explain it. But if such a method of construction were applicable at all, then I agree with an observation that was made by your Lordship, that it lies with the defender—maintaining that the words of a feu-contract are to carry a wider meaning than that which, if construed alone, they would bear by implication from a specific state of facts—to aver on record that state of facts, and to establish it by evidence. Now, there is no such averment on record, and there is no evidence—no specific evidence—of the actual condition of the water in 1886, which would enable us to say what is the measure of the right conferred on the vassal by the feu-contract. There is no attempt to clear up the contract in that way by evidence, if it was possible to clear it up; and I am of opinion, therefore, that this clause at all events cannot be so construed as to confer on the vassal any higher right than Lady Seafield possessed.

But then it is said that the second clause, to which I adverted, bars the superior from the present complaint. That is an exception from the clause for the prevention of nuisance. It is declared that the vassal shall not be entitled to carry on manufactures which may be deemed a nuisance—excepting from that declaration the carrying on of the said distillery — and as I understand the argument, it is said that is an express permission to carry on the distillery, and that therefore the pursuer cannot complain on the maxim *volenti non fit injuria*. I think that would be a very good answer to an action at the pursuer's instance to put down a distillery as a nuisance. I do not think that she would be in a position to maintain that the distillery as such is a nuisance prohibited by this clause. But the only purpose of the exception is to take the distillery out of the scope of the clause prohibiting nuisances, and when it has served that purpose there appears to me to be no other meaning that can be given to it, and therefore on this branch of the contract also, as on the other, it would be indispensable for the defender to show that the distillery could not in fact be carried on without producing this particular nuisance of which the pursuer complains; and as your Lordship has pointed out that has not been proved. Indeed, it is not consistent with the defender's case to maintain it. That there may have been a discharge of impurities into the Ringorm Burn at the time the contract was granted, or that such a discharge may be very probably, if not necessarily, a consequence of carrying on the distillery, is a very different matter, because in all these cases the question is one of degree. It cannot be alleged of any running stream that it is absolutely free from impurities at any time, and therefore the question always is, whether the person complained of has discharged into the river impurities so much greater in character and degree than what had been discharged within the prescriptive period as to create a nuisance. I think that is the true question in the present case, and that it is proved that the defenders have polluted the stream to a much greater extent than had ever been done before, and therefore if the clause in question were held to contemplate that some degree of impurity may be discharged into the stream, it does not follow that it contemplates what the defender is now doing. It appears to me that the condition of the contract which is founded on, by which the carrying on of the distillery is excepted from the general prohibition of nuisances, cannot be carried further than to bar the superior from complaining of the distillery as such being necessarily in itself a nuisance. That she does not do in this action, and therefore I think the plea of bar falls.

On all the other points in the case, as I have said, I entirely agree with your Lordships.

The Court pronounced the following interlocutor:—

"Adhere to the findings and decrees of declarator in the two first heads of the interlocutor reclaimed against, in so far as these relate to the pursuers other than Mrs Kinloch Grant, Arndilly: And in regard to the said Mrs Kinloch Grant, in place of the said findings and declarators, Find and declare that the defender has no right or title to discharge into the Ringorm Burn, and through it into the river Spey, any impure matter or liquid prejudicial to the salmon-fishings of the said Mrs Kinloch Grant: *Quoad ultra* adhere to the said interlocutor as regards all the pursuers," &c.

Counsel for the Pursuers — Sol.-Gen. Dickson, Q.C.—Cooper. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender—Shaw, Q.C.—Wilson. Agents—Davidson & Syme, W.S.

Saturday, January 28.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

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

Husband and Wife—Aliment.

A widow is entitled, as a creditor, to aliment out of the capital of her husband's trust-estate, although she has accepted a liferent of the estate in lieu of her legal provisions under his settlement, which proves inadequate for her maintenance.

Howard's Executor v. *Howard's Curator Bonis*, 21 R. 787, *distinguished.*

Alexander Anderson, farmer, Kirriemuir, died in 1877 survived by his widow and two children, and leaving a trust-settlement whereby he gave to his widow a liferent of the household furniture in their

dwelling-house and of the whole income of the residue of his estate. The provision was declared to be in full satisfaction of her claim for *jus relictæ* and terce, or of any other claim, legal or conventional. On the widow's death the residue was to go to certain beneficiaries in fee. The income of the residue of the whole estate came to about £19 yearly.

An action was raised by the widow against the trustees under the trust-settlement, and against the ultimate beneficiaries, craving the Court to ordain the trustees to make payment to her of £35 yearly by way of aliment out of the trust funds.

The pursuer, who was ninety-eight years of age, averred that she was bedridden, and that the income of the residue of her husband's estate was insufficient for her maintenance.

Defences were lodged by the trustees and the beneficiaries. The former averred that they were willing to increase the allowance had they the power to do so, but that they had been unable to obtain the consent of all the beneficiaries to their doing so. The defenders further averred that the liferent enjoyed by the pursuer was in excess of her legal rights as widow of the deceased.

The Lord Ordinary (STORMONTH DARLING) on 21st December 1898 granted decree in terms of the conclusions of the summons, and found the compearing defenders liable in expenses.

Opinion.—"This is an action for aliment brought by the widow of a farmer against his trustees and beneficiaries, on the ground that the free income of the estate which she receives under the will is insufficient for her support. If there is authority in law for granting the pursuer's demand, there could hardly be a stronger case for doing so. She is ninety-eight years of age, bedridden, deaf, and blind. The capital of her husband's estate is £665, and the income which she receives a little over £19 a year. The estate is intact and undivided in the hands of his trustees, for no division is to take place (and apparently no vesting) till the widow's death. The beneficiaries will then be the surviving grandchildren and their issue.

"The liability of the representatives of a defunct to aliment those whom he was himself bound to maintain has been the subject of many decisions, and the result of them is, I think, accurately expressed in Lord Ivory's note to Ersk. Inst. i. 6, 58, thus—'It would seem that in every case the representatives of a person deceased, whether the degree of relationship be nearer or more remote, and whether the succession by which they are *lucrati* consist of heritables or moveables, are out of this succession liable in aliment to those whom the deceased himself was under a natural obligation to maintain.' This passage is quoted with approbation by Lord Mure in *Spalding* v. *Spalding's Trustees*, 2 R. 254 (which was a case about a posthumous child), and his Lordship goes on to add that trustees under a father's trust-settlement are in the ordinary case under the same liability. If that be so in the case of a child, it must hold with at least equal force in the case of a widow.

"In most of the older cases of liability *ex jure representationis* the person found liable to aliment the widow was the heir. Such were the cases of *Thomson* v. *M'Culloch* (1778), M. 434; *Lowther* v. *Maclaine* (1786), M. 435; and *Hobbs* v. *Baird*, 7 D. 492. But in the case of *Blake* v. *Bates*, 3 D. 317, the widow's claim was successfully made against her husband's trustees, although she had repudiated a provision in her husband's settlement and claimed her legal rights. In other relationships than that of husband and wife instances of successful claims against the trustees or executors of the defunct are to be found in *Scot* v. *Sharp*, 1759, M. 440; *Spalding* cited above, and *A* v. *B*, decided by Lord Moncreiff in 1893, and reported in the Poor Law Magazine for that year, p. 339.

"It is no objection, then, to this claim that it is brought against the husband's trustees instead of being brought against the grandchildren themselves as liable *ex debito naturali*. Neither can it be held an objection that the pursuer accepted the provision which her husband had made for her, because surely a widow who accepts a provision which turns out to be inadequate cannot be in a worse position as regards her right to claim aliment than a widow who repudiates her provision and claims her legal rights. There is ample authority for saying that when terce and *jus relictæ* are inadequate the claim of aliment arises. I fail to see why an inadequate conventional provision should be any greater obstacle to the claim. It was argued for the defenders that the legal provisions had never been supplemented except in cases where there was some heritable property which from its nature or the mode in which the title stood was exempt from terce. But this, I conceive, is a pure accident, and has nothing to do with principle.

"The only real difficulty in the case to my thinking is that the claim involves an encroachment on capital. The circumstance is, so far as I know, not to be found in any of the decided cases, though the case of *Scot* v. *Sharp* (cited above) comes exceedingly near it, for there an executrix, who had received no more than £230 from her mother, was held bound to pay £12 a-year of aliment to a stepsister. But it seems to me that the question really turns on the circumstances of each particular case. I see no sanctity in capital where the decent maintenance of a man's widow is concerned. Of course one would never encroach on capital unless it were absolutely necessary. But once the jurisdiction to award aliment is conceded, why should the pursuer be denied the necessaries of life according to her present situation merely in order that the full sum of £665 should be preserved intact for the eventual beneficiaries? The defenders referred to the case of *Howard's Executor*, 21 R. 787, where a widow having received her half of the estate as *jus relictæ*, the Court held the next-of-kin entitled to immediate payment of the other half. But that was on the ground that there was no

immediate necessity for more money than the widow herself had got, and that the necessity might never arise. I do not read the case as laying down any general rule against encroachment on capital where the immediate wants of the widow cannot be met in any other way, especially in a case like the present, where upon the most sanguine view of the pursuer's prospect of life there cannot be any serious diminution of the capital which is ultimately to go to the beneficiaries.

"If aliment is to be awarded at all, nobody says that the sum claimed is excessive, and therefore I shall give decree for such an amount as, when added to the free income of the estate payable to the pursuer under her husband's trust-settlement, will make up the sum of £35 a-year. The pursuer must have her expenses, but I do not mean to suggest that the defence by the trustees was in any way improper. They were entitled to have a judgment for their own protection."

Mr David C. Grant, one of the beneficiaries, reclaimed, and argued—The truster had discharged more than his legal obligation to the pursuer, and that was the full extent of any possible claim by her—*Howard's Executor* v. *Howard's Curator Bonis*, May 25, 1894, 21 R. 787. In any event, the Court would be slow to authorise an encroachment upon the capital of the sum which was to fall to the ultimate beneficiaries.

Argued for respondent—There was a proper claim for aliment against the trustees as representatives of the pursuer's deceased husband. It was a debt, and just in the same position as any other debt, so that it could not be maintained that the capital should be secured against it. See also cases quoted by Lord Ordinary, *supra*, and *Oncken's Judicial Factor* v. *Reimers*, Feb. 27, 1892, 19 R. 519. The truster thought that what he left her was sufficient for his widow's maintenance, and if it was not she was quite entitled to have it supplemented—*Adamson's Trustees* v. *Adamson's Executor*, July 14, 1891, 18 R. 1133; *Ritchie* v. *Davidson's Trustees*, March 15, 1890, 17 R. 673.

Lord President—The reclaimer's point is that the Court cannot decern for aliment to a widow out of the capital of her husband's estate. This, I think, is unsound in law. The claim, if it exists, is that of a creditor, and to a creditor there is no distinction between the capital and the income of the debtor's estate. The case of *Howard's Executors* does not support the reclaimer's contention. In that case, so far as the controverted fund was concerned, there was no existing claim of debt. There was merely an apprehension that in the future a claim might arise, and the proposal of the widow was that the whole of the estate should be retained to meet that contingency. This the Court refused to order. But the Court did not decide, and could not decide, that if the existing debt had required the whole capital to meet it, the widow's claim would be excluded by the fact that she could take nothing but the capital of the estate.

Lord Adam—This is a claim for aliment by a widow against the trustees and representatives of her deceased husband. Now, the claim, as your Lordship has said, is one for a debt, and it exists so long as the widow or children, as the case may be, continue to live. But if it has not emerged when the proper time arrives for the division of the estate, all that was decided in the case of *Howard* was that it affords no reason why the estate should not be divided among those entitled to it. Now, if the estate is properly divided, of course nothing remains out of which the widow can get relief in the event of her claim subsequently emerging. If that were to be the case the claim would be against those who ought also to be liable to aliment her—her children or grandchildren. In the present case there is an unusual lapse of time, and at the end of it this lady has a good claim emerging. The estate of her husband, against which she had a right from the beginning, is still intact, and there can be no reason why the fee of it should not be liable for this debt just as much as for any other. These are the grounds of the Lord Ordinary's judgment, and I entirely concur in them, and in the statement of law given by him.

Lord Kinnear—I am entirely of the same opinion. The moment it is established that the widow's claim of aliment is a claim of debt, it follows as a necessary consequence that it is no answer for the representatives of the husband to say that they are unable to meet the claim without encroaching on the capital of his estate.

The case of *Howard's Executor* presents no difficulty, as it has been explained by your Lordship who took part in the judgment, because all that it appears to decide is that the widow's claim for aliment, although a personal claim against the husband's representatives, does not constitute a charge on the estate so as to create a burden over it, enabling her to prevent the distribution of the estate among the beneficiaries in order to provide security for the contingency of the claim for aliment emerging. It does not follow, as your Lordship has pointed out, that after the estate has been distributed the husband's representatives are not still liable in a claim for maintenance by the widow if such a claim emerges.

I agree accordingly with your Lordship and the Lord Ordinary. I do not understand, if the claim is good in law, that there is any objection to the terms in which the Lord Ordinary has given effect to it, or to the amount of aliment he has allowed.

Lord M'Laren was absent.

The Court adhered.

Counsel for the Pursuer—Dundas, Q.C.—Donald. Agent—W. S. Harris, L.A.

Counsel for the Defender David Grant—A. M. Anderson. Agent—Charles George, S.S.C.