The Court answered the question in the affirmative.

Agents for Lady Cuninghame—Dalgleish & Bell, W. S.

Agents for Mrs Vassall—Mackenzie & Black, W. S.

Thursday, November 2.

SECOND DIVISION.

KERR *v.* WIGNALL.

Widow—Legal and Conventional Provisions—Election. Circumstances in which *held* that a wife who survived her husband for only ten months had not made her election between her legal and conventional provisions under a deed of her husband.

Testament — Cheque — Delivery—Donation. There was found in the repositories of a gentleman on his decease a cheque dated ten years back, requesting a bank to pay to his wife "all the money deposited in your bank in my name when she presents this cheque." *Held* by Lord Gifford, and acquiesced in, that, there being no delivery real or constructive, the cheque constituted neither a donation *mortis causa*, nor a valid and subsisting testament.

Thomas Young and Grace Wignall were married on 6th September 1845. There was no contract of marriage. After her marriage Mrs Young succeeded to a considerable sum of money. On 15th September 1868 Mr Young died, survived by his widow, but leaving no children. Before his death he executed a liferent disposition *mortis causa*, by which he disponed to his wife in liferent, but that only so long as she should remain a widow, all his heritable and moveable estate, for her liferent use allenarly.

There was found in Mr Young's repositories after his death a cheque or letter holograph of him in the following terms:—

"*Bradford Banking Co.*

"Pay Grace Young or Wignall, my wife, all the money deposited in your bank in my name when she presents this cheque, and for her own use solely.

"THOMAS YOUNG,

"*Dec. 1st*, 1859."

When Mr Young died the sum deposited in his name with the said Bradford Banking Company amounted to £1813, 12s. 6d.

Mrs Young died on 16th July 1869, surviving her husband ten months only. During the greater part of that time she was in bad health.

The present action was raised by the next of kin of the late Thomas Young, against the executor of the late Mrs Young, and concluded for payment "of the whole capital sums and subjects, parts and portions of the estate and funds of the said deceased Thomas Young, uplifted, realised, and disposed of by her, the said Mrs Grace Wignall or Young, or by the defender, with the interest due and payable thereon from the date of Mrs Young's death, when her liferent right ceased and determined."

The defender pleaded—"(1) The cheque or letter addressed by the deceased Thomas Young to the Bradford Banking Company having constituted or instructed a reasonable provision, or a bequest or donation *mortis causa*, or donation *inter vivos*, in favour of the now deceased Mrs Young, of the sums deposited in the said bank in name of the said Thomas Young, the defender is entitled thereto as her executor, and to be credited therewith in this action. (2) The said Mrs Grace Wignall or Young having elected to claim her *jus relictæ* and terce, instead of the provisions conceived in her favour in the disposition executed by her husband, the defender, as her executor, is now entitled to the amount thereof. (3) Or if it shall be held that the said Mrs Grace Wignall or Young did not elect between her *jus relictæ* and terce and the said provisions, the defender is now entitled to claim the amount of the *jus relictæ*. (4) If the defender be held entitled to claim the amount of the said *jus relictæ*, and also the sum in the said cheque, whether as a reasonable provision as aforesaid, or as a donation *inter vivos*, or a donation *mortis causa*, or a bequest, he is entitled to decree of absolvitor in this action."

A proof was led, the import of which sufficiently appears from the interlocutor and note of the Lord Ordinary (GIFFORD), which is appended:—

"*Edinburgh, 19th April* 1871.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process, finds that the pursuers have failed to prove that the deceased Mrs Grace Wignall or Young, widow of the deceased Thomas Young, formerly chemist and druggist in Bradford, afterwards residing in Edinburgh, elected to accept, or did accept, the conventional provisions made in her favour in the liferent disposition *mortis causa* by her husband the said deceased Thomas Young, dated 17th January 1862; and finds that the pursuers have failed to prove that the said Mrs Grace Wignall or Young had in any way barred herself from repudiating the said liferent disposition, and from claiming her legal rights as the widow of the said deceased Thomas Young: Therefore finds, in point of law, that the said deceased Mrs Grace Wignall or Young was, at the time of her death, and that the defender as her representative is now, entitled to claim payment of or credit in account with the pursuers for the whole amount of the *jus relictæ*, and other legal rights of the said Mrs Grace Wignall or Young, as widow of the said deceased Thomas Young: Finds that the cheque No. 35 of process was never delivered, either actually or constructively, by the said Thomas Young to the said Mrs Grace Wignall or Young; and finds that the said cheque, being prior in date to the said *mortis causa* liferent disposition, the said Mrs Grace Wignall or Young was not entitled, and the defender as her representative is not entitled, to claim the funds or sums of money mentioned in the said cheque; and finds, *separatim*, that in the event of the defender, as representative of the said deceased Grace Wignall or Young, repudiating the said *mortis causa* liferent disposition, he is not entitled to claim the sums of money mentioned in the said cheque.

"*Note.*—Although the circumstances of this case are a little complicated, the questions at issue between the parties are substantially only two, viz.—*First*, Whether the late Mrs Young during her life elected to accept, and did accept, of the conventional provisions made in her favour by her husband's liferent disposition of 17th January 1862, and renounced or barred herself from claiming her legal rights? and *second*, Whether the late Mrs Young, in virtue of her husband's cheque, dated 1st December 1859, No. 35 of process, was entitled to the money in the bank therein mentioned? This second question has two aspects, for the

widow's rights under the cheque must be considered—(1) if it be held that she accepted her conventional provisions under the liferent disposition; and (2) if it be held that she was, and that her representative now is, entitled to repudiate, and does repudiate, the conventional provisions.

"The Lord Ordinary will shortly notice these questions in their order; but it will be seen that the second question in both its aspects has a very close and a very important bearing on the first question,—that is, on the question whether the widow did or did not accept of her conventional provisions.

"I. The Lord Ordinary is of opinion, upon the proof, that it has not been established that the late Mrs Young did during her life accept of the conventional provisions made in her favour in such a manner as to bar her and her representative from now repudiating these conventional provisions and claiming her legal right of terce and *jus relictæ*. The grounds upon which this opinion rests may be shortly indicated.

"(1) The time which elapsed between the death of Mr Young, on 15th September 1868, and the death of his widow on 16th July 1869, was comparatively short, only ten months; and during a considerable portion of that time—apparently the last four or five months thereof—Mrs Young's mind was, from ill-health, in a condition so enfeebled as hardly to be able to judge on the question of electing between her legal and conventional rights. It would therefore require something very explicit and unambiguous to bar the widow in such circumstances from claiming her legal rights.

"The *onus* of establishing that the conventional rights were finally accepted, and the legal rights finally renounced, lies entirely upon the pursuers. There is no presumption against the widow, but every presumption in her favour; and had the question arisen during her life—that is, prior to 16th July 1869—nothing short of express and unambiguous renunciation would have barred her from resorting to her legal rights. Especially during the *annus luctus* apparent acts of acquiescence in her husband's settlement will be disregarded, and, in general, there will be *locus penetentiæ* from even express statements of acquiescence, unless such resiling is barred *rei interventu* or otherwise.

"(3) The present case is a very favourable one for holding the widow's choice to have remained entirely open down to the date of her death. For the question whether she should elect to take her legal or her conventional provisions was a very difficult one, complicated by many important and conflicting considerations, involving what, to an unprofessional mind, must have seemed difficult and intricate calculations, and still further embarrassed by the possible rights which might arise under the signed and holograph cheque which Mr Young had left in his repositories—the claims upon which cheque might be materially affected by the widow's repudiating or not repudiating the liferent settlement. It humbly appears to the Lord Ordinary that the result of the whole proof is, that the widow, swayed sometimes in one direction and sometimes in another by these opposing considerations, had at the time of her death come to no final or irrevocable conclusion, but that it was then still open to her either to choose her legal or her conventional provisions. The choice was still before her; she had done nothing and said nothing which would prevent her from electing either the one or the other. It was not disputed on the part of the pursuers, that if the right of election remained open to the widow at her death, it must still be available to her representative.

"(4) Mrs Young, the widow, never executed any written or express acceptance of her conventional provisions. There is no deed of acceptance or homologation of Mr Young's liferent settlement, and no written renunciation of the *jus relictæ* or terce. There is no minute of friends or relatives at which the election was declared, and there is no letter or memorandum of any kind by Mrs Young intimating, however privately, what her choice was to be. This is very important, for the case of the pursuers is, that the election was fairly put before Mrs Young by her legal advisers, both in Scotland and in England, and that she deliberately exercised her choice. If so, it is very striking that by or through none of those professional advisers was the choice recorded, and that to none of them, even by a private note, did she ever intimate what the choice was to be. In the absence of express or written acceptance, the pursuers necessarily betake themselves to verbal statements, and to alleged acts by Mrs Young inferring acceptance and homologation of her conventional provisions.

"(5) The alleged verbal declarations of Mrs Young are of the vaguest and most inconclusive description. Her mind seems to have vacillated from time to time, according to the influence or idea which happened to be predominant. Sometimes it was respect for her husband's memory, who, she firmly believed, never intended to wrong her or to deprive her of the full control of money which had come to herself and not to her husband by succession. At other times she seemed disposed to acquiesce in Mr Romanes' calculations, and to take her conventional, as being in his opinion more valuable than her legal rights; but on other occasions, especially when with her friends in England, she seems to have been set the other way, and determined to claim her legal rights, and her latest express declarations seem to have been in this direction. The result is, she never was bound, she never finally committed herself, she never finally concluded her deliberations, or precluded herself from considering the matter again.

"(6) And, in this connection, it is important to notice that Mrs Young's statements, such as they were, were all made as it were confidentially to her own agents, or to her own intimate friends and relatives. There never was any statement of any kind made to what may be called the opposite party, that is, to her husband's representatives, or to any one acting for or representing them. There never was even an approach to a contract with her husband's next of kin, residuary legatees, or representatives; and it may well be doubted whether mere verbal statements made by the lady to her own confidential advisers, or to her own intimate relations, can ever be founded upon in any way by the representatives or next of kin of the late Mr Young, who were no way privy to the widow's deliberations, and with whom she never held any communication at all.

"(7) There remain only the acts done by Mrs Young, on which the pursuers found as implying homologation and acceptance of her conventional provisions. The Lord Ordinary thinks these acts quite inconclusive. The most explicit one is the agreement of lease which Mrs Young entered into with Mr Joseph Kerr, Earlston, on 1st October

1868, No. 41 of process. But this memorandum was executed only a fortnight after Mr Young's death, when admittedly the widow had not even begun to consider the question of election, had no means of doing so, and did not even know that such question arose. Her statement to Mr Martin in the beginning of 1869, that she would grant him a new lease for ten years, as her husband intended to do so, goes for very little. It was a mere statement of intention, and no such lease was ever granted. The other acts founded on, when fairly looked at, are really immaterial. Mrs Young, whether she accepted her conventional provisions or not, was her husband's executrix, and was acting as such under legal advice that her doing so would not prejudice her or prevent her in any way from claiming her legal rights. Her character as executor completely explains any acts apparently recognising her husband's settlement. The effecting of the insurance for £500 is quite consistent with the widow either taking or renouncing her legal rights, for although it is true that insurance was suggested as an expedient in case she should accept her conventional provisions, the insurance in that case was to be for £1750, then £1250; and there seems evidence to shew that one reason at least for reducing the amount to £500 was the doubt whether Mrs Young might not betake herself to her legal rights. Besides, all this question about insuring is *jus tertii* to the pursuers, who have nothing to do with any insurance which Mrs Young might choose to effect upon her own life, and seem hardly entitled to speculate upon the motives which might possibly influence her in effecting such an insurance.

"(8) It appears to the Lord Ordinary that Mr Romanes' calculations, on which Mrs Young is said to have resolved to act, turned out to be erroneous, and are subject to correction, and that the errors were discovered before Mrs Young had finally committed herself by an irrevocable choice. The errors consist—(1) In an under-statement of the rate of interest of monies in Mrs Young's absolute control; for although 4 per cent may be a fair rate of interest for trust-monies, an individual and uncontrolled investor may, with reasonable safety, secure 4½ per cent; and (2) the premium of insurance was understated. Mr Romanes assumed that Mrs Young could assure for £5, 5s. per £100, whereas in fact it cost £7, 1s. per £100 to effect insurance. If these corrections are made, the balance will be turned considerably the other way, and the legal rights would be shewn to be more valuable than the conventional ones, and this to a pretty large amount.

"(9) And then the contingency of Mrs Young entering into a second marriage was left out of view by Mr Romanes in his calculations, and apparently it was not adverted to by Mrs Young herself till it was brought prominently before her by Mr Paget, the solicitor consulted by Mrs Young's brother in England, in addition to Messrs Wood and Killick. But the contingency was not an unimportant one. Mrs Young was fifty-five years of age, and whatever may be thought of probabilities, which vary according to circumstances, it is impossible to say that the contingency should be left out of view, or that Mr Paget's advice, that it would not be wise to accept conventional provisions with such a limitation, was not a thoroughly reasonable and practical one. Such a consideration might very well, in doubtful circumstances, turn the scale; and there is some evidence that it did so with Mrs Young. But whether this be so or not, it is sufficient to hold that she never bound herself to renounce her legal rights.

"(10) But the open question about the effect of the cheque which Mr Young left uncancelled in his repositories is by itself, in the Lord Ordinary's opinion, enough to prevent it from being held that Mrs Young had finally and irrevocably made her election. It is obvious that the question, whether Mrs Young was to receive absolutely under the cheque a sum of no less than £1800, or was not to receive anything under the cheque, was the most material, and, indeed, altogether essential element in determining whether she should or should not claim her legal rights. She could not intelligently, or even rationally, exercise her election without having the question of the cheque also settled. Now, that question was always an open question to Mrs Young. It is an open question yet, and in the present process; and it has been seriously argued by the parties in its various alternatives. The Lord Ordinary is now, for the first time, deciding as to the effect of the cheque. Nobody is bound by any decision or agreement regarding it. Now, if this be so, how can Mrs Young be bound by an election into which this unknown element so seriously entered. It is plain that she herself, and her friends, always held that, in equity and justice, she had right to the sum carried by the cheque. She never gave up this claim; and, if it had been finally decided against her, it seems pretty clear that this would have removed all hesitation from her mind about claiming her legal rights.

"On the whole, the Lord Ordinary cannot say he entertains any serious doubt in holding that the election between her legal and conventional rights was open to Mrs Young at the time of her death. If so, it is admittedly open to her representative.

"II. The second question in the case remains, whether Mrs Young and her representative can, under the cheque, claim the sum lying in the Bradford Bank at Mr Young's death, being a sum of about £1800. The Lord Ordinary has felt this question in some aspects to be attended with difficulty; but he has come to be of opinion that the question must be answered in the negative, and that whether the widow's legal or conventional rights are claimed.

"(1) The cheque was undelivered at Mr Young's death. This is admitted and sufficiently proved. It was found in the deceased's repositories. The Lord Ordinary cannot hold that it was constructively delivered on the ground that a husband is the natural custodier of his wife's writs, for it was never even known to the wife or anybody for her, and the husband retained full control of, and actually drew from, the deposited money after the date of the cheque. The cheque therefore cannot be held to have constituted a *mortis causa* donation, for it wants an essential to such donation—that is, delivery, real or constructive.

"(2) Nor can the cheque be regarded as a subsisting testamentary instrument. It is not so expressed. It does not *in gremio* bear reference to the granter's death as the time when it was to be operative, and it is difficult to hold that there was more than an inchoate intention in the granter's mind to give his wife the money,—an intention, however, which he never carried out.

"(3) Even if the cheque *per se* and undelivered could be viewed as conferring on Mrs Young a

right to the balance in bank, the Lord Ordinary thinks that the cheque and the gift or bequest thereby constituted must be held as revoked by the liferent disposition subsequently executed by the husband. By that deed Mr Young gives his wife the liferent, 'for her liferent use allenarly,' of all his heritable and personal estate, 'which shall belong to me at the time of my death, wherever situated;' and he declares this provision to be 'in full to her of all claim for terce, *jus relictæ*, or any other claim, legal or conventional, competent to her or her representatives in the event of my death.' The sum in the Bradford Bank was undoubtedly personal estate, belonging to the husband at the time of his death, and it is difficult to hold that a 'liferent allenarly' of that sum, in full of all other claim, legal or conventional, was consistent at the time with a subsisting gift or bequest of the fee.

"But then it is said that the cheque, though bearing date 1st December 1859, must be held as of the date of Mr Young's death, like a testament, which is the last act of life. In a competition of testaments, however, it is the last in date which rules, and which revokes all prior in date and inconsistent therewith.

"Nor is it enough to say that the cheque is preserved from revocation by having been kept uncancelled by the testator, although he saw it, as is evidenced by two or more subsequent cheques having been cut from the cheque-book after the date of the liferent settlement. There are many motives which may induce a testator not to cancel or not to destroy a settlement or codicil which has become inoperative. He may wish to show what his intentions had once been. He may have in view the possibility of cancelling the later testament, or he may have no thought at all about the matter. But this will not prevent his last will from superseding all prior ones inconsistent therewith. It is impossible, and would be dangerous, to conjecture what the deceased's motives were for letting the old cheque stand in his cheque-book; and to act upon such conjectures would be to make a will for the deceased, and not simply to read and construe the will which he has made.

"(4) It is still more clear that in no possible view could Mrs Young or her representative claim the sum in the cheque if the liferent settlement is repudiated. and if recourse is had to the widow's legal rights. At best, the cheque and the liferent settlement must be read together as one deed or one settlement of the deceased's affairs. The widow and her representative cannot approbate the one and reprobate the other. This is the alternative view, as to which the Lord Ordinary has thought it right to make a separate finding.

"At the proof the parties mutually agreed to reserve all questions of vouching, and all mere questions of figures; and both parties concurred in asking the Lord Ordinary to decide the case by pronouncing such findings as would determine the rights of parties, and would enable them to adjust the accounting. This the Lord Ordinary has endeavoured to do in the foregoing interlocutor."

The pursuers reclaimed.

SOLICITOR-GENERAL and MACDONALD for them.

Without calling on GLOAG and MACLEAN, for the defender—

The Court adhered.

Agents for Pursuers—Paterson & Romanes. W.S.

Agents for Defender—Ronald & Ritchie, S.S.C.

Friday, November 3.

FIRST DIVISION.

DICKSON AND OTHERS *v.* BLAIR.

Sale—Heritage—Locus Pœnitentiæ—*Offer and Acceptance—Husband and Wife. Held* that an offer to purchase certain heritable subjects, held *pro indiviso* by two sisters, with acceptance thereof, did not constitute a completed contract of sale, in respect—(1) that the acceptance did not meet the offer; (2) that the consent of the husband of one of the sisters was not adhibited to the acceptance. *Held* further, that in the circumstances it was incompetent to prove the consent of the husband by reference to the oath of the husband and wife, in respect that their oath could not bind the other sister.

In March 1870 the defender Mr Blair offered to purchase certain heritable subjects in Causewayside, Edinburgh, held *pro indiviso* by the pursuers Mrs Dickson and her sister Miss Cowan. After some negotiations Mr Blair embodied his offer in the following letter, which he handed to one of the sisters:—

"7 *Livingstone Place*,

"Misses Cowan. *Edinburgh*, 11*th May* 1870.

"Madams,—I here make offer to you of the sum of four hundred pounds sterling (£400) for that northmost half of that house, together with the ground about the same, known by the name of the Broad Stairs, situated in Causewayside, Edinburgh, and the said price to be paid when titles are handed over to me or my agent, you giving a good and clear title, and the expense of transfer of title to be borne mutually by seller and purchaser. Entry to be given at Whitsunday first, when price will be paid.—I am, yours respectfully,

"ALEXANDER T. BLAIR.

"£400. 11*th May* 1870."

"*Note.*—My former offers to be cancelled.

"ALEX. T. BLAIR."

The following acceptance was returned:—

"*Edinburgh*, 12*th May* 1870.

"Mr Alexander T. Blair, Livingstone Place.

"Sir,—We accept of your offer of the 11th inst. for the property belonging to us in Causewayside, the price to be payable on your receiving a valid disposition, the expense of which, including stamp and revising, to be paid mutually by seller and purchaser. As we know of no encumbrances on the property, no search will be given; and you must take the title on that footing, or there is no bargain. Entry to be given Whitsunday first, at which time price will be paid.

"JANE COWAN or DICKSON.

"JESSIE COWAN.

"£400. 12*th May* 1870."

According to the defender's averments, these missives were exchanged in the presence of Mr and Mrs Dickson and Miss Cowan, and were entered into with the knowledge and consent of Mr Dickson.

The defender treated the transaction as a completed contract of sale, and made some arrangements with one of the tenants of the premises, by which the tenant agreed to cede possession in consideration of a payment of £7. He also appears to have executed certain small repairs on the premises.