

Friday, December 22.

SECOND DIVISION.

[Lord Sands, Ordinary.]

CHALMERS' TRUSTEE v. THOMSON
AND OTHERS.

Succession—Destination—Contractual or Testamentary—Destination in Feu-Disposition to Two Sisters Equally between Them and the Survivor of Them and the Heirs and Assignees of the Survivor—Evacuation—Will.

Two sisters A and B purchased a house, the destination in the feu-disposition by which they acquired it being as follows:—"To and in favour of the said A and B, equally between them, and the survivor of them and the heirs and assignees of the survivor."

Held--following *Perret's Trustees v. Perret*, 1909 S.C. 522, 46 S.L.R. 453—that on the death of A, B became sole fief of the house and that the terms of the destination could not be gratuitously defeated by the testamentary settlement of A.

Succession—Election—Appropriate and Reprobate—Equitable Compensation—Beneficiary under Will Subsequently Invoking Feudal Title.

A beneficiary under a will who after enjoying a liferent of heritable property conferred thereby, jettisons the will and claims a right of fee in virtue of the terms of the original title to the property must, as a condition of taking under the feudal title, make compensation to the testamentary estate which has been diminished by his enjoyment of the liferent.

David Montague Alexander Chalmers, trustee and executor acting under the trust-disposition and settlement of the late Charlotte Susan Chalmers, who resided at 3 St Swithin Street, Aberdeen, *pursuer and real raiser*, brought an action of multiplepounding and exoneration against (1) George Leslie Thomson, Aberdeen, (2) Mrs Edith Harriet Annie Simpson or Little-dale, Aberdeen, and (3) Archibald Foote Simpson and others, trustees acting under the marriage contract of Lieutenant Little-dale, R.N., and the said Mrs Little-dale, *defenders*, for the determination of certain questions regarding the disposal of a portion of Miss Chalmers' estate.

The pursuer averred, *inter alia*—"1. The pursuer is holder of the executory estate of the said Charlotte Susan Chalmers, the residue of which is destined under her trust-disposition and settlement to the defender Mrs Little-dale or the defenders, her marriage-contract trustees. The said estate includes funds hereinafter referred to which formerly belonged to her sister the said Anne Chalmers. 2. By feu-disposition dated 11th November 1876 Duncan M'Millan, architect, Aberdeen, sold and disposed 'to and in favour of the said Miss Anne Chalmers and Miss Charlotte Susan Chalmers, equally

between them, and the survivor of them, and the heirs and assignees of the survivor, but exclusive of assignees before these presents are recorded in the Register of Sasines, the house No. 3 St Swithin Street, Aberdeen.' The said feu-disposition was, with warrant of registration on behalf of the said disponees, in terms of the said destination, in the following terms:—'*Register on behalf of Miss Anne Chalmers and Miss Charlotte Chalmers, both residing in Aberdeen, in the register of the county of Aberdeen*—[The words underlined were deleted, and the words in italics were added, by way of amendment at the hearing in the Inner House]—recorded in the Division of the General Register of Sasines applicable to the county of Aberdeen on 14th November 1876. Thereafter the two sisters lived together in the said house until the death of Anne Chalmers. 3. Anne Chalmers died on 21st February 1899 leaving a holograph will and codicil dated respectively 20th June 1888 and 5th July 1897 and registered in the Sheriff Court Books of the county of Aberdeen on 1st March 1899. Her estate at the time of her death consisted of (a) a one-half *pro indiviso* share of the house and furnishings at No. 3 St Swithin Street, and (b) certain funds invested or in bank. By her said will she made provision for the payment of various pecuniary and special legacies, but with regard to the residue, which includes the estate described under letter (a) aforesaid, questions have now arisen as to whether or not the interest of her sister Charlotte Susan Chalmers was restricted to a liferent, and conflicting claims based on alternative constructions of the will have been intimated to the pursuer as hereinafter described. 4. Anne Chalmers appointed no trustee or executor by her said will, and Charlotte Susan Chalmers was decerned and confirmed executrix-dative *qua* next-of-kin to her deceased sister, conform to testament-dative expedite before the Sheriff of Aberdeen, Kincardine, and Banff at Aberdeen on 12th April 1899, and thereafter proceeded to realise and distribute her sister's estate. She made payment of the said pecuniary and special legacies to the various legatees, but *quoad ultra* the whole estate remained in her possession and under her control until her death, and she continued to reside in the said house during the whole of that period. It thus comes about that the pursuer as executor of Charlotte Susan Chalmers holds the whole residue of the estate of Anne Chalmers included in the estate of Charlotte Susan Chalmers. 5. Charlotte Susan Chalmers died on 25th September 1921. By her trust-disposition and settlement dated 2nd September 1908, and with codicils dated respectively 23rd September 1919 and 12th November 1919, registered in the Sheriff Court Books of the county of Aberdeen on 29th September 1921, she conveyed her whole estate to Alexander Webster, advocate in Aberdeen, her nephew, whom failing to David Montague Alexander Chalmers, advocate in Aberdeen, her nephew, as trustee, and nominated said trustee to be also her executor. The said Alexander Webster

predeceased the testatrix, and accordingly the office of trustee and executor devolved upon the said David Montague Alexander Chalmers, who accepted office and is the pursuer and real raiser in this action. The testatrix further directed that on her death her whole property and estate should be realised into money as soon as possible, and after making provision for the payment of her debts, deathbed and funeral charges, and certain legacies, she directed her executor to pay over the residue of her means and estate to her grandniece the said Edith Harriet Annie Simpson or Littledale, wife of Herbert Francis Littledale, or to the trustees under their marriage contract. An extract of said trust-disposition and settlement is produced and referred to. 6. The defender George Leslie Thomson maintains that on a true interpretation of the will of Anne Chalmers the estate in the pursuer's hands, so far as it comprises estate which formerly belonged to Anne Chalmers, and including the value of the share of house and furniture at No. 3 St Swithin Street aforesaid which formerly belonged to her, now comes to him as fiar of her estate, and he claims payment accordingly. The said house was sold by public roup on 2nd November 1921 and realised the sum of £1280. To obviate any question of title with the purchaser of the house the said George Leslie Thomson has agreed without prejudice to be a consenter to the deed of conveyance and to accept half the price of the house in lieu of his right to one *pro indiviso* half of the subjects in the event of his contentions being upheld. The said furniture was also sold at the same time and realised the sum of £342. The defenders Mrs Littledale's marriage-contract trustees maintain that the will of Anne Chalmers operated a gift to Charlotte Susan Chalmers of the estate claimed as aforesaid by George Leslie Thomson, and that the said estate is properly included in the estate of Charlotte Susan Chalmers and falls to be disposed of in terms of her trust-disposition and settlement. The whole estate in the pursuer's hands amounts to the sum of £10,000 or thereby, of which the sum of £3500 or thereby represents the estate formerly belonging to Anne Chalmers. The legacies which fall to be paid under the trust-disposition and settlement of Charlotte Susan Chalmers amount in all to the sum of £2305, so that the pursuer has in any event ample funds wherewith to pay the said legacies in full. Accordingly the said defenders Mrs Littledale's marriage-contract trustees claim that the said disputed estate goes to swell the residue of the estate of Charlotte Susan Chalmers, and as assignees in trust of her residuary legatee they claim that payment of it should be made to them. . . . 9. The fund *in medio* consists of the following sums—(1) The sum of £640, being one-half the gross proceeds of the sale of the said house. (2) The sum of £171, being one-half the gross proceeds of the sale of the said furniture. (3) The sum of £2700 or thereby, being the balance of the executry estate of Anne Chalmers."

Claims were lodged by Mrs Elizabeth

Hay Will or Thomson, executrix of the defender George Leslie Thomson, and by Lieutenant and Mrs Littledale's marriage-contract trustees.

George Leslie Thomson's executrix, who claimed to be ranked and preferred to the whole fund *in medio*, averred, *inter alia*—
"1. The claimant is the executrix-nominate and universal legatory of the said George Leslie Thomson, conform to holograph last will executed by him, dated 26th April 1894 and registered in the Sheriff Court Books of the county of Aberdeen 28th January 1922. The said George Leslie Thomson died on 23rd January 1922 after the summons in this action had been served. Subject to these explanations and to the further explanation in article 2 of this condescendence the claimant adopts and holds as repeated *brevitatis causa* articles 1 to 6 and 8 and 9 of the condescendence annexed to the summons under reference to the writs therein mentioned. 2. The claimant maintains that on a sound construction of the last will of Anne Chalmers the said George Leslie Thomson was, subject to the liferent of Charlotte Susan Chalmers, vested in the fee of the whole residue of Anne Chalmers' estate, including her share of the house No. 3 St Swithin Street, Aberdeen, and of the furniture therein, and that accordingly on the death of Charlotte Susan Chalmers the whole of Anne Chalmers' estate in her possession fell to be paid or conveyed to him. The notarial instrument, the trust-disposition and settlement of Charlotte Susan Chalmers, and Mrs Littledale's marriage contract, mentioned in the condescendence and claim for Mrs Littledale's marriage-contract trustees, are referred to for their terms. Explained that the writs upon which the said notarial instrument proceeded did not confer upon the said Charlotte Susan Chalmers any right as an individual to the *pro indiviso* half of the said house which belonged to the said Anne Chalmers, and that the said notarial instrument was therefore invalid. . . . 3. *With reference to the contention and plea-in-law for Mrs Littledale's marriage-contract trustees added by way of amendment, to the effect that under the terms of the feu-disposition mentioned on record it was not within the power of Miss Anne Chalmers to defeat by any gratuitous deed the destination to the survivor, and that on the death of the predeceator the right to one-half of the subjects passed in terms of said destination to Miss Charlotte Susan Chalmers, the claimant under reference to the said feu-disposition and the will of the said Miss Anne Chalmers explains and avers as follows:— There was no contractual relationship between the said sisters as far as the gift-over in the said destination was concerned or at all. By the said will Miss Anne Chalmers, subject to certain pecuniary and special legacies, bequeathed to her sister, the said Charlotte Susan Chalmers, the liferent of the residue of her estate with the fee thereof (including the property) to G. L. Thomson, and the testatrix expressly included in said residue as belonging to her and disposable by her her share of the house property held under the said feu-disposi-*

tion. After the death of the said Anne Chalmers on 21st February 1899 the said Charlotte Susan Chalmers survived for twenty-two years, and during that time not only did she fail to challenge the power of her sister to bequeath the said share of the said property in liferent and fee as aforesaid, but she elected to accept, and did accept, all the provisions of the said will in her favour and thereby approbated the same. Miss Charlotte down to the date of her death on 25th September 1921 enjoyed the liferent of the whole residue of the said Miss Anne Chalmers' estate. During her enjoyment of the liferent she received payments of income and enjoyment of the household furnishings and contents, which added together exceeded by a large amount the value of her sister's share of the said house property. Further, the said Miss Charlotte made up a title in her own favour to the share of the said house property which had belonged to Miss Anne Chalmers by expediting a notarial instrument in her own favour, which proceeded, *inter alia*, on the will of Miss Anne Chalmers, and hence took the title as one taking right through her sister's gift. It is true that the said notarial instrument was inept in so far as it professed to vest Miss Charlotte Susan Chalmers in the fee of her sister's share of the property, whereas on a sound construction of the will she was entitled only to a liferent of the said share, but that does not diminish its effect as (a) approbating the will, and (b) affording conclusive evidence that the deceased Miss Charlotte did not regard the gift-over in the said destination as contractual. Miss Charlotte Susan Chalmers elected to approbate her sister's will. The claimants Mrs Littledale's trustees represent the residuary legatee under the will of Miss Charlotte Susan Chalmers, and no claim to the pro indiviso share of the said property in respect of the terms of the said *feu-disposition* was put forward on their behalf until the reclaiming note in the action was under discussion. Moreover, any pretended reversal of the election of Miss Charlotte to approbate the will would be conditional upon restoring the liferent of the remaining items of the estate for the said twenty-two years, which is impossible." [Averment 3 was added by way of amendment at the hearing in the Inner House.]

Lieutenant and Mrs Littledale's marriage-contract trustees, who claimed one-half of the gross proceeds of the said house and furniture, being items 1 and 2 of the fund *in medio*, averred, *inter alia*—"1. The claimants are the trustees acting under the marriage contract of Mrs Edith Harriet Annie Simpson or Littledale. The claimants adopt *brevitatis causa* articles 1 to 5 inclusive and article 8 of the condescendence annexed to the summons under reference to the deeds therein mentioned for their terms, and subject to the additional statement with reference to the facts narrated in article 4 thereof, that on the death of the said Miss Anne Chalmers a notarial instrument was prepared by Mr Alexander Webster, advocate, Aberdeen (who was the nephew and law agent of the said Miss Anne and Miss

Charlotte Susan Chalmers) proceeding on Miss Anne Chalmers' infefment in the one-half *pro indiviso* share of the said No. 3 St Swithin Street, Aberdeen, and the conveyance by her to the said Miss Charlotte Susan Chalmers contained in her said will; that the said notarial instrument was duly recorded on 13th October 1899 in the Division of the General Register of Sasines applicable to the county of Aberdeen, and that succession duty on the said one-half share of the said house and legacy duty on the one-half share of the furnishings thereof was paid by Miss Charlotte Susan Chalmers. The said Mrs Littledale is the grandniece of the testatrix Miss Anne Chalmers and of Miss Charlotte Susan Chalmers. The latter by her trust-disposition and settlement, as stated in article 5 of the condescendence annexed to the summons, directed her executor to pay to the said Mrs Littledale or to these claimants as her marriage-contract trustees the residue of her means and estate. By the said Mrs Littledale's marriage contract she assigned and disposed, *inter alia*, to her marriage-contract trustees the whole property, means, and estate, heritable and moveable, real and personal, to which she might succeed and acquire right during the subsistence of the marriage. . . . Explained that the said *feu-disposition* expressly bore to be 'in consideration of the sum of one thousand, two hundred and sixty pounds sterling instantly paid to me, and of the *feu-duty* hereinafter stipulated to be paid to me by Miss Anne Chalmers and Miss Charlotte Susan Chalmers, both residing in Aberdeen. 2. With reference to the statements contained in article 3 of the condescendence for Mrs Elizabeth Hay Will or Thomson (executrix of George Leslie Thomson) added by way of amendment, these claimants admit that after the death of the said Anne Chalmers on 21st February 1899 the said Charlotte Susan Chalmers survived for twenty-two years, that Miss Charlotte down to the date of her death on 25th September 1921 enjoyed the liferent of the residue of the said Miss Anne Chalmers' estate. Quoad *ultra* the statements contained in the said article 3 are denied. Explained that Miss Charlotte Susan Chalmers had no opportunity or occasion to challenge her late sister's will. She was never in a position to exercise any choice or election between her rights under the said *feu-disposition* and her rights under her sister's will (on the assumption that any conflict of rights arose therefrom, which these claimants deny). She was never informed in any way that any question of election arose, and she did not in fact ever make any election. The said notarial instrument was prepared and recorded by Miss Charlotte Susan Chalmers' law agents as a conveyancing step, and these claimants do not admit that she herself had any knowledge of the terms in which it was expressed." [The words in italics were added by way of amendment at the hearing in the Inner House.] "3. The claimants contend that the will of Miss Anne Chalmers operated as a gift to Miss Charlotte Susan Chalmers of one-half share of the house and furnishings of No. 3 St Swithin Street,

Aberdeen, and that under the provisions of Miss Charlotte Susan Chalmers' trust-disposition and settlement and of Mrs Littledale's marriage contract they are entitled thereto."

George Leslie Thomson's executrix pleaded, *inter alia*—"2. The right of the said Charlotte Susan Chalmers in the *pro indiviso* half of said house, and in the half of the said furniture which belonged to the said Anne Chalmers, having been a *lifereit* right only, she could not competently dispose of the fee thereof by her trust-disposition and settlement, and accordingly the claim for Mrs Littledale's trustees should be repelled. 3. The claim by Mrs Littledale's trustees in respect of the alleged contractual nature of the terms of the said feu-disposition to the share of the said house property which belonged during her lifetime to Miss Anne Chalmers should be repelled in respect (a) that the said claim is irrelevant; (b) that the said claimants have no title to insist on the claim; (c) that on the assumption that the destination in the said feu-disposition could not be evacuated by the will of Miss Anne Chalmers, and that Miss Charlotte Susan Chalmers by her survivorship became entitled to the whole of the said property, the latter elected to accept, and did accept and enjoy the whole benefit bequeathed to her under Miss Anne Chalmers' will, and thereby approbated the same and barred herself and her representatives from claiming that Miss Anne Chalmers had no power to dispose of her *pro indiviso* share of the property and from reprobating that portion of the said will which purports to dispose of the fee thereof. 4. *Esto* that Mrs Littledale's marriage-contract trustees have a title to and are not barred from claiming that Miss Anne Chalmers had no power to dispose by her will of the said *pro indiviso* share of house property, they are as a condition of such claim (a) bound to renounce and restore the whole benefit taken by Miss Charlotte Susan Chalmers under the said will; or (b) bound in any event to restore the value of such benefit to the extent required for giving equitable compensation to this claimant; and accordingly this claimant is entitled to the proceeds of the sale of the said share as a *surrogatum* for such compensation." [Pleas 3 and 4 were added by way of amendment at the hearing in the Inner House.]

Lieutenant and Mrs Littledale's marriage-contract trustees pleaded, *inter alia*—"2. In respect that under the terms of the said feu-disposition it was not within the power of the said Miss Anne Chalmers to defeat by any gratuitous deed the destination to the survivor, and that on her death her right to one-half of the subjects passed in terms of said destination to Miss Charlotte Susan Chalmers, these claimants are entitled to be ranked and preferred to the fund *in medio* so far as consisting of the proceeds of the sale of the said subjects. 3. The averments of the claimant Mrs Elizabeth Hay Will or Thomson added on amendment are irrelevant." [Pleas 2 and 3 were added by way of amendment at the hearing in the Inner House.]

On 24th June 1922 the Lord Ordinary

(SANDS) pronounced this interlocutor—"Repels the claim for Mrs Elizabeth Hay Will or Thomson as executrix-nominate of George Leslie Thomson *qua* items one and two of the condescendence of the fund *in medio* as set forth in the condescendence annexed to the summons: Sustains the plea-in-law stated for the marriage-contract trustees of Lieutenant Herbert Francis Littledale and Mrs Edith Harriet Annie Simpson or Littledale, and continues the cause."

Opinion.—"Miss Anne Chalmers died in 1899 leaving a holograph testament and codicil. It appears that she resided with a sister Miss Charlotte Chalmers, who died recently. It is clear from the terms of the settlement, and it may not be an altogether irrelevant consideration as regards the inferences as to her intentions to be drawn from certain passages in the deed, that Miss Anne had implicit confidence in her sister. The state of Miss Anne's affairs at the date of the settlement and of her death appears to have been as follows:—The two sisters were joint proprietors of a house in Aberdeen in which they resided, and which was destined in the title to the survivor. The furniture in this house also belonged to them jointly. In addition Miss Anne had some investments, which were her own absolutely, and a few personal belongings. It appears from her settlement that her intention was that on her death (subject to certain pecuniary legacies which were payable in her sister's discretion) her sister should enjoy both the joint estate and Miss Anne's separate estate. On the death of the sister, George Thomson, a favourite nephew, was to take benefit. The question in the present case is whether the intention, as gathered from the terms of the settlement, was that the nephew was then to take the whole succession derived through Miss Anne, or whether, on the other hand, he was to take only the investments, the share in the house and furniture having been bequeathed absolutely to the surviving sister. [His Lordship then discussed the terms of the settlement.]

"Apart from the destination in the title to the house which would be operative in favour of the survivor if not evacuated, there is, as regards both the half share in the house and the furnishings, an unqualified bequest in favour of the sister in the opening words of the settlement. In these circumstances it is for the claimant, Mr Thomson's executrix, to show that it was the intention of the testatrix, as sufficiently indicated in the subsequent directions, to reduce the right thereby conveyed to one of *lifereit*. In my view they have failed to do so. I do not think that they can carry the matter further than the suggestion of a doubt. My own impression, gathered from a perusal of the deed taken in relation to the circumstances, is that the testatrix meant to leave to her sister without qualification the property in which their interest was joint.

"I shall accordingly repel the claim of the claimant, the executrix of George Leslie Thomson, *qua* items 1 and 2 of the conde-

scedence of the fund *in medio*, and sustain the first plea-in-law for the claimants Mr and Mrs Littledale's marriage-contract trustees."

George Leslie Thomson's executrix reclaimed, and argued—Miss Anne Chalmers had power to alter by her will the destination in the feu-disposition. In the absence of averment and proof to the contrary it must be assumed that each of the two sisters contributed an equal amount to the price of the house. Each sister was really proprietor of a *pro indiviso* share of the house, which she was at liberty to dispose of by will. The question was one of intention rather than one of conveyancing, and the surrounding circumstances could be looked at. There was no reason for supposing that the sisters intended to guarantee the survivor of them against the voluntary deeds of the predeceaser—*Walker v. Galbraith*, (1895) 23 R. 347, 33 S.L.R. 246; *Lang's Trustees v. Lang*, (1885) 12 R. 1265, 22 S.L.R. 866; Craigie's Heritable Rights (3rd ed.), pp. 550, 556, and 557; Wood's Conveyancing, p. 309. The institutional writers did not deal with the matter from the point of view of whether or not the destination could be evacuated. Ersk. iii, 8, 34, 35, and 36; Stair, ii, 6, 10; Bell's Com. (7th ed.) ii, 1, 6; Menzies' Conveyancing, pp. 662-6, were referred to. *Perrett's Trustees v. Perrett*, 1909 S.C. 522, 46 S.L.R. 453, was distinguishable. That was the case of a destination to spouses. Moreover, in that case the heirs of the survivor were called. *Renouf's Trustees v. Haining*, 1919 S.C. 497, 56 S.L.R. 440, was also distinguishable. It was the case of a gift, and a gift had to be taken *sub conditionibus*. *Esto*, however, that the destination in the feu-disposition was contractual and could not be evacuated gratuitously, Mrs Littledale's trustees could not take under the feudal title without making equitable compensation to Miss Anne Chalmers' testamentary estate, the liferent of which had been enjoyed by their author for twenty-one years—Bell's Prin., pp. 1938-1942; *Ker v. Wauchope*, 1819, 1 Bli. 21; *Earl of Glasgow's Trustees v. Earl of Glasgow*, 1872, 11 Macph. 218, 10 S.L.R. 144; *Johnston v. Johnston*, 1873, 10 S.L.R. 271; *Bell's Trustee v. Bell's Trustee*, 1907 S.C. 872, 44 S.L.R. 588; *Crum Ewing v. Bayley's Trustees*, 1911 S.C. (H.L.) 18, 48 S.L.R. 401.

Argued for the respondents (the claimants Lieutenant and Mrs Littledale's marriage-contract trustees)—Miss Anne Chalmers had no power to defeat the destination to the survivor contained in the feu-disposition by any gratuitous deed. The expression used in the destination had a well-defined meaning, and since the expression had been employed it must be held that it had been used in its legal meaning—*Perrett's Trustees v. Perrett*, 1909 S.C. 522, 46 S.L.R. 453; *Renouf's Trustees v. Haining*, 1919 S.C. 497, 56 S.L.R. 440; *Brown v. Advocate-General*, (1852) 1 Macq. 79, per Lord Chancellor St Leonards at 90; *Burrows v. M'Farquhar's Trustees*, (1842) 4 D. 1484; *Bisset v. Walker*, (1799) M. Deathbed, App. No. 2, referred to in Ross's Leading Cases, vol. i, p. 332; *Riddels v. Scott*, 1747, M. 4203

and 14,878; *Fergusson v. M'George*, (1739) M. 4202; Duff on Deeds, pp. 320-1; Bell's Com. (7th ed.) ii, 1, 6; Ersk. iii, 8, 35; Bell's Lectures (3rd ed.), vol. ii, p. 843; Fraser's Husband and Wife (2nd ed.), vol. ii, p. 1435. The claimants were not bound to impute to the testamentary estate the value of the liferent enjoyed by their author. Equitable compensation depended on election, and Miss Charlotte Chalmers had never made any election between her rights under her sister's will and her rights under the feudal title. An inference of election could not be made from the mere lapse of time, for election implied knowledge of the different rights in question, and it could not be said that Miss Charlotte Chalmers was in possession of the knowledge necessary to make a valid election—*Johnston v. Paterson*, 1825, 4 S. 234; *Douglas' Trustees v. Douglas*, 1862, 24 D. 1191; *Paterson v. Moncrieff*, 1866, 4 Macph. 706; *Hewit's Trustees v. Lawson*, 1891, 18 R. 793, 28 S.L.R. 528; *Stewart v. Bruce's Trustees*, 1898, 25 R. 965, 35 S.L.R. 780; *Bell's Trustee; Brown's Trustees v. Gregson*, 1920 S.C. (H.L.) 87, 57 S.L.R. 391.

At advising—

LORD JUSTICE-CLERK—Miss Anne and Miss Charlotte Chalmers, who were sisters, were joint proprietors of a house in Aberdeen. Miss Anne Chalmers died on 21st February 1899 leaving a holograph settlement, and the construction of that deed gives rise to the first question which is submitted to the Court for decision. It is whether on a true construction of the deed Miss Anne left her share of the house and the contents of it to her sister Miss Charlotte in liferent and to her nephew George Leslie Thomson in fee, or whether on the other hand she left her share of the house and its contents in fee to her surviving sister. The answer to that question manifestly depends on the intention of the testatrix as evinced in the language of her settlement. [*His Lordship then discussed the terms of the settlement.*] I am of opinion, therefore, that Miss Charlotte took a liferent of the house and furniture left by her sister, and that the fee passed on her death to the testatrix's nephew George Leslie Thomson.

But that does not end the matter. In the course of the discussion in the Inner House counsel for the marriage trustees of Mrs Littledale, the residuary legatee on Miss Charlotte Chalmers' estate, asked and obtained permission to amend his claim and to add new pleas-in-law. The effect of the alterations made on the pleadings was this—It was maintained that the terms of the feu-disposition in favour of Miss Anne and Miss Charlotte Chalmers, whereby they acquired the house in Aberdeen, were such as to preclude the testatrix from defeating by gratuitous deed the destination which the disposition contained, and that in virtue of that destination the property in one-half of the subjects passed on the death of Miss Anne to Miss Charlotte and her heirs. Having regard to the decision in *Perrett's Trustees v. Perrett* (1909 S.C. 522) and to the opinions of Lord Dunedin and Lord Kinnear

in that case, I am of opinion that this contention is unanswerable.

Counsel for the competing claimant, the executrix of George Thomson, also amended his pleadings. He now maintains that Miss Charlotte elected to take under her sister's settlement, that she enjoyed the life interest conferred by it for twenty-two years, and made up title to the property by notarial instrument following upon the will, and that therefore having regard to the doctrine of approbate and reprobate, she cannot now jettison the will and invoke the terms of the disposition. Whether or no Miss Charlotte in point of fact elected—and there was much argument to the effect that she did not, and indeed could not, because she had not the knowledge necessary to an intelligent election—I think it is clear that her representatives must, as a condition of taking shelter under the clause in the disposition, restore the benefits already enjoyed by their author under the will, or in any event restore the value of these benefits to the extent required to make equitable compensation to the estate—see *Brown's Trustees v. Gregson*, 1920 S.C. (H.L.) 87; *Crum Ewing's Trustees v. Bayly's Trustees*, 1911 S.C. (H.L.) 18. As the value of these benefits obviously exceeds the price obtained from the sale of the house, the marriage-contract trustees of Miss Charlotte's residuary legatee have won but a Pyrrhic victory, their claim fails, and Mrs Thomson's claim succeeds.

LORD HUNTER—The first question raised by this reclaiming note is whether or not the Lord Ordinary was right in interpreting the will of Miss Anne Chalmers, who died in 1890, as conferring upon her sister Miss Charlotte Susan Chalmers, who died in 1921, the fee of one-half of the house in which they resided together with the furniture contained therein. The settlement was written by the testatrix herself, and it is therefore not surprising that the expression of her meaning is not always clear while the arrangement of the provisions is defective.

The first part of her settlement is in these terms—"To my beloved sister Charlotte I leave my share of the house at No. 3 St Swithin Street, Aberdeen, at present our joint property and in which we dwell, with the furnishings and all that it contains; also all my bank shares and other funds of whatever description. I leave all to her during her lifetime." As I read these words the testatrix intended to confer upon her sister a life interest of all that she possessed and not a fee of any part thereof. [His Lordship then discussed the terms of the settlement.]

At the discussion counsel for the marriage-contract trustees of the residuary legatee on Miss Charlotte Chalmers' estate asked leave to add a plea founded upon the terms of the dispositive clause in the feu-disposition dated 1876 in favour of the two sisters. That clause is in these terms—"To and in favour of the said Miss Anne Chalmers and Miss Charlotte Susan Chalmers, equally between them, and the survivor of them and the heirs and assignees of the survivor." The plea is thus expressed—"In

respect that under the terms of the said feu-disposition it was not within the power of the said Miss Anne Chalmers to defeat by any gratuitous deed the destination to the survivor, and that on her death her right to one-half of the subjects passed in terms of said destination to Miss Charlotte Susan Chalmers, these claimants are entitled to be ranked and preferred to the fund *in medio* so far as consisting of the proceeds of the sale of the said subjects." The effect of a destination in similar terms was considered by the First Division in *Perrett's Trustees v. Perrett*, 1909 S.C. 522. In that case Lord Dunedin, dealing with a case where a property had been purchased by two spouses, each paying one-half of the price, and the destination had been taken in favour of them jointly and the survivor of them and the heirs of the survivor and their assignees whomsoever, said (at p. 528)—"I think that was a contractual arrangement where each took the chance of getting the half of the other, and accordingly I think that the property stands upon its own destination and is not carried and could not be carried by any testament whatsoever. The moment that disposition was mutually delivered, as it was by the mere fact of taking the destination as between these two people, I do not think this destination could have been altered except by joint consent of the spouses." Lord Kinnear expressed an opinion to the same effect. Upon the authority of this decision I think the plea for these claimants is sound.

In answer to the plea that was so added the claimant Mrs Thomson, as executrix of G. L. Thomson, made extensive alterations on her statements and added two additional pleas. The effect of her new averments is that she alleges that Miss Charlotte Chalmers elected to take, or at all events must be presumed to have elected to take, her provisions under the settlement of her sister and that she was not therefore entitled to claim under the feu-disposition. A number of cases were cited on behalf of the opposing claimants to show that an inference of election could not be made from the mere lapse of time, it being necessary to show that the person said to have made an election had knowledge of the different rights possessed by him. The question appears to me to be of merely academic interest and to be of no practical importance. If at any time Charlotte Chalmers had elected to take her rights under the disposition she would have had to renounce the rights she enjoyed under the will, or at all events to make equitable compensation out of those rights to the estate affected by her withdrawal from the provisions of the settlement of one-half of the fee of the heritable property. As was explained by Lords Atkinson and Shaw in *Crum Ewing's Trustees v. Bayly's Trustees* (1911 S.C. (H.L.) 18), the Scots doctrine of approbate and reprobate is similar to the English doctrine of election. At p. 27 Lord Shaw says—"The doctrine of approbate and reprobate in Scotland and the doctrine of election in

England are the very same thing under different names. They depend upon a principle, which in its comprehensiveness and simplicity was put by Lord Eldon in the House of Lords in the Scotch case of *Ker v. Wauchope* (1 Bli. 1), thus—'It is equally settled in the law of Scotland and of England that no person can accept and reject the same instrument.' He then quotes a passage from Lord Cairns, where that learned Judge says that "Where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent therewith." In considering this question it is immaterial to inquire whether or not the testator thought he was entitled to dispose of the subject with which he had dealt. In *Brown's Trustees v. Gregson* (1920 S.C. (H.L.) 87) Viscount Haldane says at p. 90—"It (*i.e.*, the doctrine of election) is a principle which the Courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. . . . The Court will hold that a beneficiary who is given a share under the will in assets the total amount of which depends on the inclusion of property belonging to the beneficiary himself which the testator has ineffectively sought to include ought not to be allowed to have a share in the assets effectively disposed of except on terms. He must co-operate to the extent requisite to provide the amount necessary for the division prescribed by the will, either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting to a diminution of the share to which he is *prima facie* entitled, to an extent equivalent to the value of his own property if withheld by him from the common stock."

The house in which the testatrix and her sister lived has now been sold, and no one questions the validity of the sale. The claimants who represent the residuary legatee on Miss Charlotte Chalmers' estate are in no better position that she was. It was indeed suggested that in some way they were, but I entirely failed to follow this argument. It appears to be neither in accordance with any rule of law or doctrine of equity that a gratuitous donee should enjoy rights not possessed by his author. I think therefore that their success on the belated plea which they added to the record avails them nothing. Assuming in their favour that they are entitled to plead the rights conferred upon Miss Charlotte Chalmers by the terms of the original disposition, they are bound to surrender these rights because admittedly Miss Charlotte Chalmers enjoyed benefits under her sister's will in excess of the price realised for the value of the heritable property sold. I think that the interlocutor of the Lord Ordinary should be recalled, and Mrs Thomson, as executrix-nominate of George Leslie Thomson, ranked and referred to the whole fund *in medio*.

LORD ANDERSON—The first question to be determined is, What is the meaning of the testament of Miss Anne Chalmers? I have reached the conclusion that the testatrix by the said testament disposed of the *universitas* of her estate to her sister in *lifent* and to her nephew in fee—[*His Lordship then discussed the terms of the settlement*].

This would have disposed of the reclaiming note as it was presented, but certain other points have been raised by the amendments which have since been made. The first of those new points has reference to the destination in the disposition in favour of the two sisters. Is that destination contractual or testamentary? The case of *Perrett's Trustees* (1909 S.C. 522) has decided that such a destination is contractual and incapable of being evacuated by the testament of the predeceaser. Formally, therefore, it would have been open to Miss Charlotte Chalmers to elect between her rights under the disposition and those under her sister's will, and if she has not elected, it is open to her representatives to do so now. But it is well settled in a case like the present that if election takes place the doctrine of *approbate* and *reprobate* enjoins that equitable compensation shall be made in favour of the testamentary estate which has been diminished by reason of the election—*Crum Ewing's Trustees*, 1911 S.C. (H.L.) 18; *Brown's Trustees*, 1922 S.C. (H.L.) 87. In the present case there is no dispute as to the facts—It is agreed that Miss Charlotte Chalmers drew and appropriated the revenue of the residue of her sister's estate for twenty-one years, and the figures, which are also not in dispute, show that she thus took under the testament a sum much larger than she would have acquired had she elected to take under the disposition. Accordingly the question whether by her conduct she did or did not elect is purely academic, and the predeceasing sister's share of the house must therefore be disposed of as part of the fund *in medio*.

I therefore agree with the judgment proposed.

LORD ORMDALE concurred.

The Court pronounced this interlocutor—

" . . . Recal the said interlocutor: Sustain the claim by said claimant as now amended: Rank and prefer her in terms thereof to the whole fund *in medio*: Remit the cause back to the Lord Ordinary to proceed. . . ."

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