M'Gregor v. *Stevenson*, 9 D. 1056). Indeed, I claim the first part of the Lord Ordinary's opinion as really negativing the idea that these awards ought to be reduced on any ground except the substantial one on which Lord Low has proceeded. Be that as it may, my own opinion is that there is no ground for reducing these awards on any of what may be called the technical grounds. It was because the Second Division, as constituted on 25th May 1906, thought that the Lord Ordinary had erred in accepting these technical objections as sufficient to justify reduction *de plano* that we recalled his Lordship's interlocutor and remitted to him to allow a proof before answer. The proof thus taken has of course been considerably lengthened by the pursuers insisting upon these formal objections and even adding to their number. In the result it seems to me to have been shown that there was no substance in the technical grounds, although it has also been disclosed that there was a very real and sufficient ground for reducing some of the awards, because the arbiters had not applied their minds to the sum which was necessary to put the fences, &c., into good order.

I should therefore be in favour of limiting our judgment to what I consider the true ground, and if your Lordships had agreed with me, of marking our sense of the pursuers' failure to establish their technical objections by modifying the expenses to which they are to be found entitled.

LORD JUSTICE-CLERK—I concur with both your Lordships that the so-called award in this case cannot stand. But upon the technical questions as to the procedure of the arbiters and oversman, and which can only affect the question of expenses, I agree with the views expressed by Lord Low. I entirely assent to the general view that submissions such as this which relate to farming matters are not to be too strictly dealt with as regards procedure. But relaxation of rules of sound procedure must not be carried too far. Where only detail matters are concerned mere technicalities may be held not sufficient ground for setting aside an award evidently fairly arrived at. But the difficulty in this case is that the irregularities which took place make it plain that the party complaining of the procedure did not get the benefit in the arbitration of what was stipulated for, viz., that in the event of the arbiters differing he was entitled to the decision of the oversman. He was entitled to know the fact whether the arbiters differed, and whether they referred the matter on that ground, and to consider whether he should ask the oversman to hear him or bring matters before him for consideration. Now the case as it presents itself to us indicates, if anything, that the award was an award made both by the arbiters and the oversman in conjunction, or in the form of one of the deliverances, an award by one arbiter and the oversman. Such awards presented to a party could give him no certainty as to what had been done—whether the arbiters had considered the case and had differed, and therefore had devolved the matter upon the oversman, or whether the oversman had never had any devolution made to him, but had proceeded without any such devolution to take part in disposing of the matters in dispute. It seems to me that the objection to such procedure is substantial. I cannot hold that the party to the arbitration who felt aggrieved by the so-called award can without injustice be put in the position of having to accept an award as to which it does not appear that the procedure was truly the procedure contemplated by him in entering into the arbitration as shown by the terms of the submission. I have only to say further that I do not think that the case of *Hope* has any bearing on the case. It proceeded on custom of a port. That overruled any ordinary law applicable to such a case. Here there is no ground shown for dealing with the matter on any other footing than that the law must be applied, there being nothing to show any district custom which could justify a decision not in accordance with the legal principles applicable in the circumstances of the case.

LORD ARDWALL was not present.

The Court adhered.

Counsel for the Pursuers (Respondents)—M'Lennan, K.C.—Murray—Hamilton. Agents—Murray, Lawson, & Darling, S.S.C.

Counsel for the Defender (Reclaimer)—The Solicitor-General (Ure, K.C.)—Lord Kinross. Agents—Russell & Dunlop, W.S.

Friday, November 29.

SECOND DIVISION.

[Lord Dundas, Ordinary.

DENHOLM'S TRUSTEES *v.* DENHOLM'S TRUSTEES.

(See *ante*, 1907 S.C. 61, 44 S.L.R. 42.)

Succession — Trust-Disposition — Mutual Settlement—Power to Husband to "Consume" Wife's Estate—Meaning—Onus of Proof in Question with Beneficiaries Entitled to Remainder.

In a mutual trust-disposition and settlement a wife conveyed to her husband her whole means and estate, under burden of the payment of debts and annuities and the maintenance of their children, "with full power to my said husband to consume such parts 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;" and 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 husband." The wife predeceased the husband. After the latter's death, which took place twelve years afterwards, the trustees of the wife brought an action against his trustees, in which they claimed payment of the whole amount of the wife's estate as at the time of her death. It was proved that the husband, at various times before his death, realised the whole of his wife's estate, with the exception of a bond and disposition in security for £6000, and paid the proceeds into one or other of his own bank accounts, where they became indistinguishably immixed with his own funds.

Held (*diss.* Lord Ardwall) (1) that the husband was under no obligation to keep an account of his wife's estate, and accordingly that the *onus* of proving that any portion of the wife's estate was unconsumed, and of identifying such portion, lay upon the pursuers; (2) that they had failed to discharge this *onus* with regard to any portion except the bond and disposition in security, and accordingly were entitled to it alone.

George Denholm and Mrs Sarah M'Laren or Denholm, his wife, on 10th November 1891, executed a mutual settlement. By it the husband conveyed his whole estate to trustees for various purposes, of which the fourth was as follows—"I empower my trustees after my death, as they may think proper, and as they may find expedient, to realise my whole estates: And in the event of my said wife surviving me my trustees shall pay to her as an alimentary allowance for herself and our children during the whole days of her life the net income of my estates . . . and my trustees are hereby authorised to pay over to her from time to time for her own use such portion or portions of the capital of said residue as my trustees may deem necessary, or which they think she may require, she being always bound to maintain our said children, and that until they are capable of maintaining themselves, and to educate them in a manner befitting their station: And in the event of my said wife predeceasing me, and on her death if she shall survive me, my trustees shall hold my said estates or the residue thereof, or what may remain thereof after her decease, and pay or apply the income thereof to or for behoof of William Benjamin Liddall M'Laren, my stepson, Alice Anna Mary Denholm, my daughter, and any other child or children who may be procreated of the marriage between me and the said Sarah Louisa Liddall M'Laren or Denholm, and the survivors of them equally, and on each child attaining the age of twenty-five years complete, or in the case of daughters on being sooner married, my trustees shall pay over to him or her his or her share. . . ."

The provisions made by the wife were 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 dispone 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" (*debts and various annuities*) . . . . "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 dispone to and in favour of" (*trustees named*) "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. . . . (*Third*) That my trustees shall hold and invest the residue of my said estate, and pay or apply the income thereof to or for behoof of my whole children born or to be born, and the survivors of them equally, and on each child attaining the age of twenty-five years complete, or in the case of daughters on being sooner married, my said trustees shall pay over to him or her, his or her share. . . ."

The settlement contained the following clause as to revocation—"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. Mr Denholm, who contracted a second marriage, died in 1905 leaving a will in favour of his stepson and two daughters, executed in 1902, by which he revoked all former testamentary writings, including the mutual settlement. The will contained the following provision — ". . . Further, I specially declare that in the event of my daughters, or either of them, or my stepson, the said William Benjamin Liddall M'Laren, raising any question with reference to the distribution or division of the trust estate, or taking exception or making any objection to my power to revoke said mutual settlement, or claiming that any part of the trust estate falls thereunder or is thereby in any way regu-

lated, or raising any question with reference to the distribution or division of the estate left by their mother, my wife, or taking exception or making any objection to the amount thereof, as the same may be set forth in any statement subscribed by me, they or any of them raising such questions regarding such distribution or division or taking exception or making any objection or claiming as aforesaid, with reference either to the trust estate or to the estate of their mother, shall forfeit right not only for themselves, herself or himself, but also for their, his, or her issue, in and to any share of or interest in the trust estate as aforesaid, which shall thereafter accresce to the other beneficiaries in their order under and in terms of this my will and any codicil thereto."

The following statement (No. 10 of process) was found in the deceased's repositories:—

"Statement under the hand of the late George Denholm of the net amount of the Estate of the late Mrs Denholm.

I. Heritable property—						
1. 43 Manor Place, Edinburgh, sold at				£3700	0	0
Deduct—Bond	£1000	0	0			
Expenses of repayment	2	4	0			
Completion of title	7	7	0			
				1009	11	0
				£2690	9	0
2. One half of 92 South bridge, sold at	£1500	0	0			
Proportion of rent to date of death, less taxes, &c.	6	0	0			
	£1506	0	0			
Deduct expenses of completion of title and sale	23	14	1			
				1482	5	11
3. One half of 287 High Street, Edinburgh, sold at	£600	0	0			
Proportion of rent to date of death, less taxes, &c.	2	5	0			
	£602	5	0			
Deduct expenses of completion of title and sale	22	5	0			
				580	0	0
				£4752	14	11
II. Debt due upon bond and disposition in security granted by Mr Denholm, in favour of his late wife, over estate of Press, dated 15th and recorded 22nd both days of May 1890				6000	0	0
III. Balance of *jus relictæ* from estate of Mr W. A. M'Laren				306	7	4
IV. Paraphernal effects				44	2	0
				£11,103	4	3
Deduct—Debts, Government duties, and executry general expenses				1003	4	3
				£10,100	0	0

"The above is as near as possible a correct statement of the estate of my late wife at the date of her death, and is engrossed here with reference to the directions expressed in my will, dated 17th April 1902.

"The above adopted as holograph.

"(Signed) GEORGE DENHOLM.

"(Signed) WILLIAM DICKISON, witness,
"Cashier to George Denholm."

Early in 1906 the trustees appointed by Mrs Denholm, and acting under the mutual trust-disposition and settlement, brought an action against the trustees appointed by Mr Denholm, and acting under his trust-disposition and settlement of 1902, concluding (1) for declarator that a bond for £6000 (item No. II. in the above statement) formed part of Mrs Denholm's estate, and for delivery of the bond; (2) that the defenders should be ordained to produce accounts of the whole intromissions of George Denholm as trustee or executor of his wife under the mutual trust-disposition and settlement with the means and estate of his wife whereby the true amount due by him at the time of his death to the pursuers might be ascertained.

The pursuers pleaded, *inter alia*—"(2) The said deceased George Denholm having intromitted with the estate of his wife the said deceased Mrs Denholm, the defenders, as his trustees and executors, are bound to count and reckon to the pursuers for his intromissions."

The defenders pleaded, *inter alia*—"(4) The defenders are under no obligation to account to the pursuers, ... 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. (*b*) That the whole of the said estate was consumed by him within the meaning of the said settlement."

On 5th June 1906 the Lord Ordinary (DUNDAS), finding that Mr Denholm did not take a full vested right in and to the whole estate of his wife, repelled head (*a*) of plea 4 for the defenders, and *quoad ultra* allowed a proof. This interlocutor was on November 7th affirmed by the Second Division. [The case is reported, 1907, S.C. 61, 44 S.L.R. 42.]

A proof was taken by the Lord Ordinary, prior to which, however, the defenders admitted that the bond for £6000 belonged to Mrs Denholm, and handed it over to the pursuers.

The following facts, in addition to those already narrated, appeared from the proof:—Mr Denholm was a stockbroker, and prior to 1894, had also had an insurance agency. He kept business books, but no private accounts. He had several bank accounts, and was in the habit of transferring money from one to another as suited his convenience. His professional income appeared to amount to about £2000 a-year, but he was given to speculation, and in all probability it varied considerably. At a date considerably prior to his wife's death he was shown to have had capital amounting to £5000, and in February 1899 he succeeded to a sum of £27,000 under the will of a Mrs Booth. At his death his estate amounted to some £40,000. The whole of his wife's estate, with the exception of the bond for £6000, was realised by him during his life—the Manor Place house in 1895, the South Bridge property in 1899, and the High Street property (compulsorily taken by the Corporation of Edinburgh) in 1900—and the proceeds were at once carried into one or other of his bank accounts, and

became immixed with his own funds on which he drew for his ordinary expenditure and other purposes. All the accountants examined at the proof were unanimous in stating that it was impossible to trace the money which had belonged to Mrs Denholm or to distinguish it from the rest of Mr Denholm's estate. It was proved that Mr Denholm was fully aware of his powers of consumption under the mutual settlement.

On 22nd February 1907 the Lord Ordinary (DUNDAS) pronounced the following interlocutor: "... Finds that the whole estate of the said Mrs Sarah Louisa Liddall M'Laren or Denholm, with the exception of the said bond and disposition in security, was consumed by the late George Denholm, her husband, during his lifetime within the meaning of the mutual settlement referred to on the record; Assoilzies the defenders," &c.

Opinion—"On 5th June 1906 I decided that upon a sound construction of Mr and Mrs Denholm's mutual settlement, Mr Denholm did not take a full vested right in and to the whole estate of his deceased wife; and *quoad ultra* I allowed a proof. In the opinion then delivered I pointed out that I did '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.' On 7th November 1906 the Second Divison adhered to my interlocutor. The case is reported in 44 S.L.R. 42. All, therefore, that was determined up to that point was that Mr Denholm's right was not one of full fee; its precise nature and extent have now to be considered. It may be well to recall the terms of the *sixth* purpose of the mutual settlement. The words used at the outset of the clause were, standing by themselves, sufficient to confer upon Mr Denholm an absolute fee in his wife's estate. The clause continues '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 or 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.' Mrs Denholm proceeded to appoint her husband to be her sole executor; and upon his death, if he should survive her, she assigned to trustees (who are now represented by the pursuers) 'all and sundry my said estate or such portion as may be unconsumed by my said husband' in trust for the purposes thereafter specified. It seems, therefore, that what would have otherwise been an absolute fee in Mr Denholm is limited by the destination to other parties of so much of the wife's estate as might be 'unconsumed' by him at his death. In Lord Stormonth Darling's words (44 S.L.R. at p. 45) Mr Denholm had 'a right limited to sale, administration, and consumption during his lifetime.' To attempt a closer definition of his right one must, I apprehend, study the clause as a whole and endeavour to give due weight to all its parts. On the one hand I think that the wide expression 'and in general to deal and intromit therewith as freely as I could have done myself' must be read so as to harmonise with the power to 'consume such parts or portions of the capital during his lifetime as he may find or think necessary'; and, on the other hand, the latter phrase must be taken in conjunction with the wider words. The result in my judgment is that Mr Denholm was undoubtedly entitled to 'consume' the whole of his wife's estate during his lifetime—though he might not dispose of it by *mortis causa* deed—subject to the rather unsubstantial qualification that he himself should 'find or think' it necessary to do so. The word 'consume' has no special or technical signification. The main idea etymologically is, I think, that of taking complete possession. Dr Johnson defines it as 'to waste; to spend; to destroy.' The 'unconsumed' portion, if any, of Mrs Denholm's estate must therefore in my judgment be represented by what now remains extant and can be identified as having formed part of it. I was referred to cases in which clauses more or less similar to the present were construed by the Court. The light to be derived from these is at best indirect. It may be sufficient to allude quite briefly to two of the decisions. In *Reddie's Trustees*, 1890, 17 R. 558, a surviving widow had power under a mutual settlement 'to use or encroach on the funds, means, and estate hereby conveyed on either side.' The Court held that these words must be 'read in a reasonable sense'; that the widow was not entitled to give the estate away without consideration; but that in so far as necessary for her maintenance she might encroach upon the capital, 'only for herself and not for anyone else.' The language of the deed in *Reddie's* case was obviously much more restricted than that here under consideration. A case more nearly resembling the present is *Sprot*, 1855, 17 D. 840. There a husband declared that his wife, if she survived him (which she did), should 'be at liberty to appropriate out of the stock of my said trust estate such sum or sums, from time to time, as she may find needful for her own use, over and above the free income, or as she desires to have for her own purposes and disposal, without limitation as to the amount of such sum or sums.' It was held that the widow was not entitled, as in exercise of this power, to dispose of the whole estate by *mortis causa* deed. The Lord Justice-Clerk (Hope) pointed out that the 'appropriation out of the stock ... clearly refers to an act of the wife in her lifetime taking the sums herself for her own use. Her deed of settlement is not such an act at all. She has appropriated nothing out of the stock;' but his Lordship also made it plain that the widow could during her life 'have gone any length in the way of expenditure.'

"Subject, then, to the views which I have expressed, the question that arises

seems to be one of fact, viz., what if any 'portion' of Mrs Denholm's estate can be shown to have remained extant and 'unconsumed' by Mr Denholm at the time of his death? It is now admitted by the defenders—although they disputed it down to the date of their letter of 21st January 1907—that one such portion of the estate remains 'unconsumed,' namely, a bond in Mrs Denholm's favour for £6000 over the estate of Press, which is described in the summons and condescendence. But it appears that the whole rest of her estate was realised by Mr Denholm during his life, and its proceeds immixed with his own funds so as to make it impossible to identify them or trace their subsequent history. Mr Denholm was a stockbroker, and prior to 1894 had also an insurance agency. His business books were kept with regularity; but he seems to have made no private record at all of the income and outgoings either of his own means or of his wife's estate. He had several bank accounts, and would shift money from one to another of these. When he realised successive portions of his wife's heritable estate he immediately placed the proceeds in one or other of these accounts, immixed them with his own funds, and went on drawing upon the account for his ordinary expenditure and other purposes. Upon this general sketch of the situation a question as to *onus probandi* arises. The pursuers' counsel argued that it was for the defenders to prove 'consumption' by Mr Denholm so far as they could do so; that to 'immix' is not necessarily to 'consume'; that as Mr Denholm had kept no private accounts it was impossible for the defenders to prove that any definite portion of his wife's estate had been 'consumed' by him; and that the pursuers were therefore entitled to receive and administer the amount of her estate as known to exist at the date of her death. I think that this argument is erroneous. It lies, in my opinion, upon those who seek to administer 'such portion' of Mrs Denholm's estate 'as may be unconsumed by' her husband to identify the whole portion of it which they say is unconsumed, as they have succeeded in identifying the bond for £6000. It is true that Mr Denholm was his wife's executor, but he was also the fiar (subject to the qualifications already explained) in her estate. He was not, I apprehend, under any obligation to keep account of that estate though it would have been more regular to do so. He intromitted with her estate and mixed it with his own, and if the pursuers are in these circumstances unable—as I think they are—to trace or identify it (with the exception of the bond) they fail, in my judgment, to discharge the *onus* of proving that it remained 'unconsumed' at Mr Denholm's death. Now, the nature and value of Mrs Denholm's estate at her death are shown in a statement to which I shall afterwards have to allude more particularly. The correctness of the statement is impugned upon certain heads by both parties, but may be held as sufficient for present purposes. If one discards the bond for £6000, which remains 'unconsumed,' a balance of *jus relictæ* from the estate of Mrs Denholm's former husband, and 'paraphernal effects' of trifling value, it appears that that lady's estate consisted at her death of three heritable properties. The first of these—a house in Manor Place—was sold by Mr Denholm in 1895, and the price placed immediately in one of his bank accounts. I may observe in passing that I think the pursuers have failed to prove in fact that a part of these proceeds was used in paying off a bond for £917 or thereby upon another property belonging to Mr Denholm; and further, that even if the alleged application of this money had been established, I should have been disposed to hold that Mr Denholm had 'consumed' it within the meaning of the settlement. In 1900 the subjects in High Street were acquired by the Corporation of Edinburgh, and the property in South Bridge had been sold by Mr Denholm in the previous year. In both of these cases, as in that of Manor Place, the price was placed by Mr Denholm in bank and immixed with his other funds. In my opinion Mr Denholm thus 'consumed' his wife's estate (except the bond), according to the ordinary use of the word, and its meaning in the mutual settlement. But the pursuers' counsel argued that it would be little short of absurdity to say that Mr Denholm could 'find or think' it necessary to 'consume' the whole of his wife's estate—excepting the said bond. It was, they urged, proved that he had a stockbroking business worth not less than £2000 a-year, besides heritable properties of his own, and in 1899 he succeeded to a fortune of about £27,000 under the will of a Mrs Booth. I think that Mr Denholm's professional income is overstated at the above figure; but the truth is that, as Mr Cockburn Miller frankly puts it, 'it is somewhat difficult to determine accurately the position of a man who has not made a balance-sheet showing his own affairs, and I do not know if we have knowledge of all his assets or liabilities. Further, it appears to be at least highly probable that when Mr Denholm sold the Manor Place house in 1895 he might 'find or think' it necessary to use and consume the price for his own purposes, because his assets consisted chiefly of heritage, and of certain bank stock which he utilised as cover against overdrafts on his account. A similar observation may, I think, be fairly made as to the sales of Mrs Denholm's other two properties and the 'consumption' of their prices by Mr Denholm, for he had not, it seems, actually received any part of his succession from Mrs Booth's estate until after the completion of these transactions. There is at all events no evidence to show that Mr Denholm did not find or think it necessary to consume the estate which he had in fact mixed with his own funds. The pursuers' counsel presented a further argument, based upon the statement to which I have already referred. This statement is contained in Mr Denholm's ledger, and is signed by him as being as near as possible a correct statement of

the estate of his late wife at the date of her death, 'and is engrossed here with reference to the directions expressed in my will, dated 17th April 1902.' This will is a very lengthy document, and seems to have been the outcome of deliberations between the testator and his law agent, extending over a series of years. It contains a clause of forfeiture directed against his two daughters and his stepson in the event (which has not occurred) of any of them raising questions, *inter alia*, 'with reference to the distribution or division of the estate left by their mother, my wife, or taking exception or making any objection to the amount thereof as the same may be set forth in any statement subscribed by me.' The pursuers' counsel maintained that Mr Denholm's subscription, coupled with the clause just quoted, sufficiently instruct an intention on his part that the amount or value of the estate belonging to Mrs Denholm at her death should, upon his death, pass to the trustees of her own will, for the purposes expressed by her in the mutual settlement, notwithstanding his intromissions with it during his life. I leave out of account entirely such fragments of oral testimony as exist in the proof as to Mr Denholm's expressions of intention in regard to his wife's estate. Such passages, if competent—which I doubt—are quite vague and inconclusive. In my opinion, the documents founded upon are not sufficient to rebut the strong presumption, arising from the facts of the case, that Mr Denholm intended to consume, as, in my judgment, he actually did consume, during his lifetime, the whole of his wife's estate, except the bond for £6000. The evidence discloses that Mr Denholm was made fully aware by his successive law-agents, Mr Dalziel and Mr Kerr, of his powers of consumption, and that he deliberately abstained from putting his wife's estate beyond those powers by creating a separate trust. Further, it is made clear by Mr Kerr's evidence that the purpose for which the statement was prepared and subscribed was not that which was suggested in the argument for the pursuers. Mr Kerr states that he had no knowledge of Mr Denholm's dealings with his wife's estate; but that he advised him to put upon record a definite statement of the amount of it, as received by him at her death, 'to prevent any question when he was dead. The real purpose was to fix the amount of the estate as at her death as received by him, so that there might be no question by beneficiaries coming forward and saying "this is far more than the sum our mother left."' I confess that I am unable to understand from Mr Kerr's evidence—the truth of which I accept implicitly—the precise idea which he had in mind in so advising Mr Denholm; but whatever the idea may have been, Mr Kerr's statements establish beyond question that it was not in order to secure that the original amount of Mrs Denholm's estate should be taken out of Mr Denholm's estate, so as to be made subject to the trust purposes of her settlement. I may add that in considering the case doubts have occurred to my mind as to the admissibility of Mr Kerr's evidence upon this matter, though no objection to its competency was suggested by the pursuers' counsel either at the proof or in his speech at its conclusion. But, for the reasons stated, I should arrive at the same result apart altogether from Mr Kerr's evidence. Upon the whole matter, therefore, I think that the pursuers are entitled to decree substantially in terms of the conclusions of the summons for declarator and delivery; and that *quoad ultra* the defenders are entitled to absolvitor.

"I have not found it necessary to advert in detail to the evidence given by the accountants engaged on either side. But I may say that these gentlemen appear to have gone into the whole case, upon such materials as were available, with great ability and industry; and I have not failed to study carefully their oral evidence and the numerous 'states' which they produced as explanatory of and relative to the same."

The pursuers reclaimed, and argued—The Lord Ordinary's main error consisted in holding that the *onus* of proof lay upon the pursuers, whereas it lay wholly upon the defenders. Mr Denholm (now represented by the defenders) was, as regarded his wife's estate, in the twofold position of trustee and beneficiary, and *qua* trustee was bound to account to the ultimate beneficiaries for the whole of it in so far as not "consumed" by himself during his lifetime, and the legal presumption was that nothing had been consumed except what he could prove he had consumed. There was no such proof. The mere conversion and immixture of funds, or their transference from one account, or from one investment, to another, was not consumption; consumption here meant use for definite and personal purposes—*cf. in re Thomson's Estate*, 13 Ch. D. 144; *Reddie's Trustees* v. *Lindsay*, March 7, 1890, 17 R. 558, L.P. at 564, 27 S.L.R. 514; *Sprot* v. *Pennycook*, June 12, 1855, 17 D. 840, at 850 and 853. Further, consumption was only permitted if in Mr Denholm's opinion it appeared necessary. Accordingly *qua* trustee he was bound to satisfy the other beneficiaries both as to how and why he had made advances to himself as beneficiary. The real evidence in the case was all in favour of the pursuers. Mr Denholm's will of 1902, read along with the signed statement of the amount of Mrs Denholm's estate relative thereto, amounted to an acknowledgment by Mr Denholm that in 1902 £10,100 of his wife's estate was then unconsumed. If unconsumed in 1902, after all the immixture, &c., founded on by the defenders had taken place, by what process of reasoning could it be maintained that it had been consumed by 1905? It was also a material point that the settlement was a mutual settlement which ought, so far as possible, to be interpreted so as to render the provisions made by husband and wife in favour of each other counterparts of each other. The corresponding provision by the husband was that by which he authorised his trustees to pay over to his

wife from time to time such portions of the capital as they might deem necessary—a provision under which the wife could by no possible means appropriate to herself the whole of her husband's estate by a mere stroke of the pen, as it was now contended Mr Denholm could do as regarded the estate of his wife.

Argued for the respondents — The Lord Ordinary was right. The whole *onus* was upon the defenders. Mr Denholm's position was not that of a trustee but of a beneficiary. The true test was, whether he was bound to keep accounts of his wife's estate; obviously he was not, seeing that he was entitled to consume as much or as little as he pleased, he being the sole judge of whether the consumption was necessary —*Houldsworth* v. *Brand's Trustees*, May 18, 1875, 2 R. 683, at 690, 12 S.L.R. 450. That being so, his trustees could be under no obligation to account to his wife's trustees for anything except what the latter could identify as having formed part of her estate (*e.g.*, the bond for £6000). There was no difficulty, however, in showing that he had consumed it. Consumption as applied to money meant conversion, appropriation, and change of identity. By making her estate irrecognisable he had appropriated and consumed it. Further, in view of the fact that at times he was in embarrassed circumstances the presumption was strong that the consumption had been "necessary." No inference could be drawn from the will of 1902 and the relative statement. All that the latter purported to be was a statement of what the wife's estate had amounted to at the time of her death.

At advising—

LORD JUSTICE-CLERK—This case is not unattended with difficulty, as is demonstrated by the fact that there is a difference of opinion between your Lordships upon it. Your Lordships have both very fully and very clearly stated the grounds of the opinion you have formed, and by your kindness I have had an opportunity of considering these opinions. Before doing so I had arrived at the conclusion that it could not be held in this case that there was any ground for holding that the funds which are in question had not been consumed by the deceased Mr Denholm during his life, and that having been so consumed the demand made in this case cannot receive effect, as I hold he was entitled to consume as he did, and was not bound to keep accounts by which the mode and details of consumption should be capable of ascertainment. Having considered your Lordships' opinions, I have come to the conclusion that my view formed on consideration is right. And as Lord Stormonth Darling's carefully formed and expressed opinion expresses very fully and exactly my views on the case, I feel it to be unnecessary to re-state them at length.

LORD STORMONTH DARLING—This case came before this Division more than a year ago, and was then heard by Lord Kyllachy, Lord Low, and myself. What we then decided, affirming the Lord Ordinary, was that on a sound construction of the mutual settlement by the spouses the late Mr Denholm did not take a full and unlimited right of fee in the estate of his first wife. I then said, delivering the judgment of the Court, that taking all the clauses of the deed together "their true effect was to cut down the absolute right of fee originally conferred on the husband, not to a liferent (because a liferent would have been inconsistent with the powers which she (the wife) wished him to have) but to a right limited to sale, administration, and consumption during his lifetime." The Lord Ordinary has now taken a proof, and as the result of it has in substance found that the whole estate of the first wife, with the exception of a bond for £6000 over the heritable estate of the husband, was "consumed" by him during his lifetime within the meaning of the mutual settlement. I think the Lord Ordinary is right.

If the passage I have quoted from the former judgment of this Court be well founded (and it was not challenged), there was an absolute right of fee originally conferred on the husband by the wife's conveyance. It is not qualified in any way, by trust or otherwise. It is a conveyance of "my whole estates," under burden of debts, as well as of certain annuities which the lady creates by the settlement, and under burden also of maintaining and educating her whole children, including her son by a former marriage. Then follow certain powers which, as we formerly found, were truly rather limitations of the husband's rights than powers properly so called, and in the event of his surviving her she appoints him her sole executor. Consistently with that, the trust conveyance which she goes on to make to her own trustees at her husband's death is limited to "my said estate, or such portion as may be unconsumed by my said husband." The conveyance to the husband, therefore, is in point of title absolute, and differs in that respect from the right conferred on the wife in the English case cited by Mr C. D. Murray of *in re Thomson's Estate*, 13 Ch. Div. 144, where it was controlled by the words "for the term of her natural life," although words were added which gave the wife some power of disposition over the capital. These words were—"To be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof, subject only to the payment of my just debts and funeral expenses and the charge of proving and registering this my will." The practical effect of this form of conveyance was as nearly as possible the same as Mrs Denholm's conveyance here. But in point of title the Court could not hold that the donee of this power had anything but a life interest, or any right to affect by testamentary instrument what remained undisposed of at her death, which was what the donee in that case tried to do. Here there was no such attempt by Mr Denholm, for he did not try to take advantage of the circumstance that his title

was absolute in point of form. I agree that the attempt would have been unsuccessful if he had made it, because of the limitation of his powers to consumption during his lifetime; and there was no real repugnancy between that limitation and the absolute nature of the title.

But that leaves untouched the question, What was the meaning of the "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" which Mrs Denholm gave him? It may be that such a power is exceptional and, if you like, rather anomalous. It does not fit in exactly with our ideas of either fee or liferent. But it was used by a testatrix who had plainly unbounded confidence in her husband (as shown, *e.g.*, by her entrusting him with the maintenance and education of her son by a former marriage and making him guardian of the boy), and she must also be taken to have known that, although he was a landowner and living at a very bountiful rate, he was a stockbroker and liable to considerable risks in business. Accordingly when she made him the absolute judge of what parts or portions of her estate (amounting in all to between £10,000 and £11,000 in houses and money) it was "necessary" for him to "consume" during his lifetime, and what portion he was to leave "unconsumed" at his death, I think she was doing a very different thing from giving the net income of her whole estate to trustees, and superadding a discretionary power to them to encroach upon capital as they might deem necessary, which was what the husband did in his part of this mutual deed. I therefore attach no importance, except as affecting mutuality, to the recital with which the wife's conveyance opens—"In like manner and in consideration of what is before written." The two conveyances, so far as affecting construction, must each be regulated by its own terms. And therefore when the Lord Ordinary comes to the conclusion that the "unconsumed" portion of Mrs Denholm's estate must be represented by what now remains extant, and can be identified as having formed part of it, I cannot but agree with him. Mr Robertson Durham, after a careful examination of the documents in process and of the books kept by the late Mr Denholm showing his financial transactions, is asked whether he can identify any of the estate extant at his death as belonging to his wife. And his answer is—"Only the £6000 bond over Press; everything else, so far as I can follow the items, was consumed by Mr Denholm, immixed with his estate, and swallowed up."

Now it is not disputed by the wife's trustees that her estate, both heritable and moveable, was in point of fact realised and immixed with the husband's funds by being paid into his various bank accounts. The case would have been different if all that the husband did, when he realised the house property belonging to his wife, had been to reinvest the proceeds in some other recognisable form. That might not have been "consuming" the proceeds any more than if he had put them into the traditional old stocking and had kept them there. But what he did was not that. He used the money to pay off debt and reduce overdrafts, and he dealt with it generally in such a way that the most skilled accountants cannot tell what became of it in the end. For aught I know this very impossibility of tracing the proceeds, and that it is impossible now to trace the proceeds, account for the extremely wide terms of Mrs Denholm's part of the will. Knowing that her husband was immersed in fairly large money transactions, that he had several bank accounts (frequently overdrawn), that his landed and house property was burdened, and that he had need of capital both for his own and his clients' purposes, she may have wished to give no third party the right to inquire what he did with her money any more than with his own, and so may have used an indefinite term to cover his use of the money in any way that he found most for his advantage. Certainly I cannot accept the reclaimers' main argument, viz., that "consumption" means only personal user, for it seems to me that that, besides creating at the outset the difficulty of settling what "personal user" means, would be giving no effect to the words "as he may find or think necessary," which are the words of the will. Nor do I think that this difficulty is got over by implying some vague kind of trust, where trust there is none. There is always, of course, the ultimate arbitrament of conscience. But I must say, in fairness to the late Mr Denholm, that nothing has either been established by the proof, or advanced in argument, to show that there was any failure on his part to observe the rules of good conscience as regards the beneficiaries ultimately and contingently called under his wife's part of the settlement. By his own will he seems to have dealt with them all (his stepson as well as his own two daughters) as one family. By that instrument he no doubt mentions provisions as made both by her and himself for their children, and there is a clause of forfeiture of any share or interest under his own will in the event of any of the children making any claim (inconsistent with his will), or raising any question about a statement subscribed by him relative to her estate *at the date of her death*. But that statement merely referred—and referred apparently with substantial accuracy—to the different items of her property, heritable and moveable, and does not of course touch the question in any way of what Mr Denholm was entitled to do by way of consumption of his wife's estate during his own life. I do not, therefore, see that either the statement or the passages in Mr Denholm's own will materially affect the only question of importance in the case, viz., whether the husband did "consume" the wife's estate by using it to pay his debts, and so making it impossible of identification.

I think that the test proposed by Mr Constable for the husband's trustees is the true one, viz., whether the husband was

bound to keep accounts of his wife's estate? And I think that there is no ground for saying that he was. If he was not so bound, there is an end of the argument that the mutual will contained anything in the nature of a trust or *quasi* trust. I demur altogether to the notion that although Mr Denholm may not have been bound himself to keep accounts, his trustees are under an obligation to account to his wife's trustees for anything except the bond for £6000. Beyond that, what are they to account for, and where are the materials for enabling them to do so? It is suggested that the document No. 10 of process forms an acknowledgment under Mr Denholm's own hand that, to the extent of the difference between the sum of £6000 in the bond and the sum of £10,100 which he acknowledges to have received as the net amount of his late wife's estate at the date of her death, he never "consumed" his wife's estate, nor intended to consume it. That seems to me rather a strong inference to draw from a document made out *alio intuitu* altogether. It is also an attempt to divert the question from the construction of Mrs Denholm's will in 1893 to the meaning to be attached to a jotting of Mr Denholm's made with reference to his own will in 1902. But the strongest objection to this suggested inference is that the fact of consumption or non-consumption is to be ascertained, not from ambiguous declarations, but from positive acts of his own.

I agree with the Lord Ordinary that the *onus probandi* lies on the pursuers. It is for them to show that there was any portion of the wife's estate "unconsumed" at the husband's death; it is the very groundwork of their title. They have had no difficulty in showing that with respect to the £6000 bond, because it remained exactly as it was at the lady's death. But *quoad ultra* they have, in my judgment, failed to show that any portion remained unconsumed when their trust title emerged; and on the whole matter I am for adhering to the Lord Ordinary's interlocutor.

LORD ARDWALL—This is an action raised by the trustees of the deceased Mrs Denholm against the trustees of her husband, the deceased George Denholm. It concludes, *First*, for declarator regarding a sum of £6000 contained in a heritable bond by Mr Denholm in favour of his wife; the Lord Ordinary has granted decree in terms of that conclusion, and the defenders acquiesce therein. The *Second* conclusion of the action is for count, reckoning, and payment, whereby the amount due by Mr Denholm at the time of his death to the pursuers may be determined. A proof has been led with reference to this conclusion, and it has now to be decided whether under the mutual settlement of Mr and Mrs Denholm, dated 10th November 1891, the pursuers, who are Mrs Denholm's trustees under that settlement, are entitled to the accounting and payment they ask.

The important facts seem to be as follows—On 10th November 1891 Mr and Mrs Denholm executed the mutual settlement under consideration. Mrs Denholm died in 1893. She left heritable estate which, after discharging the bonds secured over it, realised about £4752, the bond for £6000 above referred to, and a small amount of money, in all about £10,000. The details of the estate are given with sufficient accuracy in the statement signed and authenticated by Mr Denholm in reference to his own will, to which I shall afterwards refer.

At Whitsunday 1895 Mr Denholm sold the house 43 Manor Place, Edinburgh, which had belonged to his wife, at a price which, after paying the bond thereon and expenses, left £2690. At Whitsunday 1899 he sold the one-half of the property 92 South Bridge at a price which, after paying expenses, left £1482. The High Street property was compulsorily taken by the Corporation of Edinburgh in pursuance of an improvement scheme in August 1900, and the value of Mrs Denholm's half thereof, after deducting expenses, amounted to about £580. The proceeds of all these properties were at once carried into one or other of Mr Denholm's three bank accounts and merged with his other funds. It is explained by the accountants who examined his books that he kept no private accounts of his expenses of living, education of children, or anything else, so that it cannot be said what he spent year by year in these ways. It is important to notice, however, that long before his wife's death he was possessed of capital to the amount of about £5000, and that in February 1899 he succeeded to a sum of £27,000 under the will of a certain Mrs Booth. On 17th April 1902 he made a will in which he revoked the mutual settlement so far as regarded his own estate and gave directions with regard to it, and shortly after he drew up the statement already referred to and had it engrossed in one of his books with reference to the directions expressed in his will. He adopted the statement and docquet as holograph, and in addition had it witnessed by his cashier. At his death Mr Denholm's estate was found to amount to about £40,000. He had been from the time of his marriage to Mrs Denholm onwards in business as a stockbroker, and it is estimated that he had a professional income, generally speaking, of about £2000 a year, but as he speculated a good deal on his own account it is difficult to say precisely what his annual income was, and possibly the figures above given as to his capital at various times and at his death are sufficient for the purposes of this case.

From the above statement it appears that the only portion of Mrs Denholm's estate which can now be said to exist *in forma specifica* is the £6000 about which there is now no question. The whole of the rest of her estate was immixed with her husband's funds, and may be regarded as having been invested in his business, because although it appears, so far as the direct application of it was concerned, to have been used for general expenses, yet by so using it Mr Denholm was enabled to keep more money in his business. It is

now indistinguishable from the rest of Mr Denholm's estate, but if the defenders are bound to account for it to the pursuers there seems no practical difficulty in recovering it, as Mr Denholm's estate is well able to pay the whole amount sued for.

On these facts the Lord Ordinary has held that the whole estate of Mrs Denholm, "with the exception of the bond for £6000, was consumed by the late George Denholm, her husband, within the meaning of the mutual settlement referred to on the record," and he says in his note that the question is, What portion of Mrs Denholm's estate can be shown to have remained extant and unconsumed by Mr Denholm at the time of his death.

I cannot agree with the view taken by the Lord Ordinary and now concurred in by your Lordships. This case was formerly brought before this Division on a reclaiming note by the defenders, and it was then decided (see S.C., 1907, p. 61) that under the said mutual settlement the husband "did not take a full and unlimited right of fee in the whole estate of the wife," and the first question to be determined is what was the nature of the husband's right in that estate. In my opinion he was constituted a trustee upon the said estate—in the first place, for payment of Mrs Denholm's debts, deathbed and funeral expenses, and executry expenses; second, for paying her two aunts free annuities of ten pounds sterling each at Whitsunday and Martinmas in each year, and for the purpose of maintaining and educating the whole of her children out of the income of the estate. It is not said that Mr Denholm is to have a liferent of the estate subject to these burdens, but I think that must be held as implied.

With regard to the capital, there are two powers given to Mr Denholm. First, the power of consuming such parts or portions of the capital during his lifetime as he might think necessary—in other words a power of encroachment—on the construction of which this case largely turns; and second, a power of administering and using the estate. Then upon the death of her husband, should he survive her, Mrs Denholm dispones and assigns to certain trustees, who are the pursuers in this action, "all and sundry my said estate, or such portion as may be unconsumed by" her husband, in trust for certain purposes which are therein specified. I think it plain that these provisions have the effect of placing the husband in the position of a trustee with very large powers of administration and use of the estate, but with a limited power of consumption, and the result in law is that should he use the estate by mixing it up with his own or taking investments in his own name, his trustees would notwithstanding be liable to account for that estate upon his death, subject only to deduction of such portions as they could show to have been consumed in terms of the only power to encroach on capital conferred by the deed.

From the provisions above recited it is, I think, apparent that the husband as trustee was bound to defray out of the income of the estate the life annuities and the expense of maintaining and educating the children, and this could only be done by his retaining the capital of the estate and applying the income to these purposes. The only power given to him to encroach upon the capital I shall afterwards more particularly consider, but it is plain that so far as not consumed in terms of the power the testatrix intended that the whole of the capital of the estate, however dealt with under the power of administration, should be available for the purposes of her trust after her husband's death, to carry out which trust she appointed trustees in succession to him.

I have difficulty in understanding what view the Lord Ordinary takes of the character in which Mr Denholm held his wife's estate, but he has apparently reached the conclusion that under the combined powers of consumption and administration Mr Denholm was entitled, as soon after his wife's death as he pleased, to realise her whole estate and mix it with his own funds, and thus free himself and his executors from all obligation whatever to account for it to the beneficiaries under the mutual settlement. I do not think that this view is tenable. It is, I think, at variance with the former decision in this case, because it results in this, that while by the general scheme of the deed the husband had not an absolute right to the fee, yet under the powers in the same deed he could at once secure such right to himself as soon as he pleased after the death of his wife by the simple process of realising the estate and mixing it with his own, and thus defeat the whole of the carefully-drawn provisions with regard to the use to which the income and finally the capital of the estate were to be put. The Lord Ordinary adverts to the dispositive clause as helping to lead to this result. It is as follows—"I, the said Sarah Louisa Liddall M'Laren or Denholm, do hereby give, grant, assign, and dispone to 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, and instructions thereof, but under burden always," &c. Now, I would point out that the terms of this gift are of little importance in the present question, because they are the terms in which almost every trust-disposition is granted, and are as near as may be the same terms as Mr Denholm himself uses in giving his part of the trust estate over to his trustees, and although Mr Denholm is not named a trustee, yet if the directions given him and the powers and duties entrusted to him were those appertaining to trustees, I do not think that his character as such is altered by what the Lord Ordinary calls the absolute terms in which the disposition is granted. Mr Denholm by the deed is nominated his wife's "executor," and it has been decided that if an executor is charged with duties implying a continuing trust he is in the

same position as if he had been nominated a trustee—*Ainslie* v. *Ainslie*, 14 R. 209. In the next place, it appears to me that the Lord Ordinary has mixed up with the power to consume the power of realising and administering the estate, which is a totally separate power, and ought not, in my opinion, to be confused with the very special power given Mr Denholm to consume the capital thereof which precedes it.

I will now proceed to consider what is the meaning and effect of the clause giving power to consume capital.

(1) I first take the clause by itself, prefixing, however, the words which immediately precede it in the mutual settlement, and which, I think, are not unimportant. It is in these terms—"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." The word "consume" I take it simply means to use up, but it is a word which is appropriate to the use by way of supporting or keeping in comfort a husband or children, and is not so appropriate as an expression equivalent to squandering and dilapidating an estate. In Mr Denholm's part of the mutual settlement, which I shall presently advert to, the trustees are directed to pay over parts of the capital to Mrs Denholm, but of course Mr Denholm being himself the trustee it would have been ridiculous to direct him to pay over to himself, and accordingly the power takes the form of a power "to consume" such parts or portions, &c., the capital being in his own hands. But the power given is not to consume such parts of the capital as he may think proper or as he may please, but as "he may find or think necessary." Effect must be given to these last words, and the only reasonable effect which can be given to them is to hold that they limit the husband's power of consuming to what he might find or think necessary for the comfortable maintenance of himself and his own and his wife's children. It would be doing violence to these words to hold that they could possibly apply to such a case as mixing the whole of his wife's estate with his own, or that his doing so can be held in any sense to be an exercise of the limited power of consumption conferred on him.

(2) This settlement, however, is a mutual settlement, and although there was a power of revocation given to the husband which he has exercised with regard to his part, yet the original mutual deed should be read as one, and being a mutual settlement it ought to be so interpreted as to render the provisions made by the husband and wife in favour of each other respectively as nearly as possible counterparts of each other. This observation is applicable to all mutual settlements. It is so more particularly in this case because the provision made by Mrs Denholm in favour of her husband which is now under consideration is introduced by these words—"And in like manner, and in consideration of what is before written, I, the said Sarah Louisa Liddall M'Laren or Denholm, do hereby," &c.

Taking then, first, the provisions under the fourth head of Mr Denholm's part of the mutual settlement, we find them to be these—(1) The net income of his whole estate, under burden of certain annuities, is to be paid to his wife as an alimentary allowance for herself and "our children;" then follows this clause—"And my trustees are hereby authorised to pay over to her from time to time for her use such portion or portions of the capital of the said residue as my trustees may deem necessary, or which they think she may require, she being always bound to maintain our said children and that until they are capable of maintaining themselves, and to educate them in a manner befitting their station." I have above quoted the corresponding clause in Mrs Denholm's part of the deed, and comparing these two clauses I remark that the contemplation of the later clause in the deed is that the capital of the estate shall be preserved for the ultimate beneficiaries except such portion, not as her husband may consume, but as he may find or think necessary to consume. This is almost in terms the same direction as is given to the trustees by the first portion of the deed, and I think it would do violence to the intentions of both parties to the deed—and it is a mutual one—to hold that the husband was entitled to squander or appropriate all his wife's estate as he pleased without ever putting the question to himself whether the consumption of capital was necessary presumably for the purposes of the needful expenses of himself and the children. It will be noticed that what the trustees in the former part of the deed are bound to do is to pay over to Mrs Denholm such parts of the capital as they may deem necessary or which they think she may require, and my opinion is that the power given to Mr Denholm was not intended to be a whit wider than that given to the trustees; in other words, that the power given to Mr Denholm to consume parts or portions of the capital during his lifetime as he might find or think necessary, gives him a limited power only—a power to be exercised *sub modo* although the duty is put upon himself and not other trustees to act as a good trustee ought to act, and as the trustees in his own portion of the deed are directed to act.

But now follows a clause which I think has been mixed up by the Lord Ordinary with the power to consume capital, but which has nothing to do with it, being concerned with a wholly different power, namely, of administration. That clause is in the following terms—"As 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." It will be noticed that this clause is introduced by the words "and also,"

and that it deals with a power which seems to be purposely kept quite distinct from the power to consume given in the immediately preceding clause. I think, therefore, that it can not be supposed that the words "to deal and intromit therewith as freely as I could have done myself" apply at all to the power to consume but only to the power of realising, sale, and administration. A power of administration and re-investment will be found in almost every trust deed, but the peculiarity of the power under consideration is that while in the ordinary case trustees are by law strictly prohibited from using trust funds for their own purposes or investing them in their own businesses, in the present case Mr Denholm has practically unlimited power of using and investing the money, just in fact as if for these purposes it was his own, as the power indeed sets forth, and I cannot help thinking that it was the intention of both parties by this clause to enable Mr Denholm to invest in his own business, directly or indirectly, such portions of his wife's realised estate as he thought proper. This of course would be a great convenience to him in carrying on the business of a stockbroker, but the fact that he did so invest it in his business through his bank accounts cannot reasonably be held to have the effect of absolving him from all obligation to account for money so invested to those who ultimately have the beneficial right to it. I accordingly am of opinion that this clause adds nothing whatever to the power to consume portions of the capital, and indeed has nothing to do with it. And as matter of construction I consider it out of the question to hold that the words "to deal and intromit therewith as freely as I could have done myself" are to be tacked on to the clause giving power to the husband to consume such portion of the capital as he might think necessary. It was doubtless with the view of giving Mr Denholm full power to change these investments, and if he pleased to have the command of this money during his lifetime for the purposes of his business, that the power took the somewhat unusual form it did, but, I think, that, on a sound construction of the whole of this part of the deed keeping always in view the provision made by Mr Denholm himself regarding his capital, was, that Mr Denholm should have the use of the income of the estate—for the word "liferent" is used in no part of the deed—that he should be entitled to consume such portions of the capital as he might think or find necessary, and should have practically unlimited power to handle the estate and invest it in such way as he pleased. I therefore revert to what I have already said, that the deed by first giving an absolute disposition and then inserting provisions which imply, as has been held by the former decision, limitations on the absolute right, has truly the effect of placing Mr Denholm in the position of a trustee with power to encroach on the capital of the estate should he think or find it necessary for certain purposes, and with the widest powers to invest and use the rest of the capital as he pleased during his lifetime, but subject of course to an obligation to account for such capital to the ultimate beneficiaries—an obligation I may observe not the least inconsistent with the right to use the capital in his business or otherwise and to mix it with his own funds.

If I am right in what I have already said, I think it follows that the defenders are bound to account to the pursuers as Mrs Denholm's trustees under the mutual settlement for the whole value of Mrs Denholm's estate except such part thereof as they can show to have been consumed under the power to consume which I have just been dealing with. In all cases where trustees or persons in the position of trustees are charged with the management and administration of funds belonging to a deceased person, it is undoubted that it is for them to account for those funds to persons having the ultimate beneficial interest in the reversion, and if they cannot show affirmatively that capital funds have been properly consumed or used under the powers in the trust deed they must make good these funds out of the general estate of the trustee in the event of his death if such estate is sufficient for the purpose.

Now there is no doubt here of the sufficiency of the estate, for Mr Denholm left some £40,000, and the fact that under the power of administration in the trust deed he mixed his wife's funds with his own cannot absolve his trustees from the obligation to account. It appears to me, I must say, absurd to hold that they can escape that obligation merely because Mr Denholm mixed his wife's estate with his own, and because that estate accordingly does not now exist in its original form. I can find nothing in the scheme of the mutual settlement to countenance such an extraordinary result.

But I think that the pursuers' case derives great support from a consideration of Mr Denholm's will and the statement which is incorporated and practically forms part of it. I may first observe that Mr Denholm having left the sum I have mentioned, and having been all his life apparently in prosperous circumstances, and all along having had considerable capital at his command, there was really no necessity for him to consume any portion of the capital of his wife's estate, and there are indications in some parts of the oral evidence, the competency of which I cannot admit, that it was not his wish to do so. But a consideration of the deeds I have referred to, I think, makes it plain that not only did he never exercise the power to consume the estate, but never intended to do so, and was under the belief that after his death the whole of the capital of Mrs Denholm's estate as at her death should be and would be disposed of in terms of her part of the mutual disposition and settlement. Mr Denholm's will is dated 17th April 1902. It sets forth the reserved power to revoke in the mutual settlement as regarded the separate estate of each party, and that his estate had been very considerably increased since the date of the mutual settlement.

The deed then proceeds thus—"All which makes it highly expedient that I should execute a new will giving expression to my wishes as regards the disposal of my means and estate after my death." He then defines that estate, and says that it is to be referred to hereinafter as the "trust estate." It may be mentioned that Mrs Denholm had been previously married to a Mr M'Laren, and that her son of that marriage, named William Benjamin Liddall M'Laren, survived both Mr and Mrs Denholm. Then by her marriage with Mr Denholm Mrs Denholm had two daughters, both of whom survived their parents. In Mr Denholm's will the following provision occurs—". . . [*Quotes provision in Mr Denholm's trust-disposition against anyone questioning provisions, supra.*] . . ."

The statement referred to in the foregoing passage is No. 10 of process, and sets forth the whole net value of Mrs Denholm's estate at the date of her death (being over £10,000), and appended to it is the following docquet—". . . [*Quotes clause at end of statement, No.* 10 *of process, supra*] . . ." But although it is, as it professes to be, a statement of Mrs Denholm's estate "at the date of her death," it is clear from the directions expressed in Mr Denholm's will, and which the statement is signed with reference to, that Mr Denholm intended that the whole amount there set forth should be regarded as the estate of his wife and as falling under the mutual disposition and settlement executed by her. No other satisfactory construction can be put on the passage in his will taken along with the statement. He refers to the possibility of his stepson jeopardising "the provisions made for him by his mother and myself." It will be noticed that what he provides against is any of the children raising questions with reference to the distribution or division of "the estate left by my wife," not the balance or the unconsumed portion of "my wife's estate," but the "estate *left* by my wife," and he fixes the amount of it by a reference to the statement. Now the three heritable properties belonging to his wife had been realised and the proceeds carried into Mr Denholm's bank accounts in the years 1895, 1899, and 1900, and now in 1902 he treats the whole of his wife's estate as extant and as subject to the provisions of her settlement, and he warns her children under penalties against calling in question the amount of that estate as set forth by him in the statement under his hand. I think these propositions are legitimate inferences from the paragraph above quoted from the will taken in connection with the statement I have referred to—(*First*) That by the phrase "the estate of their mother" or "the estate left by their mother" is meant the estate set forth in the separate statement above referred to, amounting, as therein stated, to £10,100; (*Second*) That the trust estate (that is, the estate dealt with by Mr Denholm in his will) excludes and is contrasted with the estate of Mrs Denholm, or, as it is called, the estate of their mother; (*Third*) That Mr Denholm regarded the amount of his wife's estate as defined in the separate statement as still extant and falling to be dealt with under the mutual settlement, Mr Denholm's own trust estate being dealt with by his will.

I do not think it is possible to have clearer evidence that Mr Denholm considered that he had not consumed any part of his wife's estate in the sense now contended for by the defenders, and that notwithstanding that he had taken the use of it in his business and otherwise by throwing a great part of it into his bank accounts he contemplated that it should be dealt with after his death as his wife's separate estate, and that his trustees should account to Mrs Denholm's trustees for the amount set forth in the statement referred to which is signed with reference to his will, and which includes all the moneys which for many years before had been mixed with his own funds, and could not be traced as separate sums of money. I consider it manifest from this that Mr Denholm did not consider that he had consumed any part of his wife's estate or exercised the power to do so, and this, I think, is the best evidence we can have that he did not, in the words of the mutual settlement, "find or think necessary" to consume any portion of it, and never supposed for one moment that the effect of his taking the use of the money was equivalent to "consuming" it.

On the whole matter I am of opinion (*First*) that the power to consume such parts or portions of his wife's estate as he might find or think necessary was a power to be exercised *sub modo* and as a conscientious trustee would exercise it. (*Second*) That there is no evidence that Mr Denholm ever exercised that power or ever found or thought it necessary to do so. On the contrary, there is to be found in his own will and the statement referred to therein the best evidence now possible that he did not consider that he had either consumed or appropriated his wife's estate to any extent. (*Third*) That Mr Denholm's using the proceeds of the realised portions of his wife's estate in his own business and for his own purposes, while legitimate under the very wide powers of use and administration given to him, does not absolve his trustees from accounting for the value of his wife's estate, although that may no longer exist *in forma specifica*, the estate left by him, which includes *ex hypothesi* the proceeds of part of his wife's estate, being amply sufficient to allow for the payment of the amount of his wife's estate to the pursuers, who are the persons entitled to administer it under the mutual trust-disposition and settlement.

I am accordingly of opinion that the latter part of the Lord Ordinary's interlocutor should be recalled, and that the defenders should be ordered to lodge an account bringing out the amount of the capital of Mrs Denholm's estate as at this date, subject to all burdens and expenses properly chargeable against it.

LORD LOW was absent.

The Court adhered.

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

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

Thursday, November 21.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

M'LENNAN *v.* M'LENNAN.

Husband and Wife — Wife's Separate Estate—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 5 *Wife Living Apart from Husband — "With His Consent."*

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), section 5, enacts — "Where a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense with the husband's consent to any deed relating to her estate."

Held (*rev.* judgment of the Lord Ordinary (SALVESEN), who had allowed the parties a proof) that where a husband had, as shown by his averments, acquiesced in his wife's living apart by taking no steps to end such relations, although he had protested, the wife was living apart "with his consent," and a petition to dispense with his consent to a deed dealing with her property, *granted de plano.*

On July 12, 1907, Mrs Marion May Duncan or M'Donald or M'Lennan, Glasgow, wife of H. A. M'Lennan, wine and spirit merchant there, presented a petition under section 5 of the Married Women's Property (Scotland) Act 1881, in which she craved the Court to dispense with her husband's consent to such dispositions, assignations, or other deeds of transfer, as might be requisite to effectually convey to a purchaser a bill-posting business carried on by her, which she desired to dispose of owing to the state of her health, and for which she had received advantageous offers.

The husband, in answers to the petition, *inter alia*, averred—"1. Admitted that the petitioner is the wife of the respondent, and that their marriage took place on 19th June 1895. Explained that the marriage, at the request of the petitioner, took place secretly in London, that the petitioner made all the arrangements for said marriage, and that, at her earnest desire, knowledge of said marriage was concealed from relatives and friends on both sides, and, also at her request, the parties arranged after marriage to live as they had done before that event, each at their own residence, and each using their own names, and appearing to the public as unmarried persons. The circumstances which led up to said marriage are of importance as explaining the subsequent conduct of parties. The respondent in 1888, when nineteen years of age, went to the Argentine, South America, to engage in cattle ranching. He returned in 1893 to Glasgow on a visit of three weeks. At that time he first met the petitioner, having been introduced to her by a mutual friend. The petitioner invited him to call upon her and he did so, and got every possible encouragement from her to spend time in her society. The result was that the parties became attached to one another, and before the respondent's three weeks' visit expired the parties became engaged to one another. At this date the respondent was twenty-four years of age and the petitioner a widow, and about forty years of age, of attractive personality, and a smart business woman. The petitioner was well aware at the time that the respondent had no independent income or business to enable him to set up house, and she herself had the business described in the petition, and other means. She was also aware that the respondent had been in the Argentine for several years earning his own living. The respondent was not aware of the petitioner's pecuniary position, and did not inquire, as his affection for her was too sincere. He knew that she carried on a billposting business, but understood this to be of trifling dimensions. The respondent thereafter returned to South America, but before going the petitioner made arrangements with him that on his return to Glasgow he would marry her.

"At the date of said engagement the petitioner explained to the respondent that, although she went by the name of Mrs M'Donald, she had also the name of Mrs Grieten, the latter being the name of a Frenchman, Mr Grieten, who was a musical composer, whom she had married after her former husband's death, but who had been unfaithful to her and ill-treated her, and whom she had divorced. She also said that her marriage to the respondent could not take place for some time, till the divorce became effectual. She clearly led the respondent to believe that Mr Grieten, who had managed her business for some years, had been her lawful husband, and the respondent, fully trusting her, felt sympathy with her for having been badly used. She also impressed upon respondent that she was very much afraid of Mr Grieten, who was still alive, and this made it necessary that she should continue to be known as Mrs M'Donald, and that their engagement should be kept secret. It now appears that the petitioner was never married to Mr Grieten, although she lived with him as husband and wife for several years, and she never required to and never did divorce him. In point of fact Grieten constantly blackmailed her, and she paid him hush-money to leave the country.

"The respondent returned to South America in December 1893, and remained there till he returned to Glasgow about April 1895. During his absence the parties