truster's children, and to divide the same amongst them in certain proportions, the shares of sons and daughters respectively being to be set aside and held and invested and otherwise dealt with as after mentioned, and as regards the shares falling to sons the trustees were directed to hold and invest the same in their own names as trustees for behoof of the sons respectively in liferent, for their alimentary liferent uses allenarly, and for behoof of their respective issue in fee, but with power notwithstanding to make advances in their discretion to the sons out of the capital of their respective shares. The Court held that the trust deed did not import an absolute gift of the capital of their shares of residue to the sons. But Lord M'Laren, who gave the opinion of the Court, stated the general rule as follows—"If a testator begins by making an unqualified division of his estate or residue amongst children, and then by a subsequent clause empowers his trustees to retain the shares of one or more of them, and to pay the income to the child or children for life, and the fee or capital to their issue, it may very well be that the power is only given to the trustees for the protection of the immediate beneficiaries. Accordingly if one of these should die without issue, and leaving a will, it may be held that the original gift was not displaced but its effect only suspended during the lifetime of the beneficiary, and for his or her protection. . . . It is, however, essential to the proper application of this principle of construction that there should be an independent unqualified gift to the immediate beneficiary, capable of taking effect when the special trust fails or is exhausted." Again, in the recent case of *MacGregor's Trustees* (1909 S.C. 362), where the residue was directed to be held "in trust for behoof of such of my children as shall survive me, ... equally, share and share alike, subject to the conditions following viz. . . . in the case of my daughters I direct my trustees to retain and hold their shares, original and accrescing, for their liferent alimentary use allenarly, ... and for the issue of their bodies equally among such issue in fee," the Court held that the share of a daughter who survived the truster but died unmarried had not vested in her, because, as the Lord President put it, "you must first find words which purport to bestow a certain gift or interest. Now here there is no direct provision of a gift or interest at all." It seems to me, therefore, that as matter of construction of the settlement before us, and in the light of the authorities, we must hold (adapting Lord Low's criterion to the present circumstances) that the testator's settlement imported a gift to Peter Cowan of his share of residue which was not recalled by the subsequent direction to hold and invest it for his liferent alimentary use and for that of his widow, if he had left one, and for his children in fee, except in so far as it might be requisite to give effect to these purposes, and accordingly, that as Peter Cowan was never married, the fee vested absolutely in Peter, and was *in bonis* of him at his death.

[*His Lordship then dealt with another question, with which this report is not concerned.*]

The LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court answered head (*a*) of the first question in the affirmative, and heads (*b*) and (*c*) in the negative.

Counsel for the First and Second Parties—D. P. Fleming. Agents—Duncan Smith & M'Laren, S.S.C.

Counsel for the Third Party—Pitman. Agents—Wishart & Sanderson, W.S.

Counsel for the Fourth Parties—A. M. Mackay. Agents—A. & A. S. Gordon, W.S.

Wednesday, June 4.

SECOND DIVISION.

[Sheriff Court at Airdrie.

M'ARA AND OTHERS *v.* ANDERSON.

Right in Security—Bond and Disposition in Security—Action of Maills and Duties—Default in Payment of Principal—Action Raised within Three Months of Service of Schedule of Intimation, Requisition, and Protest under Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 119 *and Schedule FF* (2).

The creditor in a bond and disposition in security in the form prescribed by the Titles to Land Consolidation (Scotland) Act 1868, and containing a warrant for registration in the usual form, served a schedule of intimation, requisition, and protest on the debtor in the form given in Schedule FF (2) of the Act, requiring him to pay the principal sum due under the bond, with the usual notice that failing payment within three months he might proceed to sell. Ten days after service of the schedule, no default having occurred in payment of interest and no further demand for the payment of the principal having been made, the creditor raised an action of maills and duties in order to enter into possession of the security subjects. The debtor having pleaded that the action was incompetent, *held* that service of the schedule was sufficient to put the debtor in default in payment of the principal until payment was made, and that the action was therefore competent.

The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 119, enacts—"The import of the clauses of the form of No. 1 of the Schedule FF occurring in any bond and disposition in security . . . shall be as follows:— . . . The clause of assignation of rents shall be held to import an assignation to the

creditor . . . to the rents to become due or payable from and after the date from which interest on the sum in the security commences to run . . . including therein a power to the creditor . . . on default in payment to enter into possession of the lands disponed in security and uplift the rents thereof . . . the clause . . . on default in payment granting power of sale shall have the same import . . . as if it had been thereby further provided and declared that if the grantor should fail to make payment of the sums that should be due by the personal obligation contained in the . . . bond and disposition in security within three months after a demand of payment intimated to the grantor . . . in or as nearly as may be in the form of No. 2 of Schedule FF hereto annexed—[Schedule of intimation, requisition, and protest]— . . . then and in that case it should be lawful to and in the power of the grantee, immediately after the expiration of the said three months, and without any other intimation or process at law, to sell and dispose . . . of the . . . lands."

Alexander Buttery M'Ara, Bathville House, Armadale, and others, *pursuers*, creditors under a bond and disposition in security over certain heritable subjects in Airdrie, brought an action of maills and duties in the Sheriff Court at Airdrie against John Anderson, builder, Airdrie, *defender*, the debtor in the bond, and against Mary Anderson, Airdrie, and others for their interest.

The following narrative of the *facts* of the case is taken from the opinion of Lord Dundas:—"This is an action of maills and duties at the instance of heritable creditors under a bond and disposition in security granted by the compearing defender in 1904, of which bond the pursuers now stand in right in specified proportions, for declarator that they have right to the rents, mails, and duties of the security subjects, at least to so much thereof as will satisfy and pay them the principal sum of £750 and interest and penalties as specified in the bond, 'payment of said bond, although demanded, not having been made.' The bond itself has now been lodged in process; and we are informed by counsel that it is in the statutory form given in Schedule FF (No. 1) to the Titles to Land Consolidation (Scotland) Act 1868. The defender was by the bond taken bound to repay at Whitsunday 1905 the principal sum, with interest at 5 per cent. per annum to said term, and half-yearly thereafter, at Whitsunday and Martinmas during non-payment. On 11th February 1913 schedules of intimation, requisition, and protest were served on the defender by the pursuers in the form given in the said Schedule FF (No. 2), giving him notice that payment 'is now required' of the principal sum contained in the bond, and of the stated amount of 'interest due at present' on the same, with such further sum of interest as should accrue on the principal sum till paid; and further, giving him notice that if at the expiry of the period of three months from the date of said schedule the sums, principal and interest, incurred and to be incurred, of which payment was then required, should not be paid in terms of the said bond, then the pursuers might proceed to sell the security subjects in the manner provided by the said Act. The action was raised on 21st February 1913, ten days after service of the schedules of intimation, requisition, and protest. It is not averred that the interest due at Martinmas 1912 was not duly paid, nor that the defender's estates had or have been sequestrated, nor that he was *vergens ad inopiam*."

The defender pleaded, *inter alia*—"The action is irrelevant and incompetent and should be dismissed, with expenses."

On 20th March 1913 the Sheriff-Substitute (B. P. Lee) dismissed the action as incompetent and unnecessary.

The pursuers appealed to the Sheriff (Gardner Millar), who, on 14th April 1913, adhered to the interlocutor of the Sheriff-Substitute.

The pursuers appealed, and argued—The schedule of intimation, requisition, and protest was sufficient notice to the debtor that, failing immediate payment, he would be held as in default. Default included either default in payment of interest at the ordinary period or in payment of the principal after demand made. On such default the creditor, in terms of the bond under which the debtor assigned the rents and in default of payment granted power of sale, had a choice of remedies. He could either sell the property after three months, or he could enforce the personal obligation in the bond by recording it for execution and charging on it. Before sale the debtor was entitled to three months' notice, but not before enforcing the personal obligation—*M'Whirter* v. *M'Culloch's Trustees*, July 9, 1887, 14 R. 918, 24 S.L.R. 653; *M'Nab* v. *Clarke*, March 16, 1889, 16 R. 610, 26 S.L.R. 472. There was no authority for the proposition that if a demand for payment was made formal intimation must be given before an action of maills and duties could be raised—*Davidson* v. *Douglas*, November 28, 1839, 12 S.J. 211; *Saxty* v. *Smiths & Company*, June 2, 1893, 1 S.L.T. 61; Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), sec. 119. The Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. cap. 44), sec. 5, gave an analogous right to a creditor where the lands were in the personal occupation of the debtor, and the words "default in payment" had a similar meaning in that section.

Argued for the defender—There was here no default in payment in the sense of the Titles to Land Consolidation (Scotland) Act 1868. The interest had been duly paid, and the only demand for payment was in the statutory form for carrying out the power of sale. The statutory interpretation of the words "default in payment," used in Schedule F F of the Titles to Land Consolidation (Scotland) Act 1868, was to be found in section 119 of the Act, and meant default after the expiry of three months'

notice. In the present case there had been no demand for immediate payment, nor had the pursuer put the defender in default by charging under the personal obligation. The pursuer had erred in founding a personal remedy on a real remedy. The schedule of intimation, requisition, and protest was a mere preliminary to a sale on three months' notice, and could not be used as the foundation of an action of maills and duties in that it did not *per se* put the debtor in default.

At advising—

LORD DUNDAS—[*After a narrative of the facts*]—I am unable to agree with the conclusion at which the learned Sheriffs have arrived. It seems to be settled law that a creditor in a bond and disposition in security is entitled either to record the bond, in virtue of the clause consenting to registration thereof for execution, and charge the debtor thereon upon the personal obligation contained in the bond, and make him notour bankrupt if payment is not made before expiry of the days of charge, or to call up the bond by service of the statutory schedule, and failing payment within three months thereafter, to sell the security subjects; and that although the latter procedure has been instituted, the former may competently be resorted to during the currency of the three months —*M'Whirter*, 1887, 14 R. 918; *M'Nab*, 1889, 16 R. 610. In *M'Whirter's* case Lord President Inglis observed—"The bond gives two remedies—the first, that of charging upon the personal obligation; the second, that of calling up the bond, and failing payment within three months, of proceeding to a sale of the security subjects. It cannot be doubted that the respondents were entitled to both remedies." The present pursuers did not resort to their remedy upon the personal obligation. They brought this action of maills and duties, and seek to impound the rents for immediate satisfaction of principal and interest, as above explained, on the ground that default in payment has occurred. Their object seems to be to get control of the management of the security subjects, which are already under a decree of maills and duties obtained on 7th January 1913 at the instance of postponed bondholders. The pursuers' right is undoubtedly preferable to that of the postponed bondholders, and they may have a substantial interest to enforce it. The clause in the bond "I assign the rents" is defined by section 119 of the Act as, *inter alia*, entitling the creditor "on default in payment" to enter into possession of the subjects and uplift the rents. The clause "and on default of payment I grant power of sale" and the immediately preceding clauses are defined by the said section as having the same import as if the bond had specially provided that the subjects should be redeemable at the term and place of payment, or at any term of Whitsunday or Martinmas thereafter, "upon premonition of three months." It is a condition-precedent of the exercise by the creditor of his right either to enter into possession or to sell that there should be default in payment. In the case of sale the right can only be exercised after the expiry of three months after premonition. There is no similar provision as regards entering into possession. The pursuers' counsel argued that the first portion of the schedules of notice served by them on the defender contained a clear demand for immediate payment of the principal sum in the bond and interest to the date of demand; that the further notice given by the schedules about sale after three months was immaterial to impair their validity as a sufficient preliminary demand for immediate payment; and that from and after service of the schedules the defender was in default in payment until payment was made. I think the pursuers' argument is in the main correct. The Sheriff's view in holding the action to be incompetent seems to be that the debtor was not in default in payment at the date of the action, because no explicit demand for immediate payment had previously been made. The only written notice the defender had received was one in the well-known statutory form which in practice, and in conformity with the intention of the Act, is used when a creditor desires to intimate that in the event of non-payment within the stated period of three months he will (or may) proceed to sell the subjects. I have considerable sympathy with the view that the defender was reasonably entitled to read the schedule as a whole and in its ordinarily accepted sense as importing that the pursuers would (or might), after the expiry of the three months indicated, proceed to a sale, and that he might not understand it as a demand for immediate payment, to be followed in a few days by an action of maills and duties. But that does not seem to me to be a sufficient reason for holding the action to be incompetent. It would rather point to care being taken by the Court to avoid anything like oppression resulting from a justifiable misapprehension by the debtor of the force and meaning of the notice he had received, and a reasonable amount of time being allowed to him before decree was pronounced. I am unable to affirm that the notice was not in law a demand for immediate payment, and that the defender was not after its receipt in default in payment, of the principal and any interest due thereon, as he would have been if he had been certiorated by a charge or other unmistakable form of demand. I do not think the action can be dismissed as incompetent or irrelevant. We ought, in my judgment, to recal the interlocutors of the Sheriff-Substitute and the Sheriff and remit the case to the Court below with instructions to the Sheriff-Substitute that it must proceed. It will be for him to consider when the case comes before him whether in the circumstances as they then stand there is any reason for granting an extension of time before decree is pronounced, and to proceed in the matter as may be just.

LORD SALVESEN—With every desire to reach the same conclusion as that at which

the Sheriffs arrived, I find myself unable to do so, and I agree in the opinion which has been delivered. After all, the point is mainly of academic interest, because it is conceded that if a written notice had been given by letter that payment was demanded within a reasonable time, or it may be immediately, there could have been no answer to the action, and a period of ten days elapsed between the time that the schedule was served and the raising of the action. When one keeps that in view and also the law which entitles a heritable creditor to record his bond and to give a six days' charge upon it, although the interest may not be in arrears, and so to enforce payment of the bond, I do not think it is introducing any additional hardship into the debtor's position that this action should be held competent.

But taking the case from the strict legal point of view I think the debtor here was in default when after having received the schedule of intimation he did not make payment of the principal sum and interest, of which he was thereby notified that the creditor required payment. I agree with what Lord Dundas has said, that there may be circumstances in which the Court will protect a debtor from anything savouring of oppression, but that is a matter for the Inferior Court to decide—it was not a point on which we were asked to pronounce.

LORD GUTHRIE—The pursuers are only entitled to raise this action of maills and duties if, in terms of section 119 of the Titles to Land Consolidation (Scotland) Act 1868, there has been on the part of the defender "default in payment" of the principal or of the interest due under the bond named in the summons. There has been no default in payment of interest; but the pursuers, founding on schedules of intimation, requisition, and protest served on the defender by them in the form given in Schedule FF (No. 2) of the Act, allege that the defender was at the date of the summons in default of payment of the principal sum due under the bond. It is said that the pursuers had a simple and direct way of making a demand for payment, in which they would have intimated that if payment was not made within a certain short space of time other proceedings would follow. Instead of taking this course, to which it is admitted there would have been no answer, they choose to make their intimation in accordance with the above schedule—that is to say, a form which was designed, not as a preliminary to an action of maills and duties, but as a preliminary to a sale of the heritable subjects. This course has resulted in the defenders' plausible defence. I was at first inclined to think that the course taken by the pursuers had not resulted in the circumstances in producing default in payment, and to concur in the view expressed by the Sheriff when he says—"All that was done was the serving of the schedule, which is the ordinary first step in the process for realising the property, and he (the defender Anderson) had no notice of any intention of taking the present proceedings, as he had paid up the interest to the present time, and it is not averred that he has been sequestrated or is *vergens ad inopiam*."

But I have come to think with Lord Dundas, subject to the suggestion contained in the last sentence of his opinion, that if all that is needed is default of payment on the part of the defender, such default is sufficiently created by any demand made by the pursuers on him in clear terms, and that such demand is contained in the schedule of intimation, requisition, and protest in question.

LORD JUSTICE-CLERK—I have had the advantage of reading the opinion delivered by Lord Dundas, and I entirely concur with it.

The Court recalled the interlocutors of the Sheriff-Substitute and the Sheriff, and remitted the cause to the Sheriff-Substitute to proceed as might be just.

Counsel for the Pursuers and Appellants—D. P. Fleming. Agents—Laing & Motherwell, W.S.

Counsel for the Defender—D. Anderson, K.C.—Mackenzie Stuart. Agents—Balfour & Manson, S.S.C.

Wednesday, June 11.

SECOND DIVISION.

[Lord Dewar, Ordinary.

M'DONALD *v.* FANN.

Succession—Husband and Wife—Parent and Child—Legitim—Fund for Division—Donation inter virum et uxorem.

Held (*diss.* Lord Dundas) that an unrevoked gift of moveables made by a husband to his wife some years before his death formed part of the legitim fund of his children, because the gift was revocable, being a donation *inter virum et uxorem.*

Mrs Catherine M'Donald or Fann, wife of and residing with John Viotti Fann at 36 Pine Road, Cricklewood, London, *pursuer*, brought an action against Mrs Margaret Nicolson or M'Donald, residing at Crossroads, Broadford, in Skye, widow and universal legatory of John M'Donald, carpenter, at one time residing at Crossroads aforesaid, and also against David Munro, bank agent, Nairn, and Archibald Macdonald, bank agent, Broadford, foresaid, the executors-nominate of the said John M'Donald, for their interest, *defenders*. The conclusions of the summons were for an accounting by the defender Mrs M'Donald of the whole moveable estate belonging to the said John M'Donald, received and ingathered by her, whereby the true amount of the legitim due to the pursuer out of such estate might be ascertained for payment of such sum to the pursuer, or, in the event of her failing to account as aforesaid, for payment of £400.