

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—Carmen, 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.

No children were born of the marriage, which was dissolved by the death of Mrs Lyon on 10th September 1902.

By trust-disposition and settlement, dated 2nd May 1896, Mrs Lyon, after setting forth the provisions of the said antenuptial deed of trust, and on the narrative that she was desirous of making provision for the disposal after her death of the whole of her means and estate, including the means and estate conveyed in the antenuptial deed of trust, disposed to trustees her whole means and estate then belonging to her or which should belong to her at her death, or of which she might then or at any time have the power of disposal, for the following purposes, viz.—To pay the free annual proceeds to Mr Lyon for his own life or until he should die or second marriage, and on the occurrence of either of these events to realise the estate and pay and make over the residue to the children of her sister Mrs Amelia M'Leod Milne or Miller, and of her brother William Milne, who should be alive at that date, equally share and share alike.

The whole estate left by Mrs Lyon was moveable and amounted to £1978.

Thereafter Mr Lyon intimated that he was not to accept the provisions made for him in the trust-disposition and settlement, but claimed to receive one-half of his deceased wife's estate as *jus relictii*. The residuary legatees under the trust-disposition and settlement contended that he was not entitled to *jus relictii*.

For the settlement of this point a special case was presented to the Court.

The parties to the special case were (1) Mrs Lyon's testamentary trustees, (2) the residuary legatees, and (3) Mr Lyon.

The question of law was—"Whether the third party is entitled to one-half of the whole trust estate as *jus relictii*?"

The question was argued on the assumption that Mr Lyon before the marriage knew of the antenuptial deed of trust.

Argued for the second parties—In the antenuptial deed of trust Mrs Lyon reserved power to herself, in the event of there being no children, to dispose of her estate. The husband in the knowledge of this, and the wife on the understanding that she could do so, entered into a contract, viz., the marriage. Mr Lyon had thereby excluded his right to demand *jus relictii*—*Murray's Trustees v. Murray*, May 31, 1901, 3 F. 820, 38 S.L.R. 598.

Counsel for the third party was not called upon.

LORD JUSTICE-CLERK—I am of opinion that the first question should be answered in the affirmative. There is here no marriage-contract, and no ground for holding that the third party is not entitled to claim his *jus relictii* in the estate of his wife.

LORD TRAYNER—I agree. It is not stated in the case that the husband knew of or assented to the antenuptial deed of trust executed by his wife. But even assuming that he did, nothing was given by the deed to the hus-

band in exchange for or in discharge of his legal rights. The case of *Murray* referred to in the debate is essentially different from the present. In that case the husband's right was excluded by paction. Here there is nothing to suggest that the husband surrendered his rights, or even that these rights were at all in contemplation. I regard the husband's claim here as a claim of debt exigible from his wife's estate. His assent, if he gave any, to the disposal of his wife's property by the deed of trust cannot be regarded as anything more than an assent to that disposal, subject to the satisfaction of all debts, including his own, legally payable out of the estate.

LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court answered the question of law in the affirmative.

Counsel for the First Parties—Graham Stewart. Agents—Garden & Robertson, S.S.C.

Counsel for the Second Parties—Dove Wilson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Third Party—J. W. Forbes. Agents—Garden & Robertson, S.S.C.

Friday, July 10.

## SECOND DIVISION.

[Dean of Guild Court,  
Glasgow.

### ANDERSON'S TRUSTEES v. GARDINER.

*Burgh—Dean of Guild—Jurisdiction—Question of Heritable Right—Flatted Tenements—Common Property—Common Interest—Property.*

A tenement was divided into three divisions of six storeys with a row of cellars behind the basement floor and separated from it by a sunk area.

A was owner of the whole of the tenement and the cellars with the exception of two upper storeys in the east division, and two cellars behind that division which belonged to B.

A applied to the Dean of Guild Court for permission to cover over the sunk area behind the centre and west divisions of the tenement.

B objected and produced his title dated in 1818, which gave him the two storeys and the two cellars together with the parts and pertinents of the subjects and free ish and entry to the cellars by the common stair and sunk area, and also the use and privilege in common of the court or area behind. B averred that A's titles dated in 1818 and 1819 contained similar provisions to his own, that A proposed to take possession of common property, or property in which B had a common interest, the sunk area having been possessed by B and his pre-