

settlement that the provisions therein made for wife and children are "in full of all terce, *jus relicta*," and so forth. If it had not been for that declaration the principle laid down in *Macfarlane's Trustees v. Oliver* (9 R. 1138) would have been plainly applicable, and the widow would have been entitled to revert to the testamentary provisions in her favour.

It was argued, however, that the meaning and effect of that declaration was that if the widow chose to take her legal rights she was bound altogether to surrender her conventional provisions. That view receives considerable support from certain dicta of Lord President Inglis and Lord Mure in *Macfarlane's Trustees*. I think, however, that it may be doubted whether these learned Judges intended to say more than that when a testator makes a provision for a wife or child upon the condition that the beneficiary does not claim his or her legal rights, an election to take the latter extinguishes all claim to the former—a proposition which, at all events for the purposes of the present case, may be conceded.

It seems to me that the declaration with which we are dealing does not amount to such a condition. The declaration is that the provision in favour of the wife shall be "in full" of her *jus relicta*. I think that that is what would have been implied if it had not been expressed. If the wife had taken the provision in her favour—that is, a liferent of the residue from the date of her husband's death until her own death—of course she could not have taken her *jus relicta*. But the converse is not expressed. It is not said that if the wife takes her *jus relicta* that shall be in full or in satisfaction of her testamentary provisions, and the judgment in *Macfarlane's Trustees* shows that such a condition is not implied. In these circumstances it seems to me that the same considerations which led the Court in *Macfarlane's* case to hold that the beneficiary who had claimed legitim was entitled, after full compensation had been made, to revert to the testamentary provisions in her favour, are present here. If the widow is restored to her position as liferenter, the disposition of his means and estate made by the testator will receive full and precise effect. The other beneficiaries will receive what the testator provided for them—no more, but no less—and the widow will not receive a penny more than the provision in her favour, because the capital sum which she withdrew from the trust estate as *jus relicta* has been repaid out of the income destined to her. I am therefore of opinion that the widow is entitled to revert to her testamentary provisions, and I have only to add that I think that the view which I have taken of the scope of the declaration, that the testamentary provisions should be in full of legal rights, is supported by the judgment of the First Division and of the House of Lords in *Naismith v. Boyes* (25 R. 899, 1 F. (H.L.) 79), where it was held that the true object and scope of such a clause was to protect the settlement.

. . . . I therefore think that the first

question should be answered in the affirmative. . . .

LORD JUSTICE-CLERK—I have been unable to hold that there was any forfeiture by the widow in the circumstances disclosed in the case before us.

Although she undoubtedly claimed her legal rights, I cannot see that the declaration in the trust-disposition can exclude the widow from reverting to her legal rights if compensation is made. *Macfarlane's* case seems to me to be entirely in point.

The result is that the first question must be answered as proposed by Lord Kyllachy. . . .

LORD STORMONTH DARLING was absent.

The Court answered the question in the affirmative.

Counsel for the First Parties—Johnston, K.C.—Murray. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Second Party—The Dean of Faculty (Campbell, K.C.)—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Third Parties—Hunter, K.C.—Orr Deas. Agents—Mitchell & Baxter, W.S.

Wednesday, November 7.

SECOND DIVISION.

[Lord Dundas, Ordinary.]

DENHOLM'S TRUSTEES *v.*

DENHOLM'S TRUSTEES.

Succession—Mutual Settlement—Liferent or Fee—Limited or Unlimited Right of Fee.

A husband and wife executed a mutual settlement, by which the wife, in consideration of her husband's settlement of his estate, conveyed to him, if he should survive her, which he did, her whole estate, under burden of payment of her debts and executory expenses, of certain annuities, and of maintaining and educating her children, "with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary, and also power to him to realise, sell, and dispose of my said estates, heritable and moveable, by public roup or private bargain, as he may think proper, and in general to deal and intromit therewith as fully as I could have done myself. . . ." Upon the death of the survivor of herself and her husband she conveyed to her trustees "All and sundry my said estate or such portion as may be unconsumed by my said husband. . . ." Power was reserved to the spouses to alter and revoke the settlement by mutual writing during their joint lives, with power also to the sur-

vivor to alter and revoke, "but only in so far as regards our separate estates."

Held—*aff.* the Lord Ordinary (Dundas) —that upon a sound construction of the mutual settlement the husband did not take a full and unlimited right of fee in and to the whole estate of his wife.

Barr's Trustees v. Barr's Trustees, February 19, 1891, 18 R. 541, 28 S.L.R. 387, and *Corrance's Trustees v. Glen*, March 20, 1903, 5 F. 777, 40 S.L.R. 526, followed.

This was an action by the Reverend Angus Cameron and others, the trustees, original and assumed, of Mrs Sarah Louisa Liddall M'Laren or Denholm, now deceased, formerly residing at No. 45 Manor Place, Edinburgh, and wife of the deceased George Denholm of Press, Hillend, and Bee-Edge, in the county of Berwick, and of Yorke Lodge, Dunbar, in the county of Haddington, and formerly residing at No. 15 Duke Street, Edinburgh, acting under mutual trust-disposition and settlement executed by her and the said George Denholm, dated 10th day of November 1891, and executors *ad non executi* of the said Mrs Denholm, against Mrs Isabel Dunlop or Denholm, widow of the said George Denholm, and others, the trustees and executors of the said George Denholm, acting under his trust-disposition and settlement, and two relative codicils, dated respectively 17th April 1902, 9th March 1903, and 24th October 1904.

The action, *inter alia*, sought to have the defenders, as trustees and executors of George Denholm, decerned and ordained to produce accounts of his intrusions as trustee or executor of his said first wife under their mutual trust-disposition and settlement with her estate, and to have them decerned and ordained to make payment to the pursuers of the sum of £12,000, or of such other sum as should be ascertained to be due as the balance of his intrusions.

By the mutual settlement George Denholm conveyed his whole estates to his trustees for, *inter alia*, payment to his wife during her lifetime if she should survive him (which she did not) of the net income of the trust estate subject to certain annuities, with power to his trustees to pay over to Mrs Denholm from time to time for her own use such portion of the capital as they might deem necessary, or which they thought she might require. The settlement further provided as follows:—"And in like manner and in consideration of what is before written, I, the said Sarah Louisa Liddall M'Laren or Denholm do hereby give, grant, assign, and dispose to and in favour of the said George Denholm, my husband, in the event of his surviving me, all and sundry my whole estates, heritable and moveable, real and personal, of whatever description, together with the whole writs, titles, vouchers, and instructions thereof, but under burden always of paying my just and lawful debts, deathbed and funeral expenses, and the expenses attending my executry; also under burden of paying to my two aunts, Mary Beatrice

Walker and Clementina Walker, at present residing at number 25 Marlock Road, Saint Peter's Park, London, should they or either of them survive me, a free annuity of ten pounds sterling each during all the days of their respective lives . . . ; also under burden of maintaining my whole children, including the said William Benjamin Liddall M'Laren, until they are capable of maintaining themselves, and of educating them in a manner befitting their station, with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary, and also power to him to realise, sell, and dispose of my said estates, heritable and moveable, by public roup or private bargain, as he may think proper, and in general to deal and intromit therewith as freely as I could have done myself, and in the event of his surviving me I appoint my said husband to be my sole executor, and to be tutor to the said William Benjamin Liddall M'Laren should he be in minority at the date of my decease: And upon the death of my said husband, if he should survive me, or upon my own death if I should survive him, I give, grant, assign and dispose to and in favour of the said Reverend Angus Cameron, George Dalziel, Victor Reissich, and Marcus John Brown, and their foresaids, hereinafter denominated 'my trustees,' all and sundry my said estate, or such portion as may be unconsumed by my said husband, but that in trust only for the uses and purposes following *videlicet*. . . . And we hereby reserve full power at any time during our joint lives, by writing mutually executed, to alter or revoke these presents, and also, with full power and faculty to the survivor of us to alter or revoke these presents, but only in so far as regards our separate estates, but in so far as not altered or revoked as aforesaid the same shall remain effectual. . . ."

Mrs Denholm died in 1893 survived by her husband, who accepted the office of executor conferred upon him by the mutual settlement, gave up an inventory, and confirmed thereto.

The pursuers averred that it was unnecessary for him to encroach, and that in point of fact he had not encroached or consumed any part of his wife's estate which remained in his hands till his death. This the defenders denied and averred that in any case he realised the whole of his first wife's estate and immixed it with his own property, and that it was now impossible to trace or identify her estate, and that thus, at any rate, it was consumed.

George Denholm died in June 1905 leaving a will dated 17th April 1902. This will had not been printed at the date of the hearing in the Inner House, but pursuers averred it revoked all former testamentary writings executed by him including the mutual settlement, and disposed and conveyed his whole estate to certain trustees therein named.

The defenders pleaded, *inter alia*—" (4) The defenders are under no obligation to account to the pursuers, and should be

assolized from the remaining conclusion in respect (a) that under the mutual settlement of the late Mr Denholm and his first wife he took a full vested right in and to her whole estate."

On 5th June 1906 the Lord Ordinary (DUNDAS) pronounced the following interlocutor:—"Finds that upon a sound construction of the mutual settlement executed by the deceased George Denholm and his spouse the deceased Sarah Louisa Liddall M'Laren or Denholm, dated 10th November 1891, Mr Denholm did not take a full vested right in and to the whole estate of his said wife: Therefore repels head (a) of plea 4 stated for the defenders: *Quoad ultra* before further answer allows the parties a proof of their averments and the pursuers a conjunct probation."

Opinion.—"The question for decision at the present stage of this case is whether or not upon a sound construction of the mutual settlement of the deceased George Denholm and his also deceased spouse Sarah Louisa Liddall M'Laren or Denholm, dated 10th November 1891, Mr Denholm took a full vested right of fee in and to the whole estate of his said wife. I have come without much difficulty to the conclusion that the answer to this question must be in the negative. By the mutual settlement Mrs Denholm 'in consideration of what is before written,' i.e., of her husband's settlement of his estate, gave, granted, assigned, and disposed to her said husband if he should survive her, which in fact he did, her whole estates, heritable and moveable, but under burden as therein set forth. So far, no doubt, her conveyance would amount to a gift of the fee to her husband. But Mrs Denholm went on to say 'with full power to my said husband to consume such parts or portions of the capital during his lifetime as he may find or think necessary, and to confer upon her husband power to realise, sell, and dispose of her said estates. She then appointed her husband in the event of his surviving her to be her sole executor, and upon his death, so surviving her, she disposed to trustees named, who are now represented by the pursuers, her whole estates 'or such portion as may be unconsumed by my said husband,' in trust for certain purposes which are set forth in the settlement. That document also contains a clause reserving to the spouses full power during their joint lives by writing mutually executed to alter or revoke it, and full power and faculty to the survivor to alter or revoke, 'but only in so far as regards our separate estates.' The combined effect of these clauses appears to me to entirely negative the idea that Mr Denholm by the fact of survivorship took a full and unrestricted fee in his wife's estate. At the debate in the procedure roll counsel for the parties were agreed that, if I should hold the opinion which I have expressed inquiry would be necessary before the remainder of the case could be decided. I do not propose at present to attempt to define the limits of the restriction upon Mr Denholm's right of fee, or those of his power to

'consume' his wife's estate. It would, I think, be imprudent and inadvisable to do so. Nor do I intend now to discuss or comment upon the authorities to which I was referred, some of which may probably be important in the questions which will arise at the proof. I propose at this stage simply to find that, upon a sound construction of the mutual settlement, Mr Denholm did not take a full vested right in and to the whole estate of his said wife; to repel the plea which the defenders state to a contrary effect; and to allow the parties a proof in the ordinary manner."

The defenders reclaimed, and argued—The subsequent powers given to the husband did not derogate from or limit the original gift of the estate in fee. He was to have power to deal with the estate as fully as the wife had had; she had been an unlimited fiar, he was equally to be fiar. The destination-over might possibly be a substitution to moveables but it did not limit the husband's rights. The fact of the deed being mutual did not affect its construction. It might with equal truth be said that it was *pars contractus* that the husband should have a fee, as that it was *pars contractus* that the portion unconsumed by the husband should go to the wife's trustees. Accordingly the husband's right of fee was unlimited—*Davidson and Others*, May 27, 1870, 8 Macph. 807, 7 S.L.R. 498; *Nicoll's Executors v. Hill and Others*, January 25, 1887, 14 R. 384, 24 S.L.R. 271; *Mickel's Judicial Factor v. Oliphant*, December 7, 1892, 20 R. 172, 30 S.L.R. 209—and the defenders were under no obligation to account to the pursuers. In *Barr's Trustees (cit. infra)* the initial gift was a gift of lifeferent and not as here a gift of fee.

Argued for the pursuers (respondents)—Even assuming the deed had been unilateral, the gift to the husband was qualified by the powers given. The power to the husband to consume was merely during his lifetime, the other powers were mere powers of administration. The wife's estate vested in her heirs and assignees at her death subject to defeasance by consumption by her husband. The husband's right was in effect limited to a lifeferent plus a power of consumption during his lifetime—*Barr's Trustees v. Barr's Trustees*, February 19, 1891, 18 R. 541, 28 S.L.R. 387; *Forsyth (Stephen's Executrix) v. Forsyth and Others*, February 25, 1905, 12 S.L.T. 778. The clause of return was not defeasible by the husband's gratuitous alienation. But in any case this was a contract and not a unilateral deed and must be construed strictly. The destination-over was a stipulation of the contract, a condition of the gift, and the husband was not entitled to defeat it by gratuitous alienation—*Corrance's Trustees v. Glen*, March 20, 1903, 5 F. 777, 40 S.L.R. 526; *Maddever v. Maddever's Trustees*, July 13, 1903, 11 S.L.T. 343; *Davidson and Others (cit. supra)* was special in that the wife defeated her own representatives; *Mickel's Judicial Factor (cit. supra)* was decided on title to sue; *Nicoll's Executors (cit. supra)*

was of doubtful authority and had never been followed.

At advising—

LORD STORMONTH DARLING—All that the Lord Ordinary has decided at the present stage is that, upon a sound construction of the mutual settlement executed by the deceased George Denholm and his first wife, Mr Denholm did not take a full and unlimited right of fee in and to the whole estate of his said first wife, leaving it to be decided afterwards as the result of future procedure what particular portions of that estate were covered by the conveyance. I think the Lord Ordinary is clearly right, and I am for adhering to his interlocutor.

Taking first the terms of the wife's conveyance as if it stood on a separate deed, I find that it begins by conferring an *ex facie* absolute right on the husband in the event of his surviving her, subject to certain burdens. But then it proceeds to confer certain powers on him which truly imply limitations of his right, for they are powers to consume such parts or portions of the capital *during his lifetime* as he may find or think necessary, and also powers of sale and administration—powers which were quite unnecessary if the intention was to confer an absolute fee. Consistently with what I think was the true intention and effect of the conveyance, Mrs Denholm (whose estate consisted roughly of over £4700 of heritage and £6000 of moveables) went on to assign and dispose to trustees upon the death of her husband her estate, "or such portion as may be unconsumed by my said husband," for certain trust purposes, chiefly for the benefit of her whole children. Taking all these clauses together I think their true effect was to cut down the absolute right of fee originally conferred on the husband, not to a lifeferent (because a lifeferent would have been inconsistent with the powers which she wished him to have) but to a right limited to sale, administration, and consumption during his lifetime. Such being, in my opinion, the measure of the husband's right, the wife was free to dispose of any portion of her estate remaining unconsumed at his death by giving it to trustees, as she did.

This view is confirmed by the frame of the deed as a mutual one, and by the wife's conveyance being introduced by the words "in like manner and in consideration of what is before written," thus showing that the wife's gift was the counterpart of the husband's provision of the net income of his estate to her, coupled with a power to pay to her for her own use such portion of the capital as his trustees might deem necessary. When therefore the deed went on to provide that the survivor should have power to alter or revoke only as regards their separate estates, I think that the manner in which each dealt with his or her own estate, including the ultimate destination of the unconsumed portion of it, must be regarded as contractual and irrevocable by the other party.

The view which I take agreeing with the Lord Ordinary is in accordance with the

decisions of this Division (affirming Lord Kyllachy) in the cases of *Barr's Trustees*, 18 R. 541, and *Corrance's Trustees*, 5 F. 777.

LORD KYLLACHY and LORD LOW concurred.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for the Pursuers (Respondents)—C. N. Johnston, K.C.—C. D. Murray. Agents—M. J. Brown, Son, & Co., S.S.C.

Counsel for the Defenders (Reclaimers)—Hunter, K.C.—Constable. Agents—Bruce, Kerr, & Burns, W.S.

Tuesday, November 13.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.]

GOVERNORS OF TRADES MAIDEN HOSPITAL v. MACKERSY.

Superior and Vassal—Casualty—Composition—Amount—Year—Trustees—Interpretation of section 5 of Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94)—Trustees Ceasing to be Proprietors of Lands having Paid a Composition "in terms of this section"—Twenty-five Years Calculated from Date when Composition Paid, not from Date of Implied Entry—Competency of Simple Petitory Action for Recovery of Casualty.

In 1874 the owners of a feu, the charter of which provided for the payment of an untaxed composition by singular successors, were a body of trustees. In 1880 they paid a composition in respect of their entry, the last entered vassal having died in 1867. In 1905 the subjects had been acquired from them by A who had become infeft, and from whom the superiors forthwith demanded a composition calculated on the rental of 1905, their claim being founded on sec. 5 of the Conveyancing (Scotland) Act 1874 and the fact that twenty-five years had elapsed from payment of the last composition. A having refused to make payment the superiors brought an action against him, the summons containing a simple petitory conclusion for the sum sued for.

The Court *found* the pursuers entitled to a composition calculated on the rental of 1905, and *negatived* the following contentions of the defender:—(1) that the action adopted should have been an action of declarator and for payment of a casualty in the form of Schedule B of the Act of 1874, and that a simple petitory action was incompetent; (2) that the payment in 1880 was not a payment "in terms of" sec. 5 of the Act of 1874; that accordingly the twenty-five years rule provided by that section did not come into operation, so that he could not be liable for a