and although I know that this decision has been doubted, yet I think it has never been either expressly or by implication reversed or overturned, and I hesitate to do so without calling in the Judges of the other Division. *Christie* v. *Patersone* was decided by the First Division, and although there were specialties in it—for example, the cousins were described as "*children of the brothers and sisters of my mother who shall be in life at my death*,"—still the decision is not put upon specialties, such as the meaning of the word "children," but upon the relationship of the legatees, and the judgment bears to be in respect of the cases *Wallace* v. *Wallace*, Mor. "Clause," App. 6, and *Mackenzie* v. *Holt*, Mor. 6602. *Wallace* was the case of nephew's children. In *Mackenzie and Holt* v. *Holt*, it was the children of relatives, but the precise degree of relationship does not exactly appear. I cannot, merely on account of the doubts which have been expressed as to *Christie* v. *Patersone*, absolutely reverse that decision, as I think we are now asked to do. I do not think the doubts expressed in *Rhind's Trs.* v *Leith*, 5 Macph. 104, warrant us, without calling on our brethren, in introducing another rule, especially as I am by no means satisfied that on general principles the rule should be so narrow as is now proposed.

The specialties in the present case seem to me strongly to favour the claim of John Cunningham's children, though here also I may well hesitate when I find myself in opposition to your Lordships. The testator bequeaths his whole estate, first to his father as sole and universal legatory, and it is only in case the father should die before him that he substitutes for his father his whole brothers and sisters. I think this seems to show that this was because they were all descended from the same father that the brothers and sisters were instituted residuary legatees. It was because they would succeed to the father that the testator made them his own successors, and for the same reason the tie of blood would apply to brother's children. They, too, will take not from personal reasons, but because they are the grandchildren of the testator's father. Still farther, there is no express institution of survivors—the brothers and sisters alone are named to take equally—and nothing is said of survivors, and although in a conjunct bequest the effect may be the same as if survivors had been called, it is certainly a stronger case for the issue of predeceasers taking their parent's share.

On the whole, putting myself in the testator's place, as I am bound to do by the true canon of construction, and reading the testator's words as nearly as I can in the sense in which he must have used them — and this is the way to gather the intention of the testator—I cannot help thinking that he did not intend to provide that if any of his brothers and sisters predeceased him leaving children, such children should be excluded from his succession.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the Special Case, are of opinion and find—(1) That the two shares of the estate of the late Charles Cunningham provided by him to his brothers Archibald and John, who predeceased him, have not lapsed into intestacy, nor either of them; (2) That the brothers and sisters of Charles Cunningham who survived him have right to these shares, to the exclusion of the children of the said deceased John Cunningham; (3) That the children of John Cunningham have no right to the share of the testator's estate provided to their father; and (4) That they have no right to a proportional part of the share provided for their deceased uncle Archibald Cunningham; and decern."

Counsel for the First Parties—M'Laren. Agent—John M. Bell, W.S.

Counsel for the Second Parties—Horne—Mellis. Agents—Bruce & Kerr, W.S.

Wednesday, January 19.

FIRST DIVISION.

[Lord Young.

MILNE *v.* MILNE.

Succession—Fee and Liferent—Mutual Settlement.

A husband and wife executed a mutual trust-disposition and settlement, whereby the former disponed his whole property, heritable and moveable, of which he might die possessed, "to and in favour of S. M., my wife, and on her decease to the heirs and successors of me." The wife's disposition was "to and in favour of" her husband "and his heirs and assignees whomsoever." There was a clause of reservation in the following terms:—"Reserving always to us, and each of us, our respective liferents of the means and estates above conveyed, with full power to us at any time during our joint lives to alter, innovate, or revoke these presents, in whole or in part, as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual though found lying by either of us at the time of his or her decease, or in the custody of any other person for our behoof, with the delivery whereof we have dispensed and hereby dispense for ever." The wife survived her husband.—*Held* that she had right to dispose at will of her own estate, but had only a liferent of her husband's estate.

On October 4, 1867, William Stanhope Milne, stationer, of No. 126 Princes Street, Edinburgh, and his wife, the pursuer in this action, executed a mutual disposition and settlement. He was proprietor of the tenement where he carried on his business, and of considerable personal property. The pursuer had succeeded on the death of her father to a villa at Morningside, Edinburgh, and to some personal property. Her husband had greatly improved this villa, although the title stood in the pursuer's name. There was no antenuptial contract of marriage between the pursuer and her husband, and there were no children of the marriage. By the mutual disposition and settlement Mr Milne gave, granted, assigned, and disponed "to and in favour of the

said Mrs Susan Mary Moffat or Milne, my wife, and on her decease to the heirs and successors whomsoever of me, the said William Stanhope Milne," his whole property, heritable and moveable, of which he might die possessed; and the pursuer disponed her estate in the following terms:—"And in like manner, I, the said Mrs Susan Mary Moffat or Milne, do hereby give, grant, assign, and dispone to and in favour of the said William Stanhope Milne, his heirs and assignees whomsoever," the whole estate, heritable and moveable, belonging to her at her death. These conveyances were made under burden on the survivor of the just and lawful debts and sickbed and funeral expenses of the deceased, and each appointed the other sole executor. There was a clause of reservation in the following terms:—"Reserving always to us, and each of us, our respective liferents of the means and estates above conveyed, with full power to us, at any time during our joint lives, to alter, innovate, or revoke these presents, in whole or in part, as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual though found lying by either of us at the time of his or her decease, or in the custody of any other person for our behoof, with the delivery whereof we have dispensed and hereby dispense for ever."

The wife survived her husband, who died on May 16, 1874, and was duly confirmed as his executrix, and she completed a title to the property in Princes Street as disponee of her husband and absolute fiar of his estate, both heritable and moveable. Her claims were resisted by the defender, as her husband's heir-at-law, on the ground that her sole right was one of liferent.

The pursuer therefore brought this action for declarator of her rights, and pleaded—"(1) The pursuer having survived her said husband, is, under the said mutual settlement, entitled to the absolute and uncontrolled right of property in the whole estates left by him, heritable and moveable, burdened as therein mentioned. (2) The pursuer having survived her said husband, is vested in and entitled to dispose at will of the whole property, heritable and moveable, which was by said mutual settlement disponed by her to her husband, his heirs and assignees.

The defender pleaded—"(1) The right of the pursuer to the subjects in Princes Street, which belonged to her deceased husband, being, according to the sound construction of the mutual disposition and settlement, one of liferent only, she is not entitled to decree of declarator in terms of the first conclusion of the summons. (2) The pursuer not being vested under the said mutual deed in the absolute right of her husband's personal estate, she is not entitled to decree in terms of the second conclusion of the summons."

The Lord Ordinary pronounced the following interlocutor:—

"3*d July* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the cause, Finds that the pursuer has only a right of liferent in the property referred to in the first and second conclusions of the summons: Therefore sustains the defences, and assoilzies the defender from the said conclusions of the summons, and decerns: Finds the pursuer liable in expenses, and remits the account to the Auditor to tax and report.

"*Note.*—The question in this case is, whether by the mutual settlement referred to the pursuer has the fee, or only a liferent, of her husband's property, The conveyance is to her, and on her decease to her husband's heirs; and the character of her right depends on whether the words import a direct gift to the heirs of the husband, to take effect in possession immediately on the decease of his wife, or only a destination to the husband's heirs to take in succession to the wife, and as her heirs, in case she did not dispose of the property, or alter the destination. I am of opinion that the former view is the sound one, and that the latter is contrary to the natural and obvious meaning of the words, and the intention of the parties who used them.

"Nor do I think that there is any rule of construction which requires me to put any technical meaning on the words employed, which is at variance with their natural meaning, and the impression which they make with respect to the intention of the parties using them. I quite see that a slight change of expression would convert what I view as a direct gift, to take effect on a specified certain event, into a nomination of heirs to the wife by simple destination; but taking the words as they stand, I am unable to resist the conviction that the right intended to be conferred on the wife was limited in its duration to her life, and that immediately on her decease the husband's own heirs were to have the property, not as her heirs by destination (and necessarily defeasible by her), but by the indefeasible force of the gift. This conviction is strengthened by contrasting the language of the conveyance by the husband (the meaning of which alone is in question) with that of the conveyance by the wife, which is in the ordinary form of a conveyance in fee, with a destination to heirs. I am persuaded that the intention of the parties would be violated if the same effect were given to both.

"It is not essential to a liferent that it shall be given in express terms, for it may be conferred by implication, or stand on reasonable construction.

"A gift to A, to take effect on the death of the donor's wife, without any disposal or direction for the disposal of the subject while the wife lives, will confer a liferent on the wife by implication.

"I was not referred to any Scotch authority on the subject, and have not myself searched for such authority.

"But the law is so settled in England, and the reason of it is, I think, obvious and satisfactory, and equally applicable in this country.

"It was suggested that by limiting the pursuer's right by construction to a liferent, a difficulty would arise on the doctrine that a fee cannot be *in pendente*. I do not think so. In the case of an express and direct gift in liferent and fee by the same conveyance, the fee vests in the fiar to whom it is given, although his right of possession and enjoyment is postponed or in abeyance during the subsistence of the liferent, and it can make no difference whether the liferent is given expressly or by implication. Whether or not the implication is warranted is the only question, and that depends on the true

construction of the words of gift, which cannot, so far as I see, be controlled or influenced by the doctrine that a fee cannot be *in pendente*.

"Being thus of opinion that the pursuer has only a liferent of her husband's estate, I must, with respect to that estate, sustain the defences and assoilzie the defender. This disposes of all the conclusions of the summons except the last, which relates to the conveyance by the pursuer to her husband and his heirs, and is for declarator that the pursuer, having survived her husband, is vested with property to which this conveyance refers, and is entitled to dispose of it at will.

"But the conveyance refers only to the property belonging to her at her death, and it is obviously impossible to declare that she is now vested with it, and entitled to dispose of it at will.

"The conveyance will carry the property, if any, which may belong to her at her death, to the exclusion of her heirs *ab intestato*, and I should think (though it would be premature at present to decide) that she cannot defeat it by *mortis causa* deed. But the conveyance imposes no restraint upon her in spending or dealing with her property in her lifetime, and had the record presented any question on this head, I should, as at present advised, have decided it in the pursuer's favour.

"The conclusion, as it stands, I can only regard as a blunder."

The pursuer reclaimed.

Authorities—*Young's Trs.* v. *Young*, 19 July 1867, 5 Macph. 1101; *Davidson* v. *Mossman*, 27 May 1870, 8 Macph. 807; *Dyer* v. *Carruthers*, 27 May 1874, 1 Rettie 943; *Dickson* v. *Sommerville*, 3 March 1865, 3 Macph. 602; *Lang* v. *Brown*, 24 May 1867, 5 Macph. 789; *Traquair* v. *Martin*, 1 Nov. 1872, 11 Macph. 22; *Welsh's Trs.* v. *Welsh*, 24 Oct. 1871, 10 Macph. 17; *Craich's Trs.* v. *Mackie*, 24 June 1870, 8 Macph. 898; *Ramsay* v. *Beveridge*, 3 March 1854, 15 D. 764; *Humphreys*, 4 Law Rep. Eq. 475 331.

At advising—

Lord President—This case raises a difficult question of the construction of a deed which contains a conveyance by each of the spouses in favour of the other.

In these two conveyances the same words are not used, and it cannot be held that they were intended to have the same meaning.

The conveyance by the wife is a conveyance "to and in favour of the said William Stanhope Milne, his heirs and assignees whomsoever, the whole estate, heritable and moveable, belonging to her at her death."

That this is an out-and-out conveyance *ex figura verborum* cannot be doubted, but it is contended that it was only to take effect if she predeceased her husband, and that as she has survived him, she can dispose of her own estate—not by revoking the deed, but because the conveyance by the form of the deed only takes effect if the husband survives, and the defender does not dispute this, and I do not see why this lady should not have decree, not exactly in terms of the third conclusion of the summons (which is for declarator that Mrs Milne is entitled to dispose at will of the whole property disponed by her to her husband), but to that effect.

On the other hand, the conveyance by the husband is "to and in favour of the said Mrs Susan Mary Moffat or Milne, my wife, and on her decease, to the heirs and successors whomsoever of me, the said William Stanhope Milne, his whole property, heritable and moveable, of which he might die possessed."

As to the meaning of this conveyance, there are two competing constructions—First, the defender maintains—and the Lord Ordinary has sustained the contention—that the wife has the liferent of both the estates, which on her death go to the heirs of the husband, the liferent and fee both vesting at the moment of the husband's death. The second construction contended for is that the conveyance was to the wife in fee with a substitution in favour of the heirs of the husband. Now, the words may bear either construction, and we must consider which is the most probable. In the first place, it is important to observe that the estate of the husband was much more considerable than that of the wife—her estate, in fact, consisting of a villa at Morningside, to which she succeeded on the death of her father. The husband's estate, on the other hand, is very considerable for a man in his position. Now, if the wife has the fee of the whole estate of her husband, the result is that she has absolute right to the entire estate of the husband and wife—and that although the husband has near relatives, and among them the defender, his brother.

Now that is not a very probable scheme to have been arranged between the husband and wife, nor is it a reasonable arrangement. It seems to me that the antecedent improbabilities are great, and are not diminished by the terms of the deed. The deed was drawn by a conveyancer, and if it was intended to give a fee to the wife with a substitution in favour of the heirs of the husband, he would probably have inserted the words "whom failing" before the words "heirs and assignees" of the husband. In that case I would have inclined to hold that a fee was given. On the other side it is said that if a liferent only had been intended it would have been very easy to say so.

Another consideration deserving of great weight, is that the clause of reservation of power to revoke is in these terms:—"Reserving always to us, and each of us, our respective liferents of the means and estates above conveyed, with full power to us, at any time during our joint lives, to alter, innovate, or revoke these presents in whole or in part, as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual though found lying by either of us at the time of his or her decease, or in the custody of any other person for our behoof, with the delivery whereof we have dispensed and hereby dispense for ever."

Now, that power could be exercised by the spouses only jointly, and not by the servivor, and amounts to a prohibition against the survivor revoking, and the Dean of Faculty argued, that if the spouses were anxious to prevent the surviving wife from revoking it was an anomalous thing for them to make her mistress of the whole. I think there is great weight to be given to that argument, and combined with the other points to which I have referred, I agree with the Lord Ordinary. It will be necessary, however, to make an addition to his interlocutor,

to the effect that the pursuer is entitled to decree in terms of the third conclusion of the summons.

The other Judges concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel on the reclaiming-note for Mrs S. M. Moffat or Milne against Lord Young's interlocutor of 3d July 1875, Adhere to the said interlocutor, and refuse the reclaiming-note: Farther, in respect that no defence has been stated against the third conclusion of the summons, and that the defender does not dispute the right of the pursuer to dispose of her estate, notwithstanding the conveyance contained in the mutual disposition and settlement by her and her deceased husband, find and declare that the pursuer, having survived her husband, is vested in and entitled to dispose at will of her whole estate, heritable and moveable; and decern."

Counsel for Pursuers—Balfour—W. C. Smith. Agents—W. & J. Cook, W.S.

Counsel for Defenders—Dean of Faculty (Watson)—J. A. Crichton. Agent—William Steele, S.S.C.

Tuesday, January 18.

SECOND DIVISION.

[Sheriff of Forfar.

BRANDT & CO. *v.* DICKSON (LUMGAIR'S TRUSTEE).

Sale—Suspensive Condition—Mala fides.

A contract for the sale of a quantity of flax was entered into, in terms of which the price was to be payable by draft at four months from the date of sale. The flax was despatched by the sellers to the purchaser, and upon the day following they forwarded to him an invoice showing the price, and a bill at four months for acceptance. The flax was received at the purchaser's warehouse by his manager upon a Saturday, and upon the following Monday the purchaser had the first intimation of its arrival by seeing it at the warehouse. In the course of that day, in consequence of a communication received, he resolved to suspend business, and accordingly did not accept the bill nor pay the price, but ordered the flax to be set aside. *Held*, in an action for delivery of the flax at the instance of the sellers against the trustee upon the purchaser's sequestrated estate, that although they (the sellers) had failed to prove that the purchaser was in bad faith in taking delivery, they were entitled to recover the flax in respect that the delivery was not complete, the transfer of the property having been suspended until the bill was granted for the price, and the purchaser not having implemented that condition.

This was an appeal from the Sheriff-court of Forfar in a petition at the instance of Richard Brandt & Company, which set forth that they had, upon the 24th day of November 1874, sold to Robert Lumgair, merchant in Arbroath, about 10 tons of flax at £40, 10s. per ton, payable by draft at four months from the day of sale. It was further stated "that the said flax was forwarded by the petitioners to the respondent by railway on the 27th day of November last, and on the day following they forwarded the invoice thereof, showing the amount or price to be £401, 17s. 7d., and they at same time sent a bill for the said price, payable four months after date, for acceptance, conform to letter by the petitioners to the respondent, and copy invoice also herewith produced. That the respondent took delivery of the said flax on its arrival at Arbroath, but did not accept the said bill, and did not pay the said price. That at the time of purchasing the said flax the respondent was, and still is, in insolvent circumstances; and in particular, on Friday the 27th day of November last, when the said flax was forwarded to him, and when he took delivery of it on Saturday the 28th of November, he was in insolvent circumstances, and after communicating with his principal creditors as to the state of his affairs, he, on Monday the 30th of said month of November, suspended payment. That this state of matters was unknown to the petitioners, and the respondent represented or conducted himself to them as a person in good credit, and on this footing alone they dealt with him and delivered the flax."

In these circumstances the petitioners prayed the Sheriff to interdict the respondent, or any one coming in his room, from selling or disposing of the flax, and to ordain him to deliver it to them.

To this petition Mr Lumgair appeared at first as respondent, but afterwards Mr Dickson, banker in Arbroath, the trustee upon his sequestrated estates (and whose appointment had been confirmed by the Sheriff on 28th December 1874) was sisted in his room.

In their record in the Court below the petitioners rested their case upon the ground that Mr Lumgair being insolvent when he accepted delivery of the flax, did so in bad faith. On the other hand, the defence consisted in a denial of the fact of Mr Lumgair's insolvency at that particular date.

On 4th March 1875 the following interlocutor was pronounced by the Sheriff-Substitute (ROBERTSON):—"The Sheriff-Substitute having heard parties' procurators and made avizandum with the closed record, Finds in law that a buyer who finds himself to be insolvent and unable to perform his engagements may and ought to reject goods he has purchased when offered for delivery: Finds that if he takes delivery under such circumstances a fraud is committed on the seller, of which the buyer's creditors can take no advantage: Finds in the present case that as insolvency was announced almost immediately after the purchase and delivery of the goods, the *onus* of proving solvency lies on the respondent: Finds that the *onus* of proving the bankrupt's knowledge of insolvency lies on the petitioner: Allows a proof to both parties accordingly of their respective averments, and to each conjunct proof; and appoints the case to be enrolled to fix a diet."