

have survived him, and the death or second marriage of his widow, the shares destined to them should not vest in them until their majority or marriage, which in the case supposed of their having survived both the truster and the widow, or the second marriage of the widow, would be the dates of payment of their respective shares.

Accordingly when the truster provides that the said shares of residue shall not vest "until the respective terms of payment," I think he is necessarily referring to the terms immediately before mentioned, viz., the majority or marriage of the children. Again, the words "respective terms of payment" are scarcely applicable to the death or second marriage of the widow, either of which events would (on the third parties' contention) determine vesting in all the children. On the other hand the dates of the majority or marriage of the children "respectively" are different.

The survivorship clause does not affect the question; it relates to shares which have not vested.

I am therefore of opinion that the first alternative question should be answered in the affirmative.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court answered the first question of law in the affirmative, and found and declared accordingly, and decerned.

Counsel for the First and Second Parties—Cullen—Macmillan. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Third Parties—Wilson, K.C.—M. P. Fraser. Agents—Patrick & James, S.S.C.

Friday, July 10.

SECOND DIVISION.

HOWE'S TRUSTEES v. HOWE'S JUDICIAL FACTOR.

Succession—Liferent or Fee—Liferent with Power of Disposal of Fee—Exercise of Power Necessary to Create Right of Fee—Power not Exercised—Destination-over—Vesting—"Heirs whomsoever"—Period at which Heirs to be Ascertained.

By antenuptial contract of marriage a husband disposed and assigned the whole estate which might belong to him at his death to his wife in life-rent and to the children of the marriage, and failing children to his heirs whomsoever in fee, with power to the wife to apply for her personal comfort, or for the maintenance and education of the children, part or even the whole of the fee, and also with power to her, in the case of failure of children, to test upon or execute conveyances *inter vivos* or settlements *mortis causa* of

the estate, so as to sopite the destination to the husband's heirs whomsoever, but in case these powers were not exercised the estate, or the residue thereof, at her death should devolve upon the heirs as before provided as if the above powers had not been given.

The husband died without issue survived by his wife. Five years afterwards the wife died without exercising any of the powers conferred on her by the marriage-contract.

Held that the wife had only a right of life-rent, with power to convert it into a fee, and that as she had not exercised that power the fee had vested in the person who was the husband's heir whomsoever as at the date of his death.

By antenuptial contract of marriage, dated 19th August 1856, the late Alexander Hamilton Howe, surgeon, disposed, assigned, and conveyed his whole estate, heritable and moveable, then belonging to him or which might belong to him at his death, to Anne Forbes Robertson, his wife, "in life-rent in case she survives him, and to the child or children to be procreated of the said intended marriage, and failing such child or children by non-existence, or predecease of the life-rentrix, but without prejudice to the powers afterwards conferred on the said Ann Forbes Robertson, to the heirs whomsoever of the said Alexander Hamilton Howe in fee, but with power to the said Ann Forbes Robertson in case she may desire the same for her own personal comfort or for the maintenance and education of such child or children of the marriage, or the promotion of their prospects in life, to use and apply for these purposes such part or even the whole (as she may see needful and proper) of the fee or capital of the said Alexander Hamilton Howe's means and estates before conveyed, and that by the purchase of an annuity or annuities or otherwise as she may approve, and also with power to her in case of the failure of children to test upon or execute conveyances *inter vivos* or settlements *mortis causa* of the said means and estate, or the reversion thereof, so as to sopite the above destination to the heirs whomsoever of the said Alexander Hamilton Howe, but in case these powers be not exercised then said means and estate, or the residue thereof at her death, shall devolve upon the heirs of the said Alexander Hamilton Howe as before provided, and as if the above power of testing or conveying *inter vivos* or *mortis causa* had not been given; and for conferring on the said Ann Forbes Robertson these ample powers the said Alexander Hamilton Howe disposes and conveys to her primarily, in trust for the foresaid purposes, the fee of the said heritable and moveable property belonging and which may belong to him at his death, and binds and obliges his heirs to execute in her favour all deeds and conveyances necessary."

Dr Howe died without issue on 25th July 1895 leaving estate worth between £6000 and £7000. He was survived by his wife, who died on 6th December 1900.

By her trust-disposition and settlement, dated 21st April 1886, Mrs Howe conveyed her whole means and estate to trustees for the purposes therein specified. By a codicil dated 1st August 1895 Mrs Howe provided that no part of the capital of the means and estate of Dr Howe conveyed to her under the antenuptial contract of marriage should be held to be included in the conveyance to her trustees under her trust-disposition and settlement.

Dr Howe's sole heir and next of kin at the time of his death was his sister Mrs Jessie Hamilton Howe or Orr, who died on 27th December 1899. The heirs whomsoever of Dr Howe as at the date of Mrs Howe's death were Mrs Jane Galt Orr or Martin, a daughter of Mrs Orr, and the three children of the deceased Mrs Anne Maria Orr or Kilpatrick, another daughter of Mrs Orr.

In these circumstances a question arose as to the person or persons entitled to Dr Howe's estate under the marriage-contract. For the settlement of this question a special case was presented to the Court. The parties to the case were—(1) the marriage-contract trustees, (2) the judicial factor on Mrs Orr's estate, (3) the three children of Mrs Kilpatrick and their *curator bonis* and *factor loco tutoris*, (4) Mrs Martin, (5) Mrs Howe's next of kin, and (6) Mrs Howe's residuary legatees.

The questions of law were—“(1) Did Dr Howe's estate vest in Mrs Orr as his heir whomsoever at the date of his death? (2) Did Dr Howe's estate vest in the third and fourth parties as his heirs whomsoever at the date of the death of the liferentrix Mrs Howe? (3) Did Dr Howe's estate vest in Mrs Howe, and on her death fall to the fifth parties as her next of kin?”

Argued for the second party—The fee of Dr Howe's estate vested at his death in Mrs Orr as his sole heir in moveables and in heritage, subject to the exercise by his widow of the powers of disposal conferred by the marriage-contract. As these powers were never exercised by Mrs Howe the estate belonged to the second party as judicial factor on Mrs Orr's estate. A liferent with power of disposal of the fee did not constitute a fee where there was a destination over—*M'Laren on Wills*, sec. 2023; *Morris v. Tennant*, June 7, 1853, 25 S.J. 432, *aff.* July 6, 1855, 27 S.J. 546; *Ratray's Trustees v. Ratray*, February 1, 1899, 1 F. 510, 36 S.L.R. 388. The power of disposal of the fee not having been exercised by the liferentrix, the estate belonged to Mrs Orr, the heir whomsoever of the husband at the time of his death—*Lord v. Colvin*, July 15, 1865, 3 Macph. 1083.

Argued for the third and fourth parties—They agreed with the second party that the fee vested in the heirs whomsoever of Dr Howe. But these heirs must be ascertained at the date of the death of the liferentrix. Either (1) vesting was postponed till the death of Mrs Howe, the liferentrix.—An unlimited power was given to the liferentrix of using and disposing of the estate either during her life or by testament.

Any vesting of the residuum must be postponed till her death, and the heirs whomsoever must be sought for as that date—*Keddie's Trustees v. Lindsay*, March 7, 1890, 17 R. 558, 27 S.L.R. 514; *Thompson's Trustees v. Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346. The case of *Lord v. Colvin* was distinguished from the present—see opinion of Lord Deas, 3 Macph. 1093. Or otherwise (2) the fee of the estate vested in Mrs Howe subject to a substitution in favour of the heirs whomsoever of her husband.—The liferent of the estate coupled with an absolute *jus disponendi* amounted to a fee—*Rollo v. Kollo*, January 26, 1843, 5 D., opinion of Lord Cuninghame, 452; *Alves v. Alves*, March 8, 1861, 23 D., opinion of L.J.-C. Inglis, 717. Mrs Howe having declined to deal with the fee, the fee passed to the heirs whomsoever at the date of her death as substitutes—*Morris v. Tennant*, *supra*, 27 S.J., opinion of Lord Chancellor Cranworth, p. 543. The estate should therefore be divided equally between the third and fourth parties *per stirpes*.

Argued for the fifth parties—They adopted the third and fourth parties' argument in so far as they maintained that the fee of Dr Howe's estate vested in Mrs Howe. The fee having vested in her, and she not having dealt with it in her will, it fell to them as her next-of-kin.

LORD TRAYNER—This case arises under the marriage-contract of the late Dr Howe, by which his estate was conveyed to his wife in liferent and to the children of the marriage in fee, whom failing to his heirs whomsoever. He also granted his wife an absolute right of disposal over the estate. The argument which has been addressed to us by the fifth parties is to the effect that there was conferred upon Mrs Howe under the marriage-contract the fee, and not merely the liferent of the estate. A liferent coupled with an absolute right of disposal is regarded as a fee in the general case, but not in every case, and it has been determined that where the exercise of the power of disposal is necessary in order to create a right of fee, no such right is created as long as the power remains unexercised. On this point I adopt the language of Lord M'Laren upon wills (sec. 2020, *seq.*), and I am therefore of opinion that while Mrs Howe, by exercising the power conferred upon her, might have turned her right into one of fee, she not having done so, her right at the time of her death was one of liferent, and nothing more.

If Mrs Howe's interest was only that of a liferent, and the fee belongs to the heirs of Dr Howe, the next question is, at what point of time are we to look in determining who the heirs are? It is to be observed that the destination is to Mrs Howe in liferent, and failing children to the heirs whomsoever of Dr Howe—that is, to the persons who would have succeeded had Dr Howe died intestate. I think there is no doubt that in dealing with an intestate succession we must look for the heirs of the person dying intestate as at the date of his death, and that I think is the rule to be applied

here. The "heirs whomsoever" are the heirs at the date of Dr Howe's death, and not at the date of the death of the liferentrix. I am therefore of opinion that the first question should be answered in the affirmative and the second and third in the negative.

LORD MONCREIFF—I am of the same opinion. The question is whether Mrs Howe can be held under the terms of her marriage-contract to have a right of fee in Dr Howe's estate. She had a liferent and a power to dispose of the estate *inter vivos* or to test upon it. This power she never exercised; indeed, she expressly disclaimed her intention of disposing by her will of any portion of the marriage-contract funds. I agree with Lord Trayner that she might have converted the right she had into one of fee, but she did not do so, and therefore at her death the succession opened to the heirs of Dr Howe. On the second question I think the destination to the "heirs whomsoever" was to the heirs at the date of Dr Howe's death and not at the death of his widow.

LORD JUSTICE-CLERK—I am of the same opinion. I think this lady had simply a faculty of disposing of the fee which she never exercised.

LORD YOUNG was absent.

The Court answered the first question of law in the affirmative, and the second and third questions of law in the negative, and declared accordingly, and decerned.

Counsel for the First Parties—J. H. Millar. Agents—Carmont, Wedderburn, & Watson, W.S.

Counsel for the Second Party—Cullen. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Third Parties—Constable. Agents—H. & H. Tod, W.S.

Counsel for the Fourth Party—W. C. Smith, K.C.—Lamb. Agents—R. R. Simpson & Law-son, W.S.

Counsel for the Fifth and Sixth Parties—Lippe. Agents—Erskine, Dods, & Rhind, S.S.C.

Friday, July 10.

SECOND DIVISION.

LYON'S TRUSTEES v. MILLER.

Husband and Wife—Jus Relicti—Exclusion of Right—Antenuptial Trust-Deed by Wife Reserving Power to Dispose of Estate—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21), sec. 6.

A wife by antenuptial trust deed conveyed the whole estate then belonging to her, or which she should acquire during the subsistence of the marriage, to trustees to hold for herself in liferent and her children in fee, and failing children she directed her trustees to pay or convey the estate to her assignees

or disponees, whom failing to her lawful heirs. The husband knew of the deed, and after the marriage signed along with his wife the necessary transfers to the trustees.

The wife died without children, survived by her husband, and leaving a trust-disposition and settlement by which she gave her husband a liferent alimentary provision of the free annual proceeds of her estate, and directed her trustees on his death or second marriage to realise the estate and to pay and make over the residue to the children of her brother and sister. The husband rejected this testamentary provision and claimed his legal rights.

Held that the husband was entitled to one-half of his wife's estate as *jus relictii*.

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21) enacts (Sec. 6) — "After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest and the exclusion, discharge, or satisfaction thereof, as the case may be."

Section 8—"This Act shall not affect any contracts made or to be made between married persons before or during marriage or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the recited Act."

By antenuptial deed of trust dated 17th March 1890 Miss Elizabeth Hay Milne, in contemplation of her marriage with Alexander Lyon and in order to form a secured provision for herself and the children (if any) of the marriage, disposed to trustees the whole means and estate then belonging to her, or which she should acquire during the subsistence of the marriage, for the following purposes, namely—"That her trustees should hold the trust estate thereby generally and specially conveyed in trust for her alimentary liferent use alienably, exclusive of her said intended husband's *jus mariti* and right of administration, and the rights and diligence of his creditors; and declaring that the said liferent should be paid to her on her own receipt, which should be a sufficient discharge to her trustees, and for the children of said intended marriage in fee; and failing such children or issue thereof her trustees should pay or convey the same to her assignees or disponees, whom failing to her lawful heirs."

Miss Milne was married to Mr Lyon on 18th March 1890. Thereafter the trustees under the antenuptial deed of trust were vested in the estate conveyed to them, the necessary transfers being signed by Mr and Mrs Lyon.