counted this expectation, for he wished to do something for those who had done so much for him. He made a will leaving certain specific legacies, and the residue to his sister Mrs M'Culloch and her son-in-law, the latter of whom he appointed executor. It turned out that there was no residue—£150 was all that the executor acquired. An action was brought against the executor in the name of his sister Mrs M'Culloch, concluding for payment of £200 in name of maintenance to Corkran, and a decree in absence was granted by the Sheriff-Substitute. The question now arose whether this debt of £200 was to be paid before any legacy should be payable. If not, the sum of £150 was sufficient to satisfy the legacies. I consider that this old man was bound to make payment if he had any funds. The presumption of aliment being a gift and not a debt has here no place at all. The fact of a joint establishment is inconsistent with it being a gift, and puts this case under a different category to the case of aliment to persons unable otherwise to provide for themselves. In these circumstances there is no room for the presumption. In the second place, the testator considered himself under an obligation, and used expressions indicating this view. I think—though the case is not without difficulty—that this support was not regarded by him as a gift, but as a debt which he felt bound to discharge.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court sustained the appeal and assoilzied the defender.

Counsel for Appellant (Defender)—Rhind. Agent—William Ross Garson, L.A.

Counsel for Respondents (Pursuers)—Strachan. Agent—David Milne, S.S.C.

Friday, October 20.

FIRST DIVISION.

[Lord Lee, Ordinary.

M'DONALD *v.* CHEYNE'S TRUSTEES.

Master and Servant—Factor—Liability to Account.

A was employed by B to superintend his stock and farms, to keep the books of day labourers, and to account for all moneys passing through his hands, but not to collect rents. B sold the estate to C, who engaged A to act in same capacity as he had done under B. After eighteen months C discharged A, and demanded factorial accounts, which A refused as not being a factor but a grieve. *Held*, after a proof, that his true position was that of a grieve, and that he was not bound to account as a factor for the whole stock as committed to his care, but only for actual intromissions with money entrusted to and spent by him, and that he had sufficiently discharged himself of this liability.

On the 28th February 1860 an action of count, reckoning, and payment was raised at the instance of Mrs Francis Cheyne of Lismore, relict of the deceased James Cheyne of Kilmaron, against Donald M'Donald, Soroba, near Oban, concluding against him to exhibit an account of his intromissions as factor for the pursuer, or to make payment of £500 or such other sum as should be found to be the balance of his intromissions. Decree in absence was on 20th May pronounced against the defender in terms of the second alternative conclusion of the summons.

The pursuer of this action had in 1857 acquired by purchase the estate of Kilchiaran in the island of Lismore, in Argyllshire, which had been for some years in the possession of the trustees of her late husband Mr James Cheyne.

The defender had been employed by the said trustees to act as a kind of local manager or overseer, to buy and sell stock, to engage the necessary servants, and to superintend their operations. Mr Gregorson, banker, Oban, acted as agent for the trustees, and was virtually the factor upon the estate. When Mrs Cheyne acquired the estate in 1857, she arranged with M'Donald to act for her as he had done for the said trustees, and his engagement with her lasted from 1st December 1857 until Whitsunday 1859. His salary was at the rate of £70 per annum, with an allowance for a dwelling-house. At the time when the trustees made over the estate to Mrs Cheyne there was a valuation and inventory made out by Mr Gregorson, with M'Donald's assistance, to enable them to determine the price which was to be paid for the estate and stock. Mrs Cheyne continued to manage the estate, with the assistance of M'Donald as grieve, for about a year, during which time communications passed between M'Donald and Mr Sprot, W.S., Mrs Cheyne's Edinburgh agent, as to the way in which the accounts were to be kept, and various instructions were given as to furnishing monthly reports and accounts of expenditure. The only accounts which M'Donald appeared ever to have kept were a day labour list and workmen's accounts.

In 1859 Mrs Cheyne resolved to let her farm and to discharge M'Donald, and Mr Sprot, W.S., wrote to M'Donald to this effect, and asked him to render his accounts. During M'Donald's engagement various sales of stock had taken place, some by Mr Sprot, some by Gregorson, and some by M'Donald under direction of Mrs Cheyne, and it was for an accounting upon these sales, and also for all the stock which it was alleged had been put into M'Donald's hands, that Mr Sprot's demand was made. M'Donald maintained that he was not a factor but merely a grieve, and that he had no factorial accounts to render, and it was to compel him to give an account of his intromissions that the action of count, reckoning, and payment already referred to (and in which decree passed in absence against M'Donald, the defender) was raised. A charge was given upon this decree, and M'Donald was arrested at Falkirk by a messenger, acting upon the instructions of Mr Sprot, who would have incarcerated him but for the intervention of his brother Mr John M'Donald, who gave to Mr Sprot a cheque for £70 and an order for £200, and granted a letter of presentation binding himself to present the alleged debtor in Edinburgh on the 14th November 1860. A note of suspension of the decree in absence was presented on the 14th of November 1860 by M'Donald, craving supension of the decree in absence, and asking to be reponed. On the same day the note was passed by the Lord Ordinary

on the Bills, in terms of the Act 1 and 2 Vict. c. 86, sec. 6, by which Act suspensions of decrees in absence were then regulated. It appeared that, unknown to Mr John M'Donald, the letter of presentation had contained a clause binding him to produce the debtor at the time mentioned without a sist, suspension, or other legal impediment. The messenger when asked to give up the bank orders which had been lodged with him in security, refused, on the ground that they were not in security, but as part payment for the sum in the decree. Mr Sprot thereafter sent a letter to Mr John M'Donald intimating that he would be held liable for the balance of the debt which it was averred was due to Mrs Cheyne, and a summons was served upon him as having been in breach of his obligation to implement the letter of presentation already referred to. On the 22d September 1862 Mr John M'Donald was sisted as mandatory for his brother (who had gone to Australia on business) in the process of suspension of the decree in absence. On the 13th January 1864 Lord Mackenzie made a remit to Mr Alexander W. Robertson, accountant, to report whether any money was due by M'Donald to Mrs Cheyne. A report was lodged by Mr Robertson on 10th June 1865, in which, after tracing the whole circumstances out of which the action arose, and detailing the various accounts which he had been able to recover, he brought out a balance due to Mrs Cheyne of £361, 3s. 2½d.

Against this report objections were lodged by both parties, and before further answer thereon proof was allowed by Lord Mure. After various delays, extending over a period of years, the cause came to depend before Lord Fraser, who on 9th July 1881 granted a commission to examine the suspender M'Donald, who was residing in Queensland. He was examined before the commission. The more important parts of his evidence thus obtained are referred to in the opinion of the Lord President.

On the 7th March 1882 the Lord Ordinary (Lee), after consideration of the accountant's report, and the proof recently reported, pronounced the following interlocutor: — "Repels the objections to the accountant's report: Approves of said report; and in respect thereof, finds that at the date of the decree in absence a balance was due by the suspender to the respondent, on a proper accounting, of £361, 3s. 2½d., to which sum, with interest as concluded for in the summons, and with the sum of £7, 5s. of expenses, including the dues of extract incurred in the original action, restricts the said decree and charge: Repels the reasons of suspension, so far as regards the said sum and interest: But in respect that the whole amount has since been recovered by the respondent under the bond of presentation, and other proceedings mentioned on record, suspends the charge, and decerns: Finds the suspender liable in expenses," &c.

Against this interlocutor the suspender reclaimed.

At advising—

Lord President—There seems to me to have been a great deal of unnecessary delay in presenting this claim for an accounting. The original action of count and reckoning was raised so far back as 1860 by the respondent Mrs Cheyne, and there appears to have been great confusion and serious fault on her part in the conduct of the case. The original summons called upon the present suspender to account for his intromissions as factor for the respondent, in order that the true balance due to or by him might be ascertained; and looking to the relation existing between the parties this was not by any means an unreasonable request. If the suspender had occupied the position of a factor on this estate, in the proper sense of the word, his responsibilities would have been of a very different kind, but in my opinion he was not a factor at all. Mr Gregorson, the respondent's agent at Oban, was the factor, while the suspender was employed in a very different and subordinate capacity; this I think is rendered perfectly clear from the letters of Mr Sprot, the respondent's Edinburgh agent, as well as by the explanations given by the suspender. It also appears, I think, from a letter by Mr Gregorson to Mr Sprot dated 25th February 1858—"I am just favoured with yours of the 23d, and I am now enabled to send you a detailed calculation of the value of the stocking, &c., at Lismore, based on the valuation of Messrs Lightbourne and Mitchell, the two gentlemen approved of as valuators. After the valuation I had to get the numbers of the sheep from M'Donald, the manager, and that delayed the calculation. Owing to the state of the markets there was a little difficulty about prices, but I know the valuators did their best to fix on what was fair for all parties, and so far as I am a judge, I think the prices are fair and just. I hope Mrs Cheyne will think so. I will prepare and send you a report as to tenants. There are no current leases. They all hold from year to year." Now, this letter shows clearly, I think, that Gregorson continued factor; for he alone drew the rents of such of the farms as were then let. But when we turn to the evidence of the suspender as we have it in the report of the Australian Commission, we get a very clear notion of what his duties really were. He says that his duties were "looking after the stock and farm, and selling stock according to orders. I had general superintendence over the farm—to superintend the sheep and cattle, the shepherds, and the men about the place, and to keep accounts of day labourers and the money that I received and spent;" and further on, when asked "if he was not the manager on the estate, who was above him," his answer was—"Mrs Cheyne and Mr Gregorson; they both sold stock themselves."

Now, I think all this clearly disproves that the suspender was in the position of factor upon this estate, but proves that the nature of the office he held was that rather of an upper servant who had to account for sales which he carried out under the orders of his superiors—whose duty it was both to superintend the labourers and to pay them their wages, to overlook the farms, and to give reports about them, but not to collect the rents. Such being the nature of the office which the suspender held, we have now to consider what sort of accounts the respondent was entitled to require from him, and for what kind of intromissions he was liable to account. It has been said that as the whole sheep and cattle stock upon the estate had been given into his charge, he was bound when his engagement came to an end to account for everything which had been thus committed to

him. Now, it appears to me that this is quite a mistake. He certainly was bound to look after the stock, but it was never given formally into his possession. The inventory and valuation were made not for the purpose of transferring the stock from Mrs Cheyne to him, to the effect of making him responsible for them, but to transfer the stock to Mrs Cheyne from Mr Cheyne's trustees. Though the suspender assisted in making up this inventory, it does not appear to me that he can in any way be bound by it. The only account the proprietor is entitled to demand is one of actual intromissions with money obtained and spent, and this, I think, has been got so far as it is now possible to obtain it. The position of the suspender seems really to have been that of a farm manager, forester, or gamekeeper who is bound to account for all money of his master's which comes into his hands—the peculiarity in the present case being that no money of this kind has been proved to have come into the suspender's hands which has not been accounted for.

With reference to the accountant's report, he indicated in his notes what in his opinion the respondent must prove before she could establish her claim against the suspender. It is unnecessary to go into the details of this report, because none of the material facts averred by the respondent appear to me to have been established. I am therefore for recalling this interlocutor and sustaining the reasons of suspension.

Lord Mure and Lord Shand concurred.

Lord Deas was absent.

The Court pronounced the following interlocutor:—

"Recall the interlocutor; sustain the reasons of suspension; suspend the decree and charge complained of, and decern; reserving all questions as to the effect of the payments alleged to have been made by the suspender to the respondents on or about 9th October 1860, amounting to £270: Find the respondents liable in expenses," &c.

Counsel for Suspender—Robertson—Dickson. Agents—Wotherspoon & Mack, S.S.C.

Counsel for Respondents—Pearson. Agents—Sprot & Wordie, W.S.

REGISTRATION APPEAL COURT.

(Before Lord Mure, Lord Craighill, and Lord Fraser.)

Monday, November 13.

[Sheriff-Substitute of Perthshire.

FORBES *v.* HALLEY.

Election Law — County Franchise — Owner in Right of Wife — Wife Liferentrix under Marriage-Contract — Reform (Scotland) Act 1832 (2 *and* 3 *Will. IV. c.* 65), *secs.* 7 *and* 8—*Representation of the People (Scotland) Act* 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 14.

In a marriage-contract the wife's father bound himself to give her the "free liferent use and possession, both natural and civil" (excluding her husband's *jus mariti* and right of administration), of certain heritable property during his own life, and at his death to convey the property to the marriage-contract trustees for the wife in liferent, and her children in fee. *Held* that the wife was liferentrix of the property, and that the husband was therefore entitled to the franchise as owner in right of his wife.

The Reform Act of 1832, sec. 7, enacts—"From and after the passing of this Act every person not subject to any legal incapacity shall be entitled to be registered as hereinafter directed, and thereafter to vote at any election for a shire in Scotland, who, when the Sheriff proceeds to consider his claim for registration in the present or in any future year, shall have been, for a period of not less than six calendar months next previous to . . . the last day of July in any future year the owner (whether he has made up his titles or is infeft or not) of any lands, houses, feu-duties, or other heritable subjects (except debts heritably secured) within the said shire, provided the subject or subjects on which he so claims shall be of the yearly value of ten pounds." . . .

Section 8 enacts, *inter alia*—"That in elections for shires, where two or more persons are interested in any subject to which a right of voting is for the first time attached by this Act, as liferenter and as fiar, the right of voting shall be in the liferenter and not in the fiar: . . . Provided also that husbands shall be entitled to vote in respect of property belonging to their wives, or owned or possessed by such husbands after the death of their wives by the courtesy of Scotland."

Section 14 of the Representation of the People (Scotland) Act 1868 enacts as follows, *inter alia*—"In a county where two or more persons are interested as liferenter and as fiar in any lands and heritages to which a right of voting is for the first time attached by this Act, the right to be registered and to vote shall be in the liferenter and not in the fiar: . . . Provided also that husbands shall be entitled to be registered and to vote in respect of lands and heritages as aforesaid belonging, whether in fee or in liferent, to their wives, or owned or possessed by such husbands after the death of their wives by the courtesy of Scotland."

At a Registration Court for the county of Perth, William Laurence Young, solicitor, Auchterarder, mandatory for William Halley, Auchterarder, objected to the name of A. E. W. Drummond Forbes, Millearne, being entered on the register of voters for the county of Perth as owner in right of his wife of lands and estate of Millearne in the parish of Trinity-Gask. The facts were—By antenuptial contract of marriage between Arthur Edward Whitmore Forbes, the appellant, and Miss Caroline Home Drummond Moray, only daughter of Charles Stirling Home Drummond Moray, Esq. of Abercairney, Blairdrummond, and Ardoch, the said Charles Stirling Home Drummond Moray bound and obliged himself "to give to the said Caroline Moray, exclusive of the *jus mariti* and right of administration of her said intended husband, and after her decease then to the said Arthur Forbes in the event of his surviving her,