divers debts are due from a person, and he pays money to his creditor, the debtor may if he pleases appropriate the payment to the discharge of any one of those debts. If he does not appropriate it the creditor may make an appropriation. But if there is no appropriation by either party, and there is a current account between them, as between banker and customer, the law makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side." The application of this rule, equally as before, excludes Mr Jackson's claim.

This was the opinion of the Court.

Agents for Jackson—Duncan, Dewar, & Black, W.S.
Agents for the Trustee—Melville & Lindesay, W.S.

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*Saturday, January* 15.

BRODIE *v.* BRODIE.

*Summons—Amendment—Expenses.* Several dates allowed to be corrected in the condescendence on payment of £10 of expenses.

The pursuer in this action sought divorce from his wife on the ground of adultery. In his condescendence he in three places stated 1868 for 1867, and in three places stated 1869 for 1868, in setting forth the occasions on which the occurrences were alleged to have taken place. Under section 29 of the Court of Session Act, he sought to have the wrong dates corrected. The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, opens up the record: Allows the pursuer to amend his summons in the terms proposed by him in the minute No. 32 of process, and the defender to make such alterations or additions as she may in consequence deem necessary: and decerns against the pursuer to make a further interim payment of £10 to meet the defender's additional expenses incurred by her under and in connection with said amendment." Leave having been obtained, the defender appealed against this interlocutor.

DUNDAS GRANT, for her, argued—Adultery is a criminal matter, and the Court of Session Act does not apply to such. It does not apply in cases of divorce. Decree in absence is not given in divorce cases.

FRASER in answer.

The Court adhered.

Agent for Pursuer—Lindsay Mackersy, W.S.
Agent for Defender—James Barton, S.S.C.

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*Saturday, January* 15.

## SECOND DIVISION.

SPECIAL CASE FOR ALEXANDER'S TRUSTEES AND BENEFICIARIES.

*Trust—Provisions to Widow—Rejection—Residue—Term of Division—Acceleration.* A party by his trust-deed provided an annuity to his widow, and directed his trustees to divide the residue of the estate among his children in certain shares "upon the death of my said spouse and the youngest of my said children having attained majority, or the whole of them being married, or in the event of my said spouse having predeceased me," &c. The truster was survived by his widow, and by six children, all of whom were married, four having issue and one only not having attained majority. The widow formally rejected these provisions in her favour, and elected to take her legal rights. *Held* that the repudiation by the widow of her conventional provisions operated in the same manner as her death; and, as it did not appear from the terms of the deed that the truster intended to postpone the terms of division for any other purpose than to secure the widow's provision, which by the election of her legal rights had become inperative, the period had now arrived for dividing the estate among the truster's children.

This was a special case brought under the recent Court of Session Act by the trustees of the late Mr John Alexander, builder, in which several questions in law with reference to Mr Alexander's trust-estate were submitted for the opinion and judgment of the Court. Mr Alexander died in the month of January, and was survived by Mrs Alexander, his widow, and six daughters, all of whom were married, four of whom had families, and of whom only one had not attained majority. By his trust-disposition and settlement he directed his trustees to give to his widow the free use of his furniture and plenishing, to pay to her £100 for mournings, and during all the days of her life a free annuity of £70. These provisions were formally rejected by Mrs Alexander, who elected to take her legal rights. With reference to the division of the residue of his trust-estate, his trustees were directed:—"Upon the death of my said spouse, and the youngest of my said children having attained majority, or the whole of them being married, or in the event of my said spouse having predeceased me, then, upon the youngest of my said children attaining majority, or upon the marriage of all my children," to make up a vidimus of the whole residue of his means and estate, and to divide them equally into as many shares as the number of his children then surviving, and of his children who may have died leaving lawful issue then surviving, his sons (of whom, however, none survived him) being entitled to their shares in fee, while the shares of his daughters were to be held by the trustees "for behoof of his daughters in liferent and for their children in fee." The main question upon which the parties desired to obtain the judgment of the Court was, Whether the repudiation by Mrs Alexander of her provisions under the trust-settlement, and her election of her legal rights, operated as an acceleration of the "term of division" of the trust-estate? and whether, in the circumstances of the case, the trustees are now entitled to proceed with the division of the estate as directed by the truster?

BLACK for Trustees.

MILLAR, Q.C., and NEAVES for separate beneficiaries.

At advising—

LORD COWAN—The main question raised in this special case—viz., whether the widow's rejection of her conventional provisions makes it the duty of the trustees to deal with the residue of the estate in the same manner as if the widow were naturally dead, is not unattended with difficulty.

The trust-settlement confers on the widow the liferent right of the truster's whole household furniture and plenishing, and directs the trustees to make payment to her of a free annuity of £70 during all the days of her life, in addition to the annual payment to which she would be entitled from the Merchant Company. These provisions were declared to be in full of her legal claims of terce and *jus relictæ*. In the view of these provisions forming a burden on the trust-estate, it appears to me that the 9th purpose of the trust, disposing of the residue of his estate, heritable and moveable, was expressed as it is, "*upon the death of my said spouse*, and the youngest of my said children having attained majority or the whole or them being married, or in the event of my wife having predeceased me, then upon the youngest of my said children attaining majority, or upon the marriage of all my children," a vidimus of the whole estate is to be prepared by the trustees with a view to its division among his children and their issue in the manner directed by the deed. It will be observed that, irrespective of the wife's death, which might or might not have happened during the truster's life, the period for division of the estate and the payment of their respective shares to the children is fixed to be the date of the youngest of them attaining majority or of all of them being married previous to that date. As among the children, therefore, their father had fixed the period when his estate should be divided and paid over to them, share and share alike, or set aside for their behoof. The division was to be made into so many shares as there were children then surviving, and of children who had died leaving lawful issue then surviving. The clause, however, commences with the words "upon the death of my said spouse," which apparently introduces a condition suspensive of the period for division and payment; but it has to be considered for what purpose those words were introduced into his settlement by the truster. Effect must be given to his intention so far as this can be gathered from the deed, and if the obvious purpose to serve which this condition has been inserted is satisfied or no longer exists, the inference seems to be but fair and rational that the truster's intention as to the period of division and payment of his estate to his children should not be thereby affected. This would have been the case had she predeceased her husband; and the same would have resulted from her subsequent death before the majority or marriage of the youngest child. At that period, then, it was that the truster evidently contemplated that his family should enter on the enjoyment respectively of their several shares in the succession. But the wife had an interest in respect of her liferent provisions in the trust-estate, which required to be guarded; and on this account it evidently was that the period of division and payment was made dependent upon her death. It by no means follows that the period fixed by the deed for his children entering on the enjoyment of his estate and taking a vested interest therein was intended to be thereby effected. At all events the widow's repudiation of her liferent provision put an end to the purpose of the clause by which her security was provided for; and it seems to follow that with her interest in the deed and the extinction of the liferent provisions the condition for her security should also fall, and become effete and useless. It is not conceivable on any rational ground that, being guarded against the children taking their provisions when in non-age, and fixed the majority of the youngest as the period for division and payment, the truster would have made the uncertain event of his wife's possible survivance to extreme old age, after she had ceased to have any interest under the deed in the trust-estate, the cause of an indefinite prolongation of the period when the beneficial interests of his children in his estate were to take effect. No reasonable motive for such a declaration by the truster can well be imagined. I think therefore there is good reason in this case for holding, as the Court held in the case of *Annandale* v. *Macniven*, 9th June 1847, that the widow, by repudiating the trust-settlement, placed the funds in the same situation as if the deed had contained no life provisions in her favour, and entitled all interested to a division on the same footing as if her interest under the deed had been extinguished by her death.

The residuary clause in the case of *Annandale*, just as in this case, contemplated the death of the widow, to whom the liferent of the estate was provided by the truster so long as she remained his widow, and if she married a second time restricted her provision to an annuity of £50. She repudiated the conventional provisions just as in the present case, and betook herself to her rights of terce and *jus relictæ*. In this *species facti* the Court held the act of the widow to operate the same effect upon the interests of the other parties under the settlement as if she had died—Lord Mackenzie observing, that "the obvious common sense meaning of the deed is, that after the widow's liferent comes to an end in any way there shall be a division, and that plainly was the truster's intention." Some hesitation was expressed by Lord Fullerton, on the ground that subsidiary interests in the estate might be thereby prejudiced. And no doubt this was the difficulty which the Court had to overcome in arriving at the conclusion which they did. For the trust-deed was so expressed as in appearance to postpone the vesting of the estate in the beneficiaries till the death of the widow—at least, as much as the expressions employed in this deed do. Only, on the death of the widow the beneficiaries were to take. But on the same grounds as their effect ought, as I think, to be disregarded in this case, the Court got over their effect in the case of *Annandale*, and that decision has in subsequent cases been recognised as an authoritative precedent when the same *species facti* is found to exist.

There is no doubt a distinction between this case and that of *Annandale*, the effect of which has to be considered. The trust-deed in that case had been executed on death bed, and was reduced *ex capiti lecti* by the heir-at-law. The heritable estate was thus taken out of the trust succession, and the personal or moveable estate alone remained under the management of the trustees. In this case the heritable as well as the moveable estate form the trust succession, and the heritable subjects under the management of the trustees are burdened with the widow's terce. To this legal burden these subjects have become subject by her repudiation of the deed. And it may be asked, how that division which the truster appoints can take place as regards these subjects while the widow survives. The answer appears to me clear enough. The widow, by procuring herself kenned to her terce will have a preferable claim to one-third of the rents of the whole heritage, in whomsoever vested, so long as she lives. But the exis-

tence of this legal burden cannot prevent a division of the subjects among the parties interested, subject to the catholic and preferable charge thereby created. The beneficiaries under the deed must take their several shares subject to this burden. That is all. The fee of the heritage and the rental, after satisfying the terce, will be in the beneficiaries taking their several shares in the estate, when divided and given over to them by the trustees, or held for behoof of them and their issue; and I fail to see any good ground for holding that the widow's right of terce should have the effect of delaying the apportionment and division of the subjects until her death. A *cumulo* feu-duty payable to the superior is exigible from any portion of the estate of the vassal, but this will not prevent the vassal from disponing the estate in portions either *inter vivos* or *mortis causa*. Assuming, therefore, the sound construction of the trust-settlement to be that the beneficiaries are now entitled to require a division of the estate, I do not think that the subsistence of the widow's terce should prevent effect being given to what appears to me consistent with the sound intention of the truster's deed of settlement.

I have abstained from noticing the cases referred to at the debate, all of which I have carefully examined, as the opinion I have formed proceeds upon a consideration of the special clauses and provisions of this trust-settlement, and the similarity of the circumstances in which the Court are called on to construe it with those which occurred in the precedent to which I have referred, and the authority of which I do not think any one of those subsequent decisions has at all weakened or impaired.

Being of opinion, for the reasons stated, that the first question should be answered in the affirmative, it is unnecessary to advert to the second question. And as regards the third question, I am of opinion that the sum of £1600 due to the bank, being heritably secured, is to be treated as a heritable debt in a question between the widow and the children.

The other Judges concurred.

Agent for Trustees—D. Curror, S.S.C.

Agents for Beneficiaries—W. Archibald, S.S.C., and H. W. Cornillon, S.S.C.

## *Saturday, January* 15.

### BELL *v.* PRESBYTERY OF OLNAFIRTH.

*Expenses—Presbytery—Manse—Repairs—Additions—Specifications—Heritor.* A Presbytery ordained the heritors of a parish to execute repairs and additions on a manse, one of the heritors objecting to anything but repairs. After the decerniture of the Presbytery they ordained the heritors to lodge plans and specifications, which was done, and these were ultimately approved of. The objecting heritor did not appear at this meeting. It afterwards appeared that the specifications approved of could not be executed under a sum more than double what the Presbytery had decerned for. On ascertaining this the heritor offered repairs and additions to the amount decerned for by the Presbytery, and offered to lodge plans and specifications to carry out his offer. This offer not being entertained, he brought a note of suspension of the deliverances of the Presbytery decerning for repairs and additions and approving of the specifications, but repeated his offer to expend the amount required by the Presbytery. The Lord Ordinary ultimately decerned in terms of a report obtained from a man of skill, (in which parties acquiesced) for a sum larger than the decerniture, but in proportion much less than the value of the specifications. *Held*, on the question of expenses, that success in the action had substantially been with the Presbytery, it being the duty of the complaining heritor to have stated his objections at the meeting for approving of the specifications; and judgment of the Lord Ordinary, allowing expenses to the Presbytery, subject to modification, adhered to.

This was a question between Mr Bell of Lunna, in the county of Shetland, and his marriage-contract trustees on the one hand, and the Presbytery of Olnafirth on the other. The Rev. Mr Levie, minister of Nesting, presented a petition to the Presbytery craving a visitation of his manse, with the view of having it repaired and procuring additions to it; and ultimately the Presbytery ordained the heritors to execute repairs and additions on the manse to the amount of £322. The complainer, Mr Bell, as one of the heritors in the parish, objected to more than repairs, which he maintained might put the manse into a proper condition at the cost of £83. After the first decerniture, the Presbytery ordained the heritors to lodge plans and specifications, with the view of implementing the decree of the Presbytery, and these were lodged on behalf of one of the heritors who had acquiesced in the decerniture for repairs and additions. The Presbytery finally approved of the plans and specifications. At the meeting of Presbytery at which this was done, the complainer alleged that he was not represented. The offers of tradesmen were not received for some time; but it ultimately turned out that the estimate put upon the specifications amounted to £696. On ascertaining this, Mr Bell wrote to the Presbytery intimating his willingness to expend £322 on repairs and additions to the manse, but objecting to the sum at which the specifications had been returned. The Presbytery not having answered this letter, Mr Bell brought a suspension of the decree of the Presbytery, but repeated his offer to accede to £322 being expended on the manse, and to lodge the necessary specifications. The Lord Ordinary (MANOR) made a remit to Mr Wardrop, architect, Edinburgh, to report on the case; and his report, in which parties acquiesced, was that a sum of £420 should be expended in additions and repairs according to a plan varying in some particulars from that of the specifications approved of by the Presbytery. The question then came to be, who had succeeded in the litigation? On the one hand, the heritor contended that, having relieved himself by his action of the difference between the appraised value of the specifications and the sum decreed for in terms of the report, he was entitled to expenses. On behalf of the Presbytery, it was maintained that it was the duty of the heritors to look after the specifications, and that if these were wrong, as alleged in the present case, the heritors were responsible for the error. The Lord Ordinary (ORMIDALE) found that the Presbytery had been substantially successful in the litigation, and found them entitled to expenses, subject to modification of one-fourth.

The heritor reclaimed.