by Lord Adam, conflict with the view which I have indicated of the fourth purpose of the trust taken by itself. But there was this essential difference in the circumstances of that case, which no doubt affected the judgment, that although the trustees had power to make advances of income and capital, it was a general power which could be exercised without restriction in favour of the widow or all or any of the children. There was no recognition of separate individual shares of residue in the children, and no provision for the deduction of advances from the shares of the children for whom they were respectively made.

2. Assuming that the shares of the residue vested *a morte testatoris*, the next question is, whether the children who have attained majority are entitled to immediate payment of the capital of their shares. Counsel for the first and fourth parties did not seriously dispute this, and I think rightly, because in my opinion we are bound by authority to hold that they are so entitled.

The question has arisen in consequence of the truster's widow, who is still unmarried, having claimed her legal rights and forfeited the provisions in her favour in the trust-disposition and settlement. Under the third purpose of the settlement she had a total liferent of the residue subject to the burden of maintaining and educating the children; but this right was liable to be encroached upon to a certain extent by the directions in the codicil for payment of advances of income and capital to children on their attaining majority. The result of the widow's election is to subvert the scheme of the settlement to a certain extent, and the question is really the same as if she died or married again.

As matters stand, postponement of payment is not required in order to protect or provide for any other present or ulterior interest or trust purpose; it is merely a restriction on the major children's enjoyment of a fully vested right of fee in their respective shares, and as such falls to be disregarded as repugnant to and inconsistent with a right of fee. This is settled by a series of cases—*Miller's Trustees* v. *Miller*, 18 R. 301, followed by *Wilkie's Trustees* v. *Wight's Trustees*, 21 R. 199; and *Greenlees' Trustees*, 22 R. 136.

As I observed in the case of *Russell* v. *Bell's Trustees*, 24 R. 666, it is not always easy to decide whether any particular case falls within the rule established in the case of *Miller's Trustees*, or is ruled by the earlier case of *Smith* v. *Chambers' Trustees*, as decided in the House of Lords, 5 R (H.L.) 151. I think, however, that the present case is ruled by *Miller's Trustees*, because here the beneficiaries have a fully-vested unconditional right of fee, and there are no ulterior purposes to which the shares or the income thereof are to be applied in the event of the trustees not paying them to the children themselves. In *Chambers' Trustees* there were such directions, which were held by the House of Lords to overrule or qualify the directions previously given for payment and vesting; and the same feature is to be found in the later case of *White's Trustees*, 23 R. 836.

The Court pronounced the following interlocutor:—

"Answer the first and second questions therein stated by declaring that the trust estate of the deceased Thomas Ballantyne vested *a morte testatoris*, and that his major children are entitled to instant payment of their shares: Answer the third question therein stated as amended by declaring that the minor children are entitled to have the income of their shares expended for their behoof till the period of payment: Find and declare accordingly, and decern."

Counsel for the First and Fourth Parties — Dundas, Q.C. — Chisholm. Agent — J. Gordon Mason, S.S.C.

Counsel for the Second and Third Parties —Salvesen—J. J. Cook. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, February 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MACGOWN *v.* CRAMB.

(*Ante*, vol. xxxiv. p. 345, 24 R. 841.)

Expenses—Husband and Wife—Action by Wife—Dominus Litis.

In an action raised by a married woman with the consent and concurrence of her husband as her curator and administrator-at-law, *held* that the husband was liable conjunctly and severally along with his wife in the expenses of the action, in respect (1) that he was proved to have been in truth the instigator and promoter of the action, and (2) that though duly advised of the motion to make him personally liable in expenses, he did not appear to oppose it.

Opinion reserved, whether a husband who merely gives his consent and concurrence to an action at the instance of his wife thereby renders himself liable in the expenses of the action.

This was an action of declarator of right of property in certain subjects raised by Mrs Susannah Cramb or MacGown, wife of William MacGown, Glasgow, "with the consent and concurrence of the said William MacGown her husband as her curator and administrator-at-law."

On 8th June 1897 the Lord Ordinary (KINCAIRNEY), after a proof, assoilzied the defender and found her entitled to expenses.

The pursuer reclaimed, and on 25th November 1897 the Court, there being no appearance for the reclaimer, adhered to the Lord Ordinary's interlocutor, refused the

reclaiming-note, and found the defender entitled to expenses since the date of the interlocutor reclaimed against.

Upon the Auditor's report coming up for approval, the defender moved the Court to grant decree for the taxed amount of expenses against the pursuer and her husband conjointly and severally.

Upon record the defender averred that the first intimation she had received that any question might be raised in regard to the property in dispute was contained in a letter written by Mr MacGown to the defender's law-agent, and this averment was not denied by the pursuer.

At the proof the evidence of Mr MacGown and of the agent for the pursuer disclosed that Mr MacGown took an active part in the inception of the action and in giving instructions for its being carried on.

On 2nd February 1897 notice was given by the defender to Mr and Mrs MacGown in separate letters of the defender's intention to move for decree against each of them for expenses, and this intimation was repeated on 17th February in a letter addressed to them jointly.

Argued for the defender—Decree ought to be granted against the pursuer and her husband jointly and severally. The test of the husband's liability in such cases was, had he merely given his consent and concurrence—as in the case of *Whitehead* v. *Blaik*, July 20, 1893, 20 R. 1045—or had he appeared as his wife's curator and administrator-in-law, and taken an active share in the litigation? There was no doubt that this latter course was the one adopted by by Mr MacGown in this case, and it was settled law that he thereby made himself liable with his wife for the expenses of the action—*Baillie* v. *Chalmers*, 1791, 3 Pat. App. 213; *Brown* v. *Graham*, February 5, 1829, 1 Sc. Jur. 50; *Scott* v. *Maxwell*, January 22, 1851, 13 D. 503; Fraser's Husb. and Wife, pp. 562, 584. A father who had given his consent and concurrence as curator and administrator-in-law to an action raised by a minor child was held liable on the same principle—*Fraser* v. *Cameron*, March 8, 1892, 19 R. 564; *White* v. *Steel*, March 10, 1894, 21 R. 649, also referred to.

There was no appearance for the pursuer or her husband.

Lord President—On the proceedings in this case it is apparent that this gentleman did not confine himself to giving his consent and concurrence to his wife raising the action, but, passing beyond that, took an active personal part in promoting the litigation. That view is confirmed by the fact that although fully apprised of this motion to make him personally liable for expenses, he does not appear to oppose it. On these grounds I think the motion must be granted. As regards the general question, whether a husband by the fact of giving his consent and concurrence renders himself liable for the costs of an action raised by his wife, that must stand as it does at present on the authorities.

Lord Adam—I am of the same opinion. I think it is unnecessary to decide in the present case whether a husband giving a mere consent to his wife carrying on an action thereby makes himself personally liable for the expenses of that cause. I offer no opinion on that matter. I think it is not very clear on the authorities one way or the other. But I think it is sufficiently clear in this case that the husband went beyond merely giving his consent and concurrence to his wife's carrying on the action, and I therefore agree with your Lordship.

Lord M'Laren—It must be kept in view in considering these cases that in recent practice where the *jus mariti* is excluded and the wife is suing with reference to some proprietary claim, she is generally allowed to sue without the concurrence of her husband. Upon what ground that practice rests I am unable at present to say, but I know that this has been done both in special cases and in ordinary actions; a wife has sued or made a claim for her separate interests without the consent of her husband and without a curator being appointed. Most probably the practice has grown up, because since the passing of the Married Women's Property Act 1881 the consent is often a mere formality. But there are cases where the consent is really necessary, and I, following your Lordships, prefer not to say anything as to the degree of responsibility incurred by the husband who gives a *pro forma* consent. But I venture to think that a very moderate amount of interference by the husband in the conduct of his wife's case will be enough to make him the *dominus litis;* for in view of the relationship between the parties it may safely be assumed that there has been more intervention than is disclosed in the proceedings. At all events, if the husband acts at all, he can hardly interfere in his wife's affairs without making himself responsible. For the reasons more fully stated by your Lordship, I am of opinion that this claim for expenses should be allowed.

Lord Kinnear—I concur. I desire like your Lordships to express no opinion upon the question whether the mere concurrence of a husband in an action at his wife's instance will render him liable in expenses, nor do I give any upon the cognate question whether the abolition of the *jus mariti*, leaving the husband's curatorial power still standing, will enable the wife to bring an action without his concurrence. That we do not require to consider at this moment. But upon the two grounds stated by your Lordship in the chair—first, that we have here before us evidence that the husband was not a mere consenter, but an instigator and promoter of the action, and secondly, that having due notice of the motion made against him he has not come forward to maintain anything to the contrary so as to throw any doubt upon the inference to be drawn by us from the facts to which our attention has been called, I think we

should in these special circumstances hold that there is sufficient reason to subject him to this liability.

The Court approved of the Auditor's report upon the defender's account of expenses, and "on the motion of the defender, no appearance being made for the pursuer or her spouse, decern against the pursuer and her husband William MacGowan conjunctly and severally for the taxed amount of said expenses."

Counsel for the Defender — Cooper. Agent—R. Ainslie Brown, S.S.C.

Tuesday, February 22.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LAURIE, PETITIONER.

Entail—Power to Charge Estate with Payment of Estate-Duty—Expenses Incurred in Settlement of Duty and Application to Court—Entail Amendment Act 1868 (31 *and* 32 *Vict. c.* 84), *sec.* 11—*Finance Act* 1894 (57 *and* 58 *Vict. c.* 30), *secs.* 9 *and* 23.

Section 9, sub-section 5, of the Finance Act provides that a person authorised or required to pay estate-duty, whether the property is or is not vested in him, may raise the amount so paid, and expenses incurred in connection therewith, by mortgage on the property. Sub-section 6 provides that a person having a limited interest in any property who pays the estate-duty on that property, shall be entitled to "the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

By section 23, which applies the Act to Scotland, power is given to apply to the Court to authorise the granting of bonds and dispositions in security, but it is given only in the case of the duties having been paid by a person in whom the property is not vested.

Section 11 of the Entail Amendment Act 1868 gives power to an heir of entail in possession to grant, with the authority of the Court, bonds and dispositions in security for the amount of any debts "which might lawfully be made chargeable by adjudication or otherwise upon the fee of the estate."

Held that an heir of entail in possession who had paid estate-duty and settlement estate-duty was in the position of a creditor to the estate in a debt which might lawfully be made chargeable on the estate, and that accordingly he was entitled to grant a bond and disposition in security over the estate for the amount so paid by him, but that he was not entitled to charge the estate with expenses incurred in the settlement of the duty, or in the application to the Court for authority to grant the bond.

The Finance Act 1894 (57 and 58 Vict. c. 30) provides, section 9, sub-section 5—"(5) A person authorised or required to pay the estate-duty in respect of any property shall, for the purpose of paying the duty or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof. (6) A person having a limited interest in any property, who pays the estate-duty on that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

By sub-section 2 of the same section the Commissioners of Inland Revenue are required to grant a certificate of the estate-duty paid, and of the debts and encumbrances allowed by them in assessing the property. By sub-section 3 such a certificate is declared to be "conclusive evidence that the amount of duty therein named is a first charge on the lands or other subjects of property after the debts and encumbrances allowed as aforesaid."

By the 23rd section, which contains provisions for applying the Act to Scotland, it is provided, sub-section 18—"Where any person who pays estate-duty on any property, and in whom the property is not vested, is by this Act authorised to raise such duty by the sale or mortgage of that property or any part thereof, it shall be competent for such person to apply to the Court of Session (*a*) for an order of sale" . . . or "(*b*) for an order ordaining the person in whom the property is vested, to grant a bond and disposition in security over the property in favour of the person who has paid the estate-duty for the amount of the said duty." . . .

Section 9 of the Entail Amendment Act 1853 (16 and 17 Vict. cap. 94) conferred upon the heir of entail in possession of an entailed estate power to sell for the purpose of paying off debts chargeable upon the fee of the estate.

Section 11 of the Entail Amendment Act 1868 (31 and 32 Vict. cap. 84) provided that "In all cases where there are or shall be entailer's or other debts or sums of money which might lawfully be made chargeable by adjudication or otherwise upon the fee of an entailed estate, the heir of entail in possession of such estate for the time being shall have all the like powers of charging the fee and rents of such estate . . . with the full amount of such debts or sums of money, and of granting, with the authority of the Court of Session, bonds and dispositions in security for the full amount of such debts and sums of money as are by the Acts 11 and 12 Vict. cap. 36, and 16 and 17 Vict. cap. 94, conferred with reference to provisions to younger children." . . .

Colonel John Craig Laurie was the heir of entail in possession of the estate of