nary hour of closing. Upon that ground I agree with all that your Lordships have said. I am of opinion that the Lord Ordinary's judgment should be adhered to.

Lord Adam—It appears to me that the provisions as to early closing, as they have been explained to us, are clear and intelligible in their native soil, and as applicable to the English system, but I confess that since they have been transplanted here, I see and would have seen great difficulties in reconciling them with our Scottish system, which was entirely different, and if this question had occurred prior to the passing of the Act of 1887 I should have participated in your Lordship's difficulties upon the case, and would have wished further time for consideration. But now, after the passing of the Act of 1887, I do not think this case is attended with difficulty. Every certificate, as has been pointed out, must now bear that the publican does not keep open house after such an hour at night of any day not earlier than ten and not later than eleven as the licensing authorities may direct. Therefore, now, as I read that, the licensing authority must direct what the hour of closing is to be. The hour of ten is not fixed, and the hour of eleven is not fixed, and there is no hour between these two fixed by statute; there is no hour fixed, but the licensing authority shall say what the hour shall be. That is the position of matters under the Act of 1887. Now, that being so, the question comes to be, whether this publican, whose certificate ordains that he shall close at ten o'clock, has what is called an early closing licence? Early closing implies that it must be earlier than something. Earlier than what? Now, that takes us back to the English statute, because it is the English statute which introduces this. It is said that the premises shall be closed at an hour earlier than that at which such premises would have to be closed. Otherwise than what? If we go a little further down the clause we find what it is; it is earlier than the ordinary hour at which such premises shall be closed under the provisions of the Act—that is to say, under the provisions of the Act we are now considering. But, as has been pointed out, there is no ordinary hour fixed by the Act of 1887 at all; that is to be fixed by the licensing authority. In this case the licensing authority have fixed ten o'clock as the hour of closing for the whole of Midlothian, and that is the ordinary hour if there is any ordinary hour. Well, then, the question comes to be, as this gentleman's certificate declares that he shall close at ten o'clock, is that earlier than the ordinary hour fixed by the statute or by the Justices under the statute? I am totally unable to see that it is. Therefore I am unable to see that this is an early closing licence or certificate in the sense of the English Acts, and therefore I agree with your Lordship and the Lord Ordinary.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer in support of the reclaiming-note against the interlocutor of Lord Fraser of date 27th October 1888, and considered the cause, Adhere to the interlocutor reclaimed against, and refuse the prayer of the note: Find the defender entitled to additional expenses," &c.

Counsel for the Pursuer (Reclaimer)—Baxter—Vary Campbell. Agents—Wylie & Robertson, W.S.

Counsel for the Defender (Respondent)—Young. Agent—The Solicitor of Inland Revenue

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*Wednesday, November* 28.

## FIRST DIVISION.

ROSSBOROUGH'S TRUSTEES *v.* ROSSBOROUGH.

*Succession—Heritable and Moveable—Bond and Disposition in Security—Conversion—Terce*—Jus relictæ.

The husband's infeftment at the time of his death is the measure of the widow's right of terce.

The holder of certain heritable bonds had before his death taken steps towards realising the securities. Intimation and requisition for payment was served on the debtor in one of the bonds, but no further steps were taken. Similar intimation was made in respect of another bond, and the subjects of the security were advertised but not exposed for sale. The subjects under a third bond had been exposed for sale, but had not found a purchaser. In the fourth case the subjects had been exposed for sale and sold, but the purchaser having failed to pay the price had not obtained infeftment at the death of the bondholder. His widow claimed her legal rights.

*Held* that the bonds had not been rendered moveable as to the widow by the steps taken to realise the securities, and that she was not entitled to any part of the sums contained in the bonds *jure relictæ*.

*Succession—Heritable and Moveable—Trust—Liferent—Residue—Capital and Income—Lease.*

A testator in his trust-disposition and settlement, after making certain provisions for behoof of his widow in liferent, directed his trustees to pay the income of the residue of his estate to his sister and her children, and after her death, and when the youngest of the children had attained the age of twenty-five, to divide the capital of the residue among them. The testator was tenant of certain premises, where he carried on business as a purveyor of public entertainments, and when he died some years of the lease were still to run. His business was wound up after his death, and the trustees having failed to dispose of the lease or to sublet the premises, they became unoccupied. The testator's widow repudiated her provisions under the settlement, and claimed her legal rights.

*Held* that, in a question with the widow, the loss occasioned to the estate by the premises being unoccupied fell to be charged against the moveable estate of the deceased; and in a question between the trustees, as representing the fiars and the sister of the

testator, the loss fell to be charged against the residue of the estate, and did not form any proper charge against the sister as life-rentrix in the settlement.

Hubert Thomas Rossborough died on 28th March 1887, leaving a widow but no children.

By his trust-disposition and settlement, dated 8th June 1886 and recorded 4th April 1887, he conveyed to certain trustees his whole means and estate for the following among other purposes—(2) He directed his trustees to invest a sum of £5000, and pay the annual income arising therefrom to his widow, so long as she should survive him and remain unmarried. (5) He directed his trustees, after paying certain legacies, to hold and invest the residue of his estate, and to pay one-half of the annual income therefrom to his sister Sarah Jane Rossborough if she survived him, and the other half to her children. (6) After his sister's death they were to divide and pay the income of the whole residue among her children till the youngest reached the age of twenty-five years, when they were to realise the residue and divide it among the said children. It was further declared that the provisions in the settlement in favour of the testator's wife were to be accepted by her as in full of all claims of terce, *jus relictæ*, and all other claims of every description which might be competent to her in and through the testator's death.

When the testator died his sister had two children, one in pupillarity and another in minority.

The estate of the deceased consisted, *inter alia*, of sums due under certain bonds and dispositions in security, amounting in all to £29,870. Previous to his death the testator had taken certain steps towards realising the sums due under some of these bonds—(1) With regard to a bond and disposition for £1800, he had served the usual requisition for payment, and the period specified in the intimation had expired without payment, but no other steps had been taken. (2) With regard to a bond for £1300, a requisition had been served, and after the expiry of the period for payment the security-subjects had been advertised but not exposed for sale, the testator having died without signing the articles of roup. (3) Under a bond for £1150 the subjects had actually been exposed for sale, but had not been sold; and (4) under a bond for £3000 the subjects, which were situated in College Street and High Street, Glasgow, had been exposed for sale by public roup, and actually sold, but the purchaser, not having been able to implement his bargain by paying the price, had not been infeft in the subjects. The testator was also creditor in two bonds and dispositions in security, each for £1000, over these last-mentioned subjects, but no demand for payment of either of these two bonds had been made.

Section 117 of the Titles to Land Consolidation Act 1868 (31 and 32 Vict. c. 101), makes heritable securities, except where conceived expressly in favour of heirs, excluding executors, moveable as regards the succession of the creditors therein, but with the proviso that they shall "continue and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband and wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband."

The testator at the time of his death was tenant of the Britannia Music Hall, Trongate, Glasgow, under a lease for twelve years from Whitsunday 1878, at a rent of £600 per annum for each of the last two years of the lease. After his death the trustees were unable either to effect a sale of the lease for the period still to run, or to sublet the subjects, which, after the deceased's business had been wound up, fell out of occupation, and yielded no return to the estate.

The widow Mrs Rossborough claimed her legal rights in place of the provisions in her favour contained in the settlement, and a question having arisen as to the nature and amount of these rights, and also as to what part of the estate should be charged with the rent and taxes of the Britannia Music Hall, a Special Case was presented for the judgment of the Court, to which the trustees, who represented the interests of the fiars, were the first parties, the widow the second party, and the sister the third party.

The second party maintained that *qua* relict she was entitled to one-half of the moveable estate, including therein, as being moveable (first) half of the sum of £5000, being the principal sums of £3000, £1000, and £1000 contained in the three bonds and dispositions in security over the College Street and High Street properties; and (second) one-half of sums contained in the bonds and dispositions in security, on which formal intimations had been given calling for payment, and the notices had expired prior to Mr Rossborough's death without payment being made. She also claimed (third) to be relieved of all claims for rent, taxes, and other charges connected with the Britannia Hall from and after Whitsunday 1887. The first parties admitted the right of the second party to repudiate the provisions of the settlement and to betake herself to her legal rights, but they maintained that the second party was not entitled to one-half of said sums of £3000, £1000, £1000, £1800, £1150, and £1300, or to relief from whatever loss might be incurred in connection with the Britannia Music Hall from Whitsunday 1887 till the end of the lease. The third party Mrs Sarah Jane Rossborough or Sheridan maintained the same pleas as the first parties, and further maintained that in the event of the lease of the Britannia Music Hall not being realised profitably for the estate, the rent, taxes, and other charges under the lease, and all loss or deficiency thence arising to the estate, should be charged against and deducted from the capital or residue of the estate liferented by her and her children.

The questions were—"(1) Were the bonds above mentioned, or any of them, rendered moveable as to the relict by the steps taken to realise the securities, and is the second party entitled to one-half of the sums contained in said bonds, or any of them, as *jus relictæ?* (2) Can the rent of the Britannia Music Hall, and the tenant's obligations under the lease thereof, till the expiry of the lease, be so charged by the first parties as to affect the estate falling to the widow as terce or *jus relictæ?* (3) Are the obligations in the tenant's part of the lease of the Britannia Music Hall, including therein rent, taxes, and all other charges falling upon the

tenant, to be charged against and deducted from the capital or residue of the estate? Or do the said obligations fall to be charged against the revenue thereof?"

Argued for the first parties—The bonds had not been rendered moveable by the steps taken to realise the securities. Taking the case as one between heirs in moveables and heirs in heritage, the test of conversion was whether the testator had gone so far as to be unable to draw back; whether at the time of his death there remained in him only a claim for a sum of money. Bonds and dispositions in security differed from the old rights of annual rent. In the case of the latter the effect of requisition was to extinguish the real security. That was not so as regarded the former. Even in the case of the bond of £3000, where the steps taken had gone furthest towards realisation, the testator had power to resile owing to the failure of the purchaser to implement his bargain. His heritable security was not extinguished, and therefore there was no conversion—More's Notes to Stair, 143; Ersk. Inst. ii., title 2, sec. 16, title 8, secs. 23 and 25; Bell's Com. (7th ed.), ii. 6 (5th ed.), *ibid*; *Montier* v. *Baillie*, June 29, 1773, Hailes' Dec. 530, and M. 15,859; *Heron* v. *Espie*, June 3, 1856, 18 D. 917 (*per* Lord Justice-Clerk and Lord Murray, pp. 928, 937, 938); *Wilson* v. *Wilson*, November 29, 1808, F.C.; *Johnston* v. *Greig*, June 28, 1831, 9 S. 806; *Paul* v. *Horne*, July 5, 1872, 10 Macph. 937. Assuming that the steps taken towards realisation made the bonds moveable in a question between heir and executor, that would not be the case as to the widow. With her at all events it was a question of fact and not of intention. The husband died infeft in the security subjects, and therefore the widow's right of terce was not concluded. Having a right of terce she of course could not claim his *relictæ*, nor could she choose between the two rights—Ersk. ii. 9, 46; Bell's Prin. 1600; *MacCulloch* v. *Maitland*, July 10, 1788, M. 15,866; *Campbell* v. *Campbell*, February 17, 1776, 5 Brown's Supp. 627; Fraser on Husband and Wife, ii. 1095; Titles to Land Consolidation Act 1868 (31 and 32 Vict. c. 101), sec. 117. II. As regarded the Britannia Music Hall—(1) In a question with the widow—The lease was a fruit-bearing subject. If the trustees, to whom the testator had conveyed the *universitas* of his estate, could have carried it on at a profit, the fruits would have fallen into executry, out of which the widow would have had a claim of *jus relictæ*. As loss had occurred she was therefore bound to bear her share of it — *Ferguson* v. *Ferguson's Trustees*, February 23, 1877, 4 R. 532. (2) In a question between the liferenter and fiar—The lease being part of the residue, the profits by increasing the residue would have increased the income arising therefrom. Therefore the loss should lie on the revenue also.

The second party argued—(1) In all the six bonds out of which the widow claimed *jus relictæ* the testator had clearly shown his intention to realise. That should govern his succession. As regarded the bond for £3000, and the other bonds over the same subjects, the testator had actually sold the subjects. Here at all events there was conversion. He had deliberately divested himself of his character of security-holder, and so far as his own acts went converted his claim into one for a sum of money. He might have a right of retention for the price, but that was quite a different thing from his position as security-holder. It would be absurd to think that the insolvency of the debtor in the contract of sale could regulate the succession to the creditor's estate—Stair's Inst. ii. 4; Mack. Inst. ii. 2, sec. 6; Bell's Comm. (5th ed. and 7th ed.) ii. 6; opinions *per* Lord President and Lord Curriehill in *Heron* v. *Espie*, *supra*; *Wilson* v. *Wilson*, *supra*; Fraser's Husband and Wife, ii. 985. (2) If the heir had sold the reversion of the lease of the music hall, the profits would have gone to him, and therefore he must bear the loss. Rent was a proper charge against the heir. The lease not being subject to the widow's terce, she could get no benefit from it, and therefore she should not be subject to any loss arising therefrom—*Dundee Police Commissioners* v. *Straton*, February 22, 1884, 11 R. 586.

The third party concurred in the arguments stated for the first parties, with the exception that they argued that in a question between liferenter and fiar, the loss arising from the lease of the music hall should fall on the capital and not the revenue of the estate—*Ferguson* v. *Ferguson's Trustees*, *supra*.

At advising—

Lord President—The late Mr Hubert Rossborough died on 28th March 1887, leaving a settlement dated 8th June 1886 disposing of his whole estate. He was married to Miss Elizabeth Gifford, the second party in this Special Case, but there is no issue of the marriage.

The widow rejects the provisions made for her in the settlement, and claims her legal rights, and it is not disputed that she is entitled so to do.

Her rights extend to one-third of her husband's heritable estate and one-half of the moveable estate. Her interest therefore is to augment the amount of the moveable estate as much as possible, or, in other words, to enlarge the amount affected by her *jus relictæ* at the expense of the estate subject to the terce.

The greater part of Mr Rossborough's heritable estate consisted of bonds and dispositions in security on which he was infeft. The Act 31 and 32 Vict. c. 101, sec. 117, makes such securities moveable as regards the succession of the creditors therein, but with the express proviso that they shall continue heritable *quoad fiscum*, "and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband."

Where a widow claims her legal rights in opposition to her husband's settlement, all questions between her and the parties interested in her husband's succession must be settled as in a case of intestacy, for while the latter cannot found on the settlement to the prejudice of the former's rights, neither can the former take any benefit from the settlement which she has repudiated. The question therefore comes to be, what portion of the deceased's estate is to be considered heritable and what moveable in a ques

tion between the widow on the one hand, and the heir and executor respectively on the other. Now, the statute settles that question so far when it enacts that heritable securities shall be subject to the terce as heritage, and shall not pertain to the widow *jure relictæ*.

But as regards certain of the heritable securities in the present case, the widow contends that both the common law and the statute which declares and confirms the common law should receive no effect because of the steps which were taken by her husband before his death for the purpose of converting the heritable securities into moveable estate. These steps amount in substance to this—Of the entire amount of heritable bonds belonging to the deceased (£29,870) he had previous to his death demanded payment in the usual form of four bonds, amounting in all to £7250. In one case he had served the usual intimation and requisition for payment, but no further steps were taken. In another, after the expiry of the period for payment under the requisition, the subjects were advertised for sale, but had not been sold or exposed for sale. In a third, the subjects had been brought to sale, but had not found a purchaser. In the fourth, the subjects had been exposed for sale, and were actually sold. But the purchaser being unable to pay the price the contract of sale remained unfulfilled, and the purchaser obtained no title to the subjects.

In all these cases it is clear that the infeftment of the deceased as creditor stood undischarged and undisturbed, and afforded him at the time of his death precisely the same security over the same subjects as he acquired when he originally took infeftment on the bonds, excepting only any change in the value of the security subjects.

It is well settled law that the husband's infeftment at the time of his death is the measure as well as the security of the tercer's right, and that though the husband has actually sold his heritable estate, and the purchaser be ready to fulfil his contract and pay the price, yet if the purchaser be not infeft during the husband's lifetime, the right of terce will not be excluded. It seems needless to add (though the statute above cited has done so) that estate which is subject to the terce cannot be affected in any way by the *jus relictæ*.

The first question therefore falls to be answered in the negative.

As regards the second and third questions, Mr Rossborough was at the time of his death tenant of the Britannia Music Hall under a lease for twelve years from Whitsunday 1878 at a rent of £600. He carried on business there as a manager and purveyor of public entertainments, and realised profits from that business. But when his estate came into the hands of his trustees they were unable either to carry on the business or to find a purchaser for the unexpired term of the lease. They have accordingly wound up that business, and the hall is unoccupied, and instead of yielding revenue is an annual burden on the estate to the extent of the rent and taxes till the expiry of the lease at Whitsunday 1890.

It appears to me that this is a loss occasioned to the estate by the failure of a speculation in business, and falls to be charged against the moveable estate of the deceased in a question with the widow, and against the residue of the estate under the settlement in a question between the other parties to the case, and does not from any proper charge against the third party as liferenter.

Lord Mure—I agree in the opinion read by your Lordship, and having had the opportunity of previously seeing it, have nothing to add.

Lord Adam—The main question in this case is, whether the widow of the testator has a claim of *jus relictæ* out of the sums due under the six bonds amounting in all to £29,870 5s.? The bonds are mentioned in the case presented, and it is not disputed that they are all heritable bonds, and that the husband died infeft in the subjects over which the bonds were granted. Neither do the trustees dispute that the widow has a right of terce out of the bonds. On the contrary, they assert that she has such a right, and that is their principal reason for holding that she is not entitled to *jus relictæ*. *Prima facie* the right of the widow is one of terce, and terce only, but it is said—and it is the first question that we have to decide—that certain steps taken by the husband during his life with a view to realise the securities had the effect of rendering the bonds moveable, so as to give the widow a claim of half the amount due under the bonds as *jus relictæ*.

It is only necessary to consider the steps taken to realise the security as to the bond for £3000, because the steps taken with regard to that bond went a great deal further towards realisation than the steps taken under any of the other bonds. If the widow cannot succeed on the facts in the case of that bond, she cannot succeed as to the others.

With reference to that bond it is set forth in article 7 of the case that the security subjects were exposed for sale by public roup at the upset price of £5250. A purchaser appeared and offered the upset price, and was preferred to the purchase. The purchaser was unable to fulfil his bargain, and a charge for payment was served upon him, which was allowed to expire without payment being made. It is not relevant to consider what the trustees did after the testator's death, and therefore the proceedings are just these—The testator endeavoured to realise the security subjects, and they were knocked down to an intending purchaser for a certain sum, but the testator died without having got payment of the price, and still infeft in the subjects.

Now, in my opinion the widow is not entitled to *jus relictæ* out of that bond, but is clearly entitled to terce. There is no doubt that the husband's sasine is the measure of the widow's right, and no proceedings which have not the effect of evacuating the husband's sasine can preclude the widow's right. There are two authorities on the point, one a very strong authority. The first is the case of *M'Culloch* v. *Maitland*, July 10, 1788, M. 15,866, where certain lands were disponed by a husband and the disponee took possession but was not infeft in the lands. The husband died. The widow claimed terce out of the lands which had been actually disponed by the husband during his life, and were in the pos-

session of the disponee. The husband's sasine, however, had not been evacuated by the disponee becoming infeft, and it was held that the widow was therefore entitled to terce out of the lands.

The other case is the case of *Campbell* v. *Campbell*, February 17, 1776, 5 Brown's Supp. 627, and it is there said—"The husband's sasine, says Mr Erskine, b. 2, title 9, sec. 46, is the measure of the wife's terce; thus neither an heritable bond nor a disposition of lands granted by the husband if death has prevented him from giving sasine to the creditor or disponee can hurt the terce, and so the Lords found—'In respect that the deceased John Campbell was not at the time of his death denuded of the subject within mentioned by infeftment, but only by a title which remained personal: therefore find that Katherine Waddell, his relict, is entitled to a terce of said subjects, and not to a third part of the price thereof.'"

Now, it humbly appears to me that both of these cases are—one of them much—*a fortiori* of the present case. There was not only an intention to sell, but an actual disposition, not followed, however, by the infeftment of the disponee. The sasine stood in the husband's name, and with it the widow's right of terce. I cannot find circumstances so strong in the present case, and therefore I think these authorities are conclusive of this case, and it must be held that the widow has a right to terce, and that being so, the irresistible and only conclusion is that the securities being heritable and subject to the widow's right of terce, as a necessary consequence, are not subject to a claim of *jus relictæ*. I agree, therefore, with your Lordships in regard to the bond for £3000, that the only answer we can give is that the widow is not entitled to *jus relictæ* out of it. If that is true of that bond, it is also true of the rest, and so I agree that we must answer the first question in the negative.

I also agree with your Lordship as to the answer to be given to the second and third questions.

Lord Shand was absent.

The Court pronounced the following interlocutor:—

"In answer to the first question, Find and declare that the bonds mentioned in the case were not rendered moveable as to the relict by the steps taken to realise the securities, and that the second party is not entitled to any part of the sums contained in said bonds *jure relictæ:* In answer to the second and third questions, Find and declare that the loss occasioned to the estate of the deceased by the subsistence till 1890 of the lease of the Britannia Music Hall is occasioned by the failure of a speculation in business, and falls to be charged against the moveable estate of the deceased in a question with the widow, and against the residue of the estate under the settlement in a question between the other parties to the case, and does not form any proper charge against the third parties as liferenters, and decern: Find the first and third parties entitled to expenses against the second party."

Counsel for the First Parties—Ure. Agents—Campbell & Smith, S.S.C.

Counsel for the Second Party—Guthrie Smith. Agent—Adam Shiell, S.S.C.

Counsel for the Third Party—Vary Campbell. Agents—Campbell & Smith, S.S.C.

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*Wednesday, November* 28.

## FIRST DIVISION.

[Lord Fraser, Ordinary.

### WALES *v.* WALES.

*Jurisdiction—Burgh Court—Summary Ejection—Heritable Right.*

By a mutual disposition and settlement a husband disponed certain premises to his wife "in liferent, for her liferent alimentary use allenarly." After the husband's death his heir-at-law disponed the premises to the widow in fee. She married again, and, as liferentrix of the premises under her former husband's will, she presented a petition in a burgh court for ejection against her present husband. He lodged defences, on the ground that the disposition to the fee in favour of his wife did not exclude his *jus mariti* and right of administration. The burgh court granted decree of ejection. A suspension thereof at the instance of the husband *sustained*, on the ground that the question involved in the case was one of heritable right, and so beyond the jurisdiction of the Burgh Court.

A petition was presented in the Burgh Court of Stranraer by Mary Wales, praying to have her husband Robert Liddle Wales ordained to remove from certain premises, and in the event of his refusing to remove, for warrant to eject him.

The petitioner averred that by a mutual disposition and settlement dated 21st March 1867, executed between John M'Lauchlan (her former husband) and herself, John M'Lauchlan had disponed to her, in case she should survive him, "in liferent for her liferent alimentary use allenarly, whom failing and at her death to my own heirs, executors, and assignees whomsoever, in fee, all and whole my heritable and moveable estate," including the said property mentioned in the prayer of the petition; that she and her husband, the defender, had lived together in the said property, but that she had had to leave home owing to his ill-treatment, and declined to return to live with him; that she had legally warned him to remove, but he refused to do so.

The defender stated—"The pursuer acquired absolute right to the properties in question by disposition granted by William M'Lauchlan, land steward, Billown, near Castletown, Isle of Man, in her favour, dated the 16th and recorded in the division of the General Register of Sasines applicable to the county of Wigtown the 20th, both days of August 1873. The defender's right of *jus mariti* and right of administration are in no way excluded by the terms of said disposition, and no other deed has entered the record in any way affecting or restricting them." To which the pursuer answered—"Irrelevant. Admitted that the pursuer, as alimentary life-