for 600 subsequently does not appear to have been for any steamer then at the Broomielaw, and to have been given merely to test whether the pursuers would or would not implement it. On these grounds, I am for adhering, and I incline to put our judgment on the footing that there has not been adduced sufficient, or indeed any, proof of damage suffered by the defender from non-delivery of coals, and that consequently the defence fails.

LORD COWAN—I am of opinion that the delivery on July 1st, 2d, and 3d, must, in the circumstances, be ascribed to the month of June. I cannot think that in a mercantile contract such as this, the mere fact of the intervention of a Sunday, or the delay of a day or two in taking delivery, is to cause orders intended for June to come into the July account, and exclude the 233 tons of coals from being computed in reckoning the monthly allowance of 500 tons for June. The delivery came to be the matter of dispute. I do not think that this, however, was really made by the pursuer a ground on his side for annulling the contract. It must be borne in mind that although 54 tons were bought elsewhere by the defender to fill up what was wanted in the supply for the s.s. "Crusader," yet the defender need not have gone elsewhere for this, as he had in any view still 270 tons of the July supply over and above the disputed orders, which he could have had if he had required them. The only question is, Whether the claim for damages for breach of contract in July and August has been relevantly set forth and established? As to this, I think that, as the pursuer afterwards was willing to supply coal if called on so to do, there cannot exist such a claim, and any damage resolves into the matter of the 54 tons, and the difference between market and contract prices therefor. That point, as I have said, also fails.

The parties here, however, on both sides, have been a little sharp in taking advantage of slips, and this may modify the finding as to expenses.

LORD BENHOLME—Although in the main I concur with your Lordships, in one slight particular I differ, for I am of opinion that, upon the strict view of this contract, coals furnished in the beginning of July were properly attributed by the furnisher to that month. But supposing that I am mistaken, and that your Lordships are right in that view of the contract, which is based rather upon equitable considerations, all that the shipper could need would be furnished by the other contracting party, and I think it a very foolish thing for parties to have gone on with this dispute.

LORD NEAVES—I cannot say that I could have concurred in all the views of the Lord Ordinary, either in his interlocutor or his note, as I think there was a good deal of strictness, and judaical strictness too, in the pursuers' conduct towards the defender, holding him so strictly to the letter of the contract. There is no doubt that during the period of the contract the market price of coals had undergone very extensive fluctuations; it had risen largely, and the coals to be supplied at 12s. 9d. a ton could not be purchased in the open market under some 15s. or 16s. These influences, I think, told heavily in this case, as in such cases they almost invariably do. It does not appear to me that there was any sufficient failure of duty, or that the defenders established an amount of damages against the pursuers, entitling them to set off the price already due by them for the coals undoubtedly delivered during April and May. I concur with your Lordships in the interlocutor we are about to pronounce, and at the same time I entirely agree in the propriety of the Court's considering whether the whole expenses should be given or not.

SOLICITOR-GENERAL—I should call your Lordships' attention to the fact that in this case the whole expense in reality was caused by the fictitious orders for coals given by the defenders when they had not ships in port requiring a supply, and merely to establish some ground of defence. In this view, it will be a great hardship to my clients if they do not receive the full amount of taxed expenses.

LORD JUSTICE-CLERK—There are certain pleas of the pursuers on record to which we are not prepared to give force, and accordingly the expenses will be modified to three-fourths.

The Court pronounced the following interlocutor:—

"Recall the interlocutor complained of; Find that the contract in question remained in force until the termination of the six months for which it was entered into, and that the dispute between the parties as to the sum deliverances did not operate to rescind the same: Find that the pursuers were willing to deliver 267 tons for July, and 500 tons for August; Find that the defender did not require 267 for July, but only 54 tons: Find that the defender declined to receive the amount which the pursuers were willing to furnish: Find that the defender has not established that damage resulted from the acts of the pursuers, of which he complains: Find that the defender has not proved any defence to this action: Therefore decern for payment to the pursuers by the defender of the sums sued for, with interest, in terms of the conclusions of the summons: Find the pursuers entitled to expenses, remit to the Auditor to tax the same and to report, but under deduction to the extent of one-fourth of the taxed amount."

Counsel for Pursuers—Solicitor-General (Clark), Q.C., and Asher. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Defenders—Millar, Q.C., and Paterson. Agents—J. & A. Peddie, W.S.

R., Clerk.

Wednesday, June 12.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

MACKENZIE AND OTHERS *v.* MACKENZIE'S TRUSTEES AND OTHERS.

Mora—*Taciturnity—Acquiescence.*

Held, mere lapse of time not a bar to widow's claim of *jus relictæ*. Circumstances in which claim *held* not barred by *mora* and taciturnity or discharged by acquiescence.

This was an action brought by three of the surviving children of the late Murdo Mackenzie, of

Dundonnell and Mrs Ross or Mackenzie, his wife, and, as such, heirs *in mobilibus* of their mother, against the sole surviving trustee and representatives of the late Hugh Mackenzie of Dundonnell, concluding for payment to them of their proportion of the *jus relictæ* due to their deceased mother at the date of the dissolution of the marriage between her and the said Murdo Mackenzie.

Murdo Mackenzie died in May 1845, survived by seven children and his wife Mrs Ross or Mackenzie. Mrs Mackenzie died in June 1856, survived by five children of the marriage between her and the said Murdo Mackenzie.

On 14th July 1838, the said Murdo Mackenzie executed an entail of his estate of Dundonnell in favour of the said Hugh Mackenzie, his eldest son, and the heirs whomsoever of his body, whom failing, the other heirs of tailzie therein specified, of the lands and estates of Dundonnell, and others therein described, but always under the conditions, prohibitions, provisions, and declarations therein set forth, reserving thereby to himself, however, full power and liberty, even although the said deed of entail should be recorded, to alter, innovate, or revoke the same, or to execute a new deed of tailzie and settlement; and further, reserving the whole effect of any trust-deed which might be executed by him for the purpose of making provisions for his younger children, or for other purposes.

Murdo Mackenzie further executed a trust-settlement, dated 5th March 1844, and codicil annexed, dated 1st April 1845, whereby he assigned, disponed, conveyed, and made over, to the said Hugh Mackenzie, his eldest son, and the now deceased Robert Warrand, his nephew (as well as to certain other persons who did not accept of the trust), and to the survivors and survivor of them, all and whatever bonds, personal and heritable, bills and mortgages, bank-receipts, debts, and sums of money, which belonged to him, or to which he should have right at the time of his decease, with power to sue for, uplift, and discharge the same; and also the rents of his whole lands and estates which should fall due and be payable at the first term of Martinmas after his death, but in trust only for certain purposes mentioned in the trust-deed.

By this deed the truster left considerable legacies to various parties, and, among others, to the pursuers of the present action. The following clause was also inserted in the deed, viz.: —"And should the funds thereby conveyed as aforesaid to my trustees be found, contrary to my expectation, insufficient for the above payments,—considering that in the entail which I have made of my lands and estate, I have reserved power to burden the same to such extent as I shall deem necessary with reference to provisions for my younger children, I hereby farther assign and convey to my said trustees the yearly rents of the whole lands and salmon fishings which I have purchased lately, belonging to the family of Cromertie, until all the aforesaid payments shall have been made and satisfied."

There was no contract of marriage, either ante-nuptial or post-nuptial, between the said Murdo Mackenzie and his wife, the said Mrs Christy or Christian Ross or Mackenzie; and the said Murdo Mackenzie did not at any time, by deed *inter vivos* or *mortis causa* or otherwise, make any provision for his said wife in case of his predecease, nor did she ever renounce her legal claim of *jus relictæ*.

The said Hugh Mackenzie intromitted with and uplifted the whole personal estate (with the exception of a sum of about £34), including (1) a bond and disposition in security for £2000 over the estate of Millbank; (2) the rents of the estate of Dundonnell, payable at Martinmas 1845, and the rents of the lands and fishings acquired by his father from the family of Cromertie, and also the said *jus relictæ* due to his mother; and, after paying certain debts of the truster, and paying or setting apart the legacies and provisions bequeathed by the trust-deed, he appropriated the whole residue of the trust-estate, heritable and moveable, and applied the same for his own uses and purposes.

Mrs Mackenzie, on the decease of her husband, was entitled to one-third of the goods in communion in name of *jus relictæ*, but no payment was made to her during her lifetime, nor, since her death, to her children as her next of kin, and accordingly the present action was raised.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 24th January* 1873.—The Lord Ordinary having heard the counsel for the parties, and considered the Closed Records in the conjoined actions, Finds that the late Murdo Mackenzie of Dundonnell died on 9th May 1845, survived by his wife, Mrs Christy or Christian Ross or Mackenzie, and by seven children of the marriage between them: finds that upon the dissolution of the said marriage one-third part of the goods then in communion between the said spouses vested in the said Mrs Christy or Christian Ross or Mackenzie as *jus relictæ:* Finds that Mrs Christy or Christian Ross or Mackenzie died in June 1856, survived by five of her said children, and that two of the said children predeceased her without issue: Finds that the claim now made for payment of the sum which vested in and belonged to the said Mrs Christy or Christian Ross or Mackenzie as *jus relictæ*, and of the interest thereof since her husband's death, is not excluded or discharged by the trust-disposition and settlement of the said Murdo Mackenzie, dated 5th March 1844, or by payment to or acceptance by his children of the sums or legacies provided to them in said deed. And appoints the conjoined causes to be put to the roll with a view to further procedure."

The defenders reclaimed, and pleaded, *inter alia*, (1) That the widow herself never made any claim for *jus relictæ*. (2) That the claim was excluded by lapse of time, or by *mora*, or by taciturnity on the part of the pursuers. (3) That the claim was excluded or discharged by payment to and acceptance by, the pursuers, of the legacies bequeathed them by their father. (4) That the whole of the free executry having been exhausted in payment of the truster's debts and bequests in accordance with the express provisions of the trust-disposition of 1844, and there being therefore no funds out of which the claim for *jus relictæ* could be paid, the claim must be held as excluded or discharged by the deed. (5) In the event of the claim being sustained, the defenders were entitled to take credit for sums spent in the maintenance of the widow by her son Hugh Mackenzie.

Authorities relied on by them—*Hume* v. *Huntly*, M. 2764; *Robson* v. *Bywater*, 8 Macph. 757; *Pringle*, 8 Macph. 622.

At advising—

Lord President—Murdo Mackenzie died in

1845, leaving a widow and seven children. His eldest son, Hugh Mackenzie, succeeded under a deed which he himself had made. By the trust-disposition of 1844 he left legacies to his younger children, and to provide for payment of these legacies and his debts, he gave to trustees not only his whole personal estate, but also "bonds, personal and heritable, bills, mortgages, bank-receipts, debts, and sums of money which now belong to me, or to which I shall have right at the time of my decease, with power to them to sue for, uplift, and discharge the same, and also the rents of my whole lands and estates which shall fall due and be payable at the first term of Martinmas after my death." If the funds thus conveyed are sufficient to pay the debts and discharge the legacies, and also to satisfy the claim of *jus relictæ*, there is no longer any difficulty. But the truster made a further provision in view of the possibility of the funds not being sufficient. He says—"and should the funds hereby conveyed as aforesaid to my trustees be found, contrary to my expectation, insufficient for the above payments, —considering that in the entail which I have made of my lands and estate I have reserved power to burden the same to such extent as I shall deem necessary with reference to provisions for my younger children, I hereby further assign and convey to my said trustees the yearly rents of the whole lands and salmon fishings which I have purchased lately, belonging to the family of Cromertie, until all the aforesaid payments shall have been made and satisfied." Now it is very possible, and very probable, that Mr Mackenzie had not in view the legal provision for his surviving wife. He not only does not contemplate the legal provisions, but does not make any conventional provisions. That would not relieve from liability to pay the said *jus relictæ*. By acceptance of the trust, a legal obligation was undertaken by the trustees to pay the legacies and also the *jus relictæ*, and it is alleged that so far as the widow was concerned they failed in their duty. They made no provision whatever for her. She lived for eleven years, and does not seem to have claimed her *jus relictæ*. It is vain to say that that of itself extinguishes the claim, if made afterwards by her children: so that, if the claim is good, the pursuers are entitled to three-fifths of the whole sum. One objection to the claim is, that there are no funds; And it is said further that it is hard upon Hugh Mackenzie's representatives to have this claim brought up at so long a distance of time. But hardship alone won't do; lapse of time alone won't do. Something more is necessary to extinguish the claim. I can see nothing on the part of the widow or her representatives of the nature of a discharge of the claim. The accountant has brought out as free executry a sum of £7745, and if Hugh Mackenzie set apart one-third of that sum for the widow, that would have left £5,164 free executry to meet the payment of debts and legacies. But the trustees had funds beyond the executry. They had the £2000 contained in the Millbank Bond, and they were entitled to a half-year's rent of the estate of Dundonnell, under special provision of the trust deed, whatever that sum might amount to. It is probable that these sums were more than sufficient to meet the claims of the legatees, and that on the assumption that a sum was set aside to meet the claim of *jus relictæ*, and if so that sum remains, spent or unspent, in the hands of Hugh Mackenzie. If not, the widow's representatives are entitled to go against Hugh Mackenzie's estate and rents until a sum equal to the amount claimed. And there is no hardship in that, for so far as the claim was not set aside, Hugh is just *locupletior*. If he had been residuary legatee he might have had some ground for the plea that through the silence of the widow he had been lulled into the belief that what was unclaimed was his. But what was not claimed was not his, but belonged to his younger brothers and sisters. It is further alleged that Hugh Mackenzie did spend money in the maintenance of the widow. If so, he is entitled to state that against the claim, and therefore, while quite prepared to adhere to the judgment of the Lord Ordinary as it stands, it would be proper to reserve to the defenders their right to make out, if they are able, a case of set off.

Lord Deas—The first question is as to how matters stood at the date of Murdo Mackenzie's death in 1845. His settlements consisted of (1) the deed of entail of 1848. It is quite plain that that deed was a mere testamentary deed, leaving him free, notwithstanding the entail, to deal with the estates referred to therein as he should think proper. Then there was (2) the deed of 1848, conveying to trustees—[reads clauses of deed *ut supra*]. Apparently he left a widow, who was not mentioned in the deed. It is perfectly clear that she was entitled to demand *jus relictæ* in 1845, and if claimed it would have been her own. It is of no consequence whether there was sufficient left, apart from the heritable estate, to pay the legacies and the *jus relictæ* in addition, because the effect of the entail deed was to make the estate in it as liable as any of his property. The widow having died in 1856, her children, as her representatives, now claim the amount of her *jus relictæ* over and above the legacies bequeathed to them, and the only answer, apart from what happened after Murdo Mackenzie's death, is that the testator did not know of the legal provision to which his widow was entitled. The presumption is that he had that in view. But it is no matter whether he had or had not. The deed was for payment of all obligations, and it would be a most dangerous thing to go against the distinct terms of a deed on that ground. Then what has taken place since the death of Murdo Mackenzie? It is quite plain that mere lapse of time can't operate a discharge of the right. The only other thing is that certain payments have been made to the widow by her son. That is not sufficient either, unless you can hold that it amounts to an implied contract that his mother was not to claim her *jus relictæ*. But length of time alone will not bring it up to that. The case of *Bywater* was very different. The judgment of the Lord Ordinary seems to me perfectly well founded. I agree entirely in recommending the reservation proposed by your Lordship.

Lord Ardmillan—In the case of *Bywater* it was pointedly declared that mere lapse of time was insufficient, and that it was only sufficient when taken in connection with other circumstances. In the case of *Pringle*, also, taciturnity was coupled with other circumstances.

Now, here I don't see my way to sustain lapse of time as sufficient, and I cannot say that I see any additional circumstances sufficient to bring it up to implied discharge or abandonment. I have only to add, that if Hugh Mackenzie advanced

money to his mother, give him all credit for these advances, but they will never found a discharge.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Adhere to the said interlocutor, but under reservation of the claim of Hugh Mackenzie's trustee to set off against the amount of the *jus relictæ* any sums which he can show that Hugh Mackenzie expended on the maintenance of the widow during her viduity. . . . ."

Counsel for Pursuers—Millar Q.C. and Hunter. Agents—Skene, Webster, & Peacock, W.S.

Counsel for Defenders—Fraser and Duncan. Agents—Murray, Beith, & Murray, W.S.

B., Clerk.

Friday, June 13.

FIRST DIVISION.

[Lord Gifford, Ordinary.

ARKLEY AND OTHERS (HAY'S TRUSTEES).

PETITIONERS.

Trusts Act 1867, § 3—*Intention.*

A truster left his estates to trustees with directions to pay his debts and an annuity to a nephew out of the rents of his landed estates and the proceeds of his other property, and he also expressly prohibited the trustees from selling any part of the landed estate, which they were directed to entail. On his death it was found that his entire income was not sufficient to meet the burdens on his estate exclusive of the annuity. The trustees applied to the Court for authority to sell a portion of the landed estate, entailing the remainder; *held*, that in the face of the truster's prohibition of sale the Trusts Act 1867, sec. 3, did not apply, and that the Court could not assume an intention on the part of the truster at variance with the express words of his trust deed.

This was a petition under the Trusts Act by the trustees of the late Mr Hay, of Letham, for authority to sell a portion of the trust-estate. The directions of his settlement were to realise his estate other than landed estate, and to apply the proceeds, together with the rents of his landed estate, in payment of his debts, including an annuity of £750 created by a separate bond of annuity in favour of his nephew Alexander Hay Miln, of Woodhill; but the trustees were expressly forbidden to sell any part of his landed estates in the counties of Forfar and Perth, which they were to hold till the debts were paid off, and in any event for twenty-one years, during which Mr Miln's annuity was never to exceed one-third of the free rental of the estates. By a codicil there was a provision for extinguishing the debt by an annuity arrangement with an insurance company, to expire in not more than fifty or less than forty years; and when the debt was all paid the trustees were to hold the trust for behoof of Mr Miln if alive, and if he was dead, they were to execute an entail in favour of his son and a series of heirs. Mr Hay hoped that thus his personal property and the rents of his landed estates would suffice in time to pay off his debts, but in this he was mistaken, for the trustees found themselves in possession of an estate yielding a gross rental of £5035, while the interest on debt and other burdens amounted to £5141, leaving a deficiency of £106 per annum, and this without any payment of annuity to Mr Miln.

In these circumstances, they craved authority to sell lands to the extent of about £2000 or £2500 of rental, the full proceeds to be applied in extinction *pro tanto* of the heritable debt. The petition was served on Mr Miln and on the three next having interest in the annuity and the estates. He lodged answers, in which, while concurring in the general object of the petition, he asked that a larger portion of the trust-estate should be sold, so as to provide to some extent for the payment of his annuity. The Lord Ordinary, after a remit to Mr T. G. Murray, W.S., granted the prayer of the petition.

Mr Hay Miln reclaimed.

At advising—

LORD PRESIDENT—This is an application by the trustees of the late Mr Hay, of Letham, for authority to sell part of his heritable estate, and the petition is based on sec. 3 of the Trusts Act of 1867. The circumstances of the case are peculiar. Mr Hay left a trust-disposition with two codicils, the effect of which was that he directed his trustees to pay his debts out of his estates other than the landed estates in Forfarshire, which they were expressly prohibited from selling. The prohibition is thus expressed:—"My trustees shall with all convenient speed apply the trust property, excepting my landed estates particularly above named, no part whereof they shall have liberty to sell," &c. Now he further provided that his nephew, the respondent, who appears to have been his nearest relation, should receive an annuity of £750, secured by a bond of annuity. The trust was to endure for twenty-one years, and the truster apparently hoped that in that time his property, other than the estate of Letham and the rents of that estate, would be sufficient to pay off his debts, but in this expectation he was mistaken, for the income of the estate was not sufficient to pay off the annual burdens, even after applying to that purpose all the rest of the available property. There was a deficiency of £106 a year. Now the expediency of granting the prayer of this petition is clear—indeed the trust is unworkable otherwise; but the first question is whether its object can be attained under sec. 3, or whether the trustees must not go to Parliament for a private Act. It is true that the Act of 1867 was intended to save the necessity of doing so, and I should be prepared, generally speaking, to give it as wide an interpretation as possible, but the words of sec. 3, clause 1, are those on which the difficulty arises, for I do not think, with the Lord Ordinary, that sec. 19 creates any difficulty. Section 3, however, authorises the Court to grant powers of selling, on condition of "being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." It may be expedient that the trustees should have power to sell, but we must look whether that be not inconsistent with the intention of the truster. Now the truster's intention is clear; the estate was not to be sold. The