

the separate parts into which it may be divided.

If that is so, the question is whether the houses, so far as their external appearance and quality of construction and workmanship is concerned, are the same in style and quality. The Lord Ordinary is satisfied that they are, and I agree with the Lord Ordinary. I do not say that "style and quality" necessarily refer only to the external appearance. I think they may also refer to the internal construction so far as quality of material and workmanship is concerned. But these words do not in my opinion refer to the internal subdivision of the tenement, and the buildings being of similar quality and style in other respects, I cannot see that their difference in the matter of internal sub-division is such as to lead us to differ from the Lord Ordinary.

LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. I think Mr Abel was quite right in saying that when stipulations of this kind imposing restrictions upon rights of property are expressed in ambiguous terms, they must be construed *contra proferentem*, that is, against the superior and in favour of the vassal who is to be limited in the use of his property. I think that that general rule is applicable in this case, because the language used in the feu-contract is exceedingly vague. The houses which the vassal is taken bound to erect are to be similar in quality and style to those already erected by the superior. The superior says that he has erected a tenement of shops, offices, and dwelling-houses consisting of three or four rooms each, and he complains that the vassal has erected a tenement containing dwelling-houses, some of three and some of two rooms. The vassal's buildings therefore resemble the superior's in so far as they are tenements subdivided into dwelling-houses containing a very small number of rooms.

I agree with Lord Adam that the restriction in the feu-contract does not strike against use and occupation. The question therefore to be considered is, whether the division into houses of two and three rooms, instead of into houses of three and four rooms each, creates a dissimilarity in style and quality between the two buildings, and I cannot say that it does. If the superior intended to limit the sub-division which should be permissible to his vassal, he should have done so in express terms. I agree with Lord Adam that in order to satisfy the obligation of the vassal, his house should in material and workmanship be as good inside and outside as the superior's—but it is not said that the two houses are different in this respect.

The other differences seem to be immaterial. I should, however, have thought that the difference in height between the two tenements might have afforded the superior a ground of objection if the condition in the contract had stopped at the word "quality," but the following sentence contains a specific provision that the vassal

shall not build higher tenements than the superior's, which seems to me to imply that the new buildings need not be of the same height as the old provided they do not infringe the specific restriction.

As to the general construction of the clause, it appears to me that some light is thrown upon the question what the superior meant by "style and quality," by a comparison of the clauses as to the different kind of buildings which the vassal may erect. He is bound to erect houses "similar in style and quality to and not exceeding in height the houses already erected" by the superior. But he (the vassal) is allowed as an alternative to erect cottages or two-storey houses subject to certain restrictions. The distinction seems to be between the general style of the houses already built and that of the cottages or two-storey buildings.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer—Jameson—Kemp. Agents—Henry & Scott, W.S.

Counsel for the Defenders—C. S. Dickson—Abel. Agents—Dalgleish, Gray, & Dobbie, W.S.

Friday, May 25.

#### FIRST DIVISION.

#### HOWARD'S EXECUTOR v. HOWARD'S CURATOR BONIS AND OTHERS.

*Husband and Wife—Aliment—Claim of Widow for Aliment out of Estate of Husband.*

A died intestate leaving a widow who was insane, but no children. He left personal estate which, after payment of debts and expenses, amounted to about £200. Held that the widow was only entitled to the moiety of the estate which fell to her as *jus relictæ*, and that A's executor was not bound to retain the other half of the estate, which fell to the next-of-kin, in order to provide for prospective claims of aliment to the widow.

George Frederick Howard died intestate on 26th April 1892. He was survived by his widow, who was insane, and also by his father, a brother, and a sister. He left no children. The deceased left personal estate amounting, after payment of debts and expenses, to about £200.

The present case was presented to the Court by (1) Mr Howard's executor-dative; (2) John Walker, C.A., who had been appointed *curator bonis* to the widow; and (3) the father, brother, and sister of the deceased, the judgment of the Court being craved on the following questions—" (1) Is the second party entitled in the circumstances to require the first party to retain the estate and apply it, so far as it will go, for the maintenance of the deceased's

widow, or to require payment of one-half of the estate now, and to insist that the first party should hold the other half thereof until it is ascertained whether it is required for Mrs Howard's maintenance? or (2) Are the third parties entitled to payment at once of one-half of the deceased's estate as the father and next-of-kin of the deceased, the second party being paid the other half in full of the widow's claim on the estate?"

The following statement was made in the case—"Mrs Howard has no means other than her interest in her late husband's estate. Dr Clouston, the physician in the asylum where Mrs Howard is confined, writes on 29th December 1893—"Mrs Howard is still suffering from melancholia, and it is difficult to give any reliable opinion as to her chances of recovery. There are no symptoms at present in her case contra-indicating recovery. She may or may not recover." The parties adopt Dr Clouston's letter as an accurate statement of Mrs Howard's present condition and prospects. The second party contended that in respect of Mrs Howard's insanity and inability to earn her own livelihood, her maintenance—she being without means of her own—was a burden upon the residue of her husband's estate, and that therefore so long as she remained in such condition the executor was bound to hold the estate and apply it, so far as it would go, for the maintenance of Mrs Howard. The third parties, on the other hand, contended that the second party was only entitled to one-half of the estate, as *jus relictæ*, and that they were entitled now to the other half thereof as father and next-of-kin of the deceased."

Argued for the third parties—It was admitted that the widow's claim for aliment out of the deceased husband's estate was not a claim of debt, and that was enough to dispose of the claim made by the *curator bonis*. The cases in which it was held that the Court had a right to award aliment to a widow out of the husband's estate were where the husband had left a considerable estate, and the widow was insufficiently provided for—*Stair*, i. 5, 10. The present case was conspicuously different, for here the estate was small in amount, and one-half fell to the widow as *jus relictæ*. In such a case no obligation lay upon the other parties who took a share of the estate to provide out of their share for the widow's aliment—*Mackintosh v. Taylor*, November 5, 1868, 7 Macph. 67; *Stuart v. Court*, June 10, 1848, 10 D. 1275.

Argued for the second party—A claim for aliment might transmit as a debt against the executors of a party deceased—*Oncken's Judicial Factor v. Reimers*, February 27, 1892, 19 R. 519. While a widow's claim for aliment could not compete with the claims of her husband's creditors, she was among heirs a creditor for a proper maintenance. It was well settled that if the legal provisions in favour of the widow were inadequate, the Court had the power of ordering

additional aliment—*Fraser*, ii. 968; *Thomson v. M'Culloch*, 1778, M. 434; *Young v. Campbell*, January 27, 1790, M. 400; *Smith v. Smiths*, March 11, 1812, F.C.; *Hobbes v. Baird*, February 22, 1845, 7 D. 492. Looking to the authorities, the Court had power to order the executor to retain in his hands the moiety of the estate which did not fall to the widow as *jus relictæ*, to afford her aliment if necessary in the future.

At advising—

LORD ADAM—The way in which his case is put by the second party is that he is entitled "to require payment of one-half of the estate now, and to insist that the first party should hold the other half thereof until it is ascertained whether it is required for Mrs Howard's maintenance." I am of opinion that we should answer that question in the negative. The widow, it is not disputed, is entitled to get £100. That is sufficient to maintain her for three or four years, but the proposition of the second party is, that because the widow may possibly remain of unsound mind and unable to support herself, the Court ought to say that that portion of the estate which would in the ordinary course of law go to the next-of-kin, shall not go to them but be retained for the maintenance of the widow. I know of no authority for that proposition. No doubt there were cited cases to the effect that where a husband has died possessed of considerable estate, leaving his widow unprovided for, she has been found entitled to aliment out of the income of the estate, but that is not what is asked here. What is said is, that on the arrival of an event which may never occur, the capital of that part of the estate which belongs to the next-of-kin shall be utilised for the widow's maintenance, and that it shall be kept up by the first party, and not paid to the next-of-kin, until it shall be seen whether that uncertain event will ever occur. I do not think that we can give effect to that proposition.

LORD M'LAREN—I should be sorry to throw any doubt on the rule of law under which a child or a widow, unprovided for or insufficiently provided for by the deeds of the head of the family, has a claim for aliment against the father's or husband's representatives. That such a claim exists is stated by Lord Stair, with the limitation that it only arrives if the father has left a competent estate. The case mentioned by Stair is that between son and son, but of course the principle applies equally to the case between a widow and her husband's representatives. Such a claim is recognised in the cases cited by Mr Craigie—cases which are not recent but which are of undoubted authority. All those are cases where, from the way in which the estate was invested, the widow or child making the claim of aliment had not received a fair share of the intestate's succession.

In the present case the estate is move-

able, and by operation of law it falls to be divided between the widow and the next-of-kin. Now, it seems to me that when a widow has received her full legal share of the husband's succession, this is complete fulfilment of the husband's obligation to provide for her. In the present case it is admitted that the widow is entitled to receive £100, the total amount of the estate being £200.

No authority has been cited for the proposed extension of the doctrine of the liability of the deceased's estate for aliment, and such extension might lead to very inequitable results, for the claim, if it exists at all, must continue through life, and it would be in the power, for example, of a child who had spent his share of the succession, to come down at any time upon his more provident brothers and sisters for aliment.

Some of the decisions relating to aliment are cases where the conventional provisions were insufficient. Such a state of matters may very easily happen. A father whose means are small may make what he thinks at the time a suitable provision for his wife and children, and yet that provision may be quite insufficient if the father dies in affluent circumstances. The reasonableness of a provision depends upon whether it is reasonable in all the circumstances of the estate. It must further be noticed that in some of the cases cited, the provisions in favour of the claimant were of the nature of annual payments out of income. Now here the curator is entitled to go on spending the £100 which the widow gets until it is exhausted. She is therefore not at present destitute, and the necessity for a further sum for aliment may never emerge. The widow may succeed to money, or she may die before the £100 is exhausted, and so the necessity for aliment may stop. I see no justice or equity in the money which by law belongs to the next-of-kin, being held over to meet this event which may never occur.

LORD PRESIDENT—I have examined the cases in *Morison* cited by Mr Craigie, and I find in them certain features widely distinguishing them from the present.

(1) Where the Court has granted additional aliment there has been a great disproportion between the income of the heir's estate and the income from the widow's share. In the case of *Thomson* the husband died infert in only a small portion of the lands, with the result that the yield of the terce amounted to only one-sixth of the free income of the whole lands of which the husband had died possessed. There the Court held that the mere fact that there was a legal provision for the widow did not exclude her claiming further aliment; and they acted on the view that the legal provision did not afford to the widow the sort of provision which the law holds to be just.

(2) There again what the Court gave to the widow was a payment out of income, and not out of capital of the legal share of the heir or next-of-kin.

(3) Further, the criterion of the amount of aliment to be given was not the amount of the widow's income, but the amount of the total income of the estate. That that is so is clearly brought out by what was said from the bench—"Where there are no conditional provisions the widow is entitled to an aliment out of her husband's estate, suitable to its free income. When her legal provisions of terce and *jus relictæ* are not adequate to this, she is entitled to an additional aliment out of it."

Now, turning to the present case we find, in the first place, that there is no disproportion between the share taken by the widow, and that taken by the next-of-kin; on the contrary, the two shares are equal moieties of the whole estate. Second, What is asked by the widow here is not a part of the income of the husband's estate, but the capital of the whole of it; and third, the claim is put forward solely on the ground of the widow's needs, and so far from equitably adjusting the rights of the next-of-kin and of the widow, it would operate the total extinction of the rights of the next-of-kin in the succession. I think, therefore, that we should answer the second question in the affirmative.

LORD KINNEAR was absent.

The Court answered the second question in the affirmative.

Counsel for the First and Third Parties—Graham Stewart. Agents—Irons, Roberts, & Company, S.S.C.

Counsel for the Second Party—Craigie. Agents—Snody & Asher, S.S.C.

Tuesday, May 29.

## FIRST DIVISION.

[Court of Exchequer.

### FORBES v. STANDARD LIFE ASSURANCE COMPANY.

*Revenue—Inhabited-House-Duty—Exemption—Business Premises—Servant Residing on Premises—Customs and Inland Revenue Act 1878 (41 Vict. cap. 15), sec. 13, sub-section 2.*

Sub-section 2 of section 13 of the Customs and Inland Revenue Act 1878 provides that premises occupied solely for the purposes of business shall be exempt from inhabited-house-duty, and that the exemption shall take effect "although a servant or other person may dwell in such house or tenement for the protection thereof."

A company carried on business in premises consisting of two adjoining houses which communicated internally and had only one entrance from the street. Two messengers employed by the company lived on the premises, one in the attic flat of each house. The company having been assessed to