The case is a hard one as against the defender, but that is not a ground for depriving the pursuers of their legal rights.

"It was stated at the bar that the parties were prepared to settle the claim for furniture and all questions of amount by agreement, if the principle on which the defender is to account were decided."

The defender reclaimed, and argued—The relations of parties were altered by the terms of the discharge, which did not, as the Lord Ordinary thought, merely repeat the terms of the will, but contained a new obligation to the effect that Thomas James Harkness should not make up a title to the house, sell it, and divide the proceeds till required to do so. This was a very natural arrangement, as not only was he blind and therefore unable to make a living for himself, but he might have claimed the house as his father's heir, and was not bound to accept the share of the moveable estate destined to him under the will and expended by the trustee on his education. His sister, on the other hand, was married to a man with means. Assuming that the defender's construction of the deed of discharge was mistaken, she had a good ground to resist the claim for back rents on the plea of *bona fide* consumption, unless it were averred and proved that she knew of the obligation laid on her husband to sell the house and divide the proceeds. Her possession was founded on an apparently good title. Her husband had served as nearest and lawful heir-in-special of his father, and she had made up title to the house by notarial instrument as universal disponee under the antenuptial contract executed in 1869—*Huntly's Trustees v. Hallyburton's Trustees*, November 5, 1880, 8 R. 50, *per* Lord Shand 65.

Argued for the pursuer—The deed of discharge proceeded on the footing that the defender's husband had taken the benefit of the provisions in his favour under the will. He was therefore bound to fulfil the provisions under the will to which the deed of discharge referred. If this were the true construction of the deed of discharge there was no room for the plea of *bona fide* consumption, the defender not having possessed on an apparently good title—*Haldane v. Ogilvie*, November 8, 1871, 10 Macph. 62; *Johnston v. Johnston*, July 20, 1875, 2 R. 986.

At advising—

LORD PRESIDENT—As regards the first part of his Lordship's interlocutor I am of opinion with his Lordship that "the defender as representing the late Thomas James Harkness is liable to make payment to the pursuers of a sum equal to  $\frac{6}{14}$  of the value of the subjects libelled." The payment is limited to  $\frac{6}{14}$  of the value of the property because one of the Evans family is not to be found and is not a pursuer. His Lordship then proceeds to find that the defender is also liable to make payment of "a sum equal to a like proportion of the rents of the said subjects since the death of the late Mrs Janet Comrie or Harkness in January 1862." Therein I differ from his Lordship. No doubt under the will of the late Mr Harkness, which was executed so far back as 1831, there was a conveyance only of moveable estate, and it was provided that if the heir-at-law refused to throw the heritage into the general fund he should take no benefit under the will. If nothing had followed upon that, of

course it would have been a simple question of election for the heir-at-law whether he would throw in the heritage or elect to hold by his rights as heir and renounce his shares of the moveable estate under the will. But after Mr Harkness's death a considerable time elapsed before his children came of age, and the state of the family then was this—The widow was still alive and there was one daughter Mrs Evans, the mother of the pursuers, and on the other hand there was Thomas James Harkness, and they entered into the arrangement embodied in the deed of discharge by which they discharged the executor of the deceased Mr Harkness of all his intromissions with the moveable estate. It is a full and complete discharge of the executor, and also embodies an acknowledgment by the daughter and by the son that they had received their shares of the moveable estate of their father, and if there were nothing beyond that, the necessary inference would be that Thomas James Harkness had elected to give effect to his father's intentions as expressed in the will, and thrown the heritable property into the general fund. But there is a clause in the deed of discharge which gives the matter a different complexion altogether, and shows that it is not merely a discharge of the executor, but that it also embodies the result of an arrangement come to between the daughter and the son, because it is provided and declared that "I, the said Thomas Harkness, shall be bound, whenever required, either during the lifetime of my mother the said Mrs Janet Comrie or Harkness, or after her decease, to make up a title in my person as heir of my deceased father to the house in George Street, Dumfries, which belonged to him at the time of his death, and in regard to which he executed no separate deed, and to sell and dispose of the same in terms of the directions and wishes contained in his said last will." Now, if the arrangement was of the simple nature that would appear on the face of the discharge without that provision, there would be no need for that provision at all. The discharge would have shown distinctly on the face of it that the whole estate had been dealt with, and therefore there must have been some other reason to account for this particular declaration.

Now, what followed upon this discharge was that the house was occupied by the mother and son till the mother's decease, and after her death that it continued to be occupied by the son. That throws light, I think, on the meaning of the provision that he need not make up a title to or sell the house till required to do so. The counsel for the defender suggested a motive for the arrangement which is probably sufficient. Mrs Evans was married to a man of substance, and Thomas James Harkness was a blind cripple, and therefore a person for whom his sister would likely have some consideration. All this influences one in construing the particular provision in question, and it seems a rational meaning to put upon the words that Thomas James

Harkness was to be left in the beneficial occupation of the house till he was required to make up a title to sell it. That was not an irrational arrangement, or contrary to what one might expect in the circumstances, and I do not see any difficulty in giving the meaning to the words that Mr Harkness was not to be bound to do anything till he was required, and that then he was to make up a title as heir, and sell the property and divide the proceeds in terms of the will. Now, if a man is left in the occupation of a house with no provision that he is to pay rent for it, or even if he is left in possession of a property and is drawing the rents, and there is no provision that he should account for the rents when requisition is made on him, the natural inference is that it is not intended to demand the back rents from him. Giving that effect to the clause in the discharge, contrary to what the Lord Ordinary has held, that Thomas James Harkness was not bound to account for the rents till a demand was made upon him in terms of the provision, I find the demand was made for the first time on 11th August 1888, and therefore I propose to your Lordships that we should vary the interlocutor of the Lord Ordinary by substituting the words "since 11th August 1888" for the words "since the death of the late Mrs Janet Comrie or Harkness in January 1862."

LORD SHAND—I have come to the same conclusion. I think the vital point on which we differ from the Lord Ordinary is that we are of opinion that the question in this case is to be determined by the terms of the obligation in the discharge, and not by the terms of the will. The question, I think, turns on the meaning of the clause ending with the words "whenever required." The Lord Ordinary draws back to the will of Mr Harkness, but the deed of settlement contains no such words. All that is there provided is that if the heir takes the benefit of the moveables conveyed under that deed he must make up a title and sell the house for behoof of himself and the other children of the testator.

The provision contained in the deed of discharge also seems to me a particularly appropriate one in the circumstances. It is plain enough that the moveable estate was trifling in amount, and was substantially exhausted in the education and maintenance of the children. When the parties came to discharge the executor, what is the meaning of the provision inserted in these circumstances in the discharge? I agree in the interpretation put upon it by your Lordship. If it had been proposed to Thomas James Harkness that he should come under an obligation at once to give up all his rights to the house property he might have demurred, but instead he gets this provision inserted in the discharge. In these circumstances I am induced to read "whenever required" as meaning "whenever requisition is made," and that till then Thomas James Harkness was to have the beneficial occupation of the house.

The plea of *bona fide* consumption is not pleaded on record. All that I have got to say with regard to it is that if it had been pleaded I think there would have been room for it on the view that on a reasonable reading this clause did mean what it has been held to mean. Such a plea could, I think, have been raised. Not having been raised, I am not able to give a final opinion upon it.

LORD ADAM—It seems to me that the deed of discharge contains a discharge and an obligation, and the construction of that deed is not to be found in any other deed. If it were merely a discharge containing an acknowledgment on the part of Thomas James Harkness that he had received his portion of the estate of his father, and that he thereby made his election, there would have been no necessity for inserting the clause of obligation at all. It appears to me that there is here a new obligation in a new clause, and that it must be construed. If it is a mere recital of the obligation in the settlement well and good, but if it is different I do not see why it should not receive effect. If we apply our minds to the construction of the clause, I agree with your Lordship that the words “whenever required” really have a meaning, and that Thomas James Harkness was entitled to hold the house till he was required to part with it, and as a necessary parallel consequence that he was entitled to the rents if he let it.

If that be so, there is no dispute about the fact that he was not required to give it up till 1888, and that there was no obligation upon him to make up a title to it and sell it till then. I therefore agree that the Lord Ordinary’s interlocutor should be altered to the effect proposed.

LORD M’LAREN—Your Lordship has expressed fully the view I take on this case, and I have nothing to add to what your Lordship has said. I wish, however, to say, as at present advised, that I should not be able to concur in the observations with regard to the question of *bona fide* consumption which have fallen from Lord Shand. It appears to me that that question can only arise where parties are contending on competing titles. We have no such case here, the only question being whether Thomas James Harkness held the house property on a beneficial title or merely as a trustee.

The Court altered the Lord Ordinary’s interlocutor by substituting the words “since 11th August 1888” for the words “since the death of the late Mrs Janet Comrie or Harkness in January 1862,” and *quoad ultra* adhered.

Counsel for the Pursuers and Respondents—Guthrie—Wilson. Agents—Somerville & Watson, S.S.C.

Counsel for the Defender and Reclaimer—Low—Sym. Agents—J. K. & W. P. Lindsay, W.S.

Saturday, June 14.

FIRST DIVISION.

[Court of Exchequer.

ABERDEEN COMMISSIONERS OF SUPPLY v. RUSSELL (SURVEYOR OF TAXES).

Revenue—Income Tax—Act 5 and 6 Vict. cap. 35, sec. 102.

Section 102 of the Act 5 and 6 Vict. cap. 35, enacts that upon all annual interest of money not otherwise charged, duty shall be charged as there set out—“Provided always, that where any creditor on any rates or assessments not chargeable by this Act as profits shall be entitled to such interest, it shall be lawful to charge the proper officer having the management of the accounts with the duty payable upon such interest.”

Held that where the commissioners of supply of a county borrowed money for the erection of county buildings, and in security of the loan mortgaged the rates and assessments which they were authorised by statute to levy for the erection of new buildings, it was lawful to charge them with the duty payable on the annual interest due on the borrowed money.

This was a case stated by the Commissioners of Income Tax for the county of Aberdeen under the Taxes Management Act 1880 on the appeal of the Commissioners of Supply for the county of Aberdeen. The case set forth as follows—At a meeting of the Commissioners of Income Tax for the county of Aberdeen, held at Aberdeen on the 12th February 1890, James Forbes Lumsden, Clerk of Supply, appealed against an assessment on £92, 10s. under Schedule D of the Income Tax Acts made against the Commissioners of Supply of the county of Aberdeen for the year 1889-90.

The following facts were found by the Commissioners—

1. The Commissioners of Supply are the vested proprietors of certain portions of buildings in the city of Aberdeen known as the “Aberdeen County and Municipal Buildings,” erected under the provisions of the Act 29 and 30 Vict. cap. 104.

2. The portions of the buildings in question are occupied as a county hall, and as the rooms and offices of the Clerk of Supply, and as writing chambers rented by Messrs Robertson & Lumsden, advocates, at a yearly rent of £40, and are assessed under Schedule A of the Income-Tax Acts on £145, their full annual value, as appearing in the valuation roll.

3. Under the provisions of the Act in question the Commissioners of Supply are empowered to borrow money for the erection of the buildings, and the sum of £92, 10s., which forms the subject of appeal, is the interest for the year 1889-90 of the money so borrowed.

4. The money borrowed is secured not on