the nature of the tenant's rights? He is entitled to demand "compensation for the unexpired term or interest in such lands"—that is, the lands taken. That is what the statute gives him, and it also gives him compensation for severance damage to the lands where only part of the lands is taken. Here a part of the lands was taken, not by any act of the landlord, but by the railway company under the authority of Parliament, and he is entitled to get compensation for the loss or the profit he might have made out of the lands. He is directed to make his claim for this compensation against the railway company, but he has not done so, and he now seeks to have a deduction made from the rent he has to pay to the landlord. It is hard that he should be in the position of a party who cannot plead such a set-off to his landlord's claim for rent, but we are here dealing with a statutory matter, and the statute gives the tenant no such redress as he now seeks.

Lord Shand—In the recent case of *The Queen* v. *Great Northern Railway Company*, in the Queen's Bench Division, it was held that although the lands were held under a written lease for a period of years, yet if at the date when the lands were taken the tenant's interest was no greater than for one year, the case falls under section 121 of the English Act, which corresponds to section 112 of the Scotch Act. I see great reason and convenience in this result, and I am not prepared to express any doubt here. Taking the case so, the tenant has a claim for a just allowance for any injury he has sustained through the loss of the lands, and he has also a claim for severance damage. That is the substance of his claim. It is quite clear that it is a claim which the tenant may make against the railway company—which he is just as much entitled to make as the landlord is entitled to make his claim for compensation for the loss he has suffered from the lands having been taken away. The view of the Sheriff is that the landlord has got the price of the lands purchased, and having got that he is not entitled also to have the rent of these lands, and that the tenant is entitled to a corresponding abatement of rent, and for any just profits he might have made. And it is further said that the landlord has got too much by way of compensation from the railway company. I am not at all sure that he has got too much, for besides what he gets himself he expressly reserves to the tenant all his rights. Even, however, if it could be shown that the landlord has got too much, that would not entitle the tenant to receive any part of it. I do not think that under the 114th section the tenant is entitled to make any claim against the landlord, but only against the railway company, unless, indeed, it could be shown that by arrangement the landlord has made a claim against the company, not only for himself, but also on behalf of the tenant. But here, on the contrary, the landlord, as I have said, expressly reserves the tenant's claim. On the whole matter, therefore, I think we should revert to the judgment of the Sheriff-Substitute.

The Lords recalled the interlocutor of the Sheriff, and of new found in terms of the interlocutor of the Sheriff-Substitute.

Counsel for Appellant—Guthrie Smith—Dickson. Agents—Henry & Scott, S.S.C.

Counsel for Respondent—R. Johnstone—Wallace. Agents—Welsh & Forbes, S.S.C.

Wednesday, November 30.

SECOND DIVISION.

[Lord Adam, Ordinary.

HEWAT *v.* ROBERTON.

(Before the Lord Justice-Clerk, Lords Craighill, and M'Laren.)

Agreements and Contracts—Residue—Jointure—Construction—Acquiescence.

A widow who had right to a certain jointure and to the income of the residue of her husband's estate, in virtue of various deeds of settlement executed by him, lived for nineteen years after her husband's death with her son, having executed a deed of agreement whereby she undertook to pay him one-half of the income of the residue of the estate to which she had acquired right from her husband, and paid him one-half of her whole income arising from all sources. An action raised twelve years after her death by a daughter against the said son for count and reckoning, on the footing that the terms of the agreement did not include the jointure provision, *dismissed*, in respect of the terms of the agreement and the actings of parties.

John Roberton of Lauchope died in the year 1850, survived by his wife, who died on 15th Dec. 1869 in her ninety-eighth year, and by four children—William, his eldest son, who succeeded him in the estate of Lauchope, and who died on 30th December 1856; by a daughter Helen, who became Mrs Perston, and died shortly after him; by his younger son James; and by a daughter Catherine, who became Mrs Hewat. By antenuptial contract of marriage entered into between Mr and Mrs Roberton, of date 21st June 1805, Mrs Roberton was provided, in the event of her surviving her husband, with an annuity of £100 and the liferent of the mansion-house and furniture of Lauchope. These provisions, however, were superseded by the provisions subsequently bequeathed to her by her husband in his disposition and settlement and codicils thereto. By disposition and settlement, dated 20th Dec. 1830, Mr Roberton disponed and conveyed to his eldest son William his whole means and estate, heritable and moveable (except the moveable furniture in Lauchope House, which he conveyed to Mrs Roberton in liferent in the event of her surviving him), but *inter alia*, under the burden of paying an annuity of £400 to Mrs Roberton and of providing to her the free liferent of the mansion-house, offices, and garden of Lauchope, or, in his option, of paying to her an additional annuity of £100. The provisions contained in the settlement in favour of the younger children of the marriage were not to come into effect during their mother's widowhood, and accordingly it was provided that Mrs Roberton should maintain them at bed and board in her own house during her lifetime, but that should they decline to live with her or marry, she should not be bound to contribute to their

support, and, on the other hand, should she prefer to live separate from them, she was bound to pay an annuity of £50 to each of them she should decline to take into her house. The daughter Helen was married to Mr Perston in 1834. Her father then came under an obligation in her marriage-contract to pay to her and her husband an annuity of £50 after his death and during his widow Mrs Roberton's survivance. By codicil, dated July 30, 1834, which was signed by Mrs Roberton, he declared that as Mrs Roberton would by her daughter's marriage be relieved of the expense of her maintenance, she should be bound to pay this annuity out of the jointure provided to her by the deed of settlement.

Mr Roberton further, by a codicil dated July 29, 1840, which proceeded on the narrative of an agreement he had entered into with his son William, by which he had given up to him the mansion-house, offices, and garden at Lauchope, recalled the liferent thereof which he had previously given to Mrs Roberton, and appointed his son to pay to her the additional annuity of £100 provided by the settlement in lieu thereof. He further gave and disponed to Mrs Roberton, and bound William as his general disponee to convey and dispone to her, the liferent of Lauchope Cottage and offices, and of all the lands and estate, heritable and moveable, which should belong to him at his death, except the lands of Lauchope, which had already been conveyed to William Roberton, and also gave her the liferent of all sums of money belonging to him, after paying William Roberton the sum of £8000 which he had bound himself to pay by the before-mentioned agreement.

On her husband's death, therefore, in 1850, Mrs Roberton was entitled under his settlement to an annuity of £400, and to an additional annuity of £100 in lieu of the liferent of Lauchope House, &c., but under the burden of maintaining her unmarried younger children and of paying the annuity of £50 to Mr and Mrs Perston; she was also entitled to the liferent of the furniture in Lauchope mansion-house, and to the liferent of Lauchope Cottage, and of the income of the residue of the whole estate, heritable and moveable.

By the codicil of 30th July 1834 Mr Roberton, on the narrative of the marriage-contract of his daughter Helen and Mr Perston, and that he had bound himself to pay the trustees therein mentioned, upon the first term after the death of the longest liver of himself and his wife, the sum of £2000, to be applied by them as therein mentioned, and that this was in full satisfaction of the £2000 provided by the disposition and settlement to Helen Roberton and her children, restricted the sum of £8000 which was directed to be paid to the foresaid trustees under the disposition and settlement to the sum of £6000.

He further conveyed to James Roberton the whole furniture liferented to Mrs Roberton.

By a contract and agreement entered into between Mr Roberton and his son William, Mr Roberton, in consideration of an annuity which William agreed to pay to him, bound and obliged himself to convey to William the lands of Lauchope and to pay him a sum of £8000, in consideration whereof William bound himself to pay to Mr Roberton an annuity of £1000, and to pay to Mrs Roberton in the event of her surviving her husband the annuity of £350 provided by the disposition and settlement and codicils, and to allow her the liferent of the mansion-house of Lauchope, or to pay her in lieu thereof an additional annuity of £100, to pay the sum of £6000 to the foresaid trustees under the disposition and settlement six months after his father's death, to pay the annuity of £50 provided to Mr and Mrs Perston and the sum of £2000 to their marriage-contract trustees, and also to discharge certain other obligations of Mr Roberton — in consideration whereof Mr Roberton conveyed and disponed to William Roberton the lands of Lauchope, but under burden of the foresaid annuities and sums of money, which were declared real burdens over the lands. In pursuance of this arrangement Mr Roberton left Lauchope mansion-house, and resided till his death at Lauchope Cottage, which was a smaller house built on some adjacent property—William at the same time taking up his residence at Lauchope mansion-house. William also obtained possession of Lauchope estate, but it was admitted that his father did not pay to him the £8000 during his lifetime, and, on the other hand, it was admitted that William paid his father an annuity of £600 only in place of the stipulated annuity of £1000, the difference being met apparently by the interest of the unpaid £8000.

Mr Roberton died on 4th April 1850, and Mrs Roberton went to live with her son William at Lauchope House—of the furniture in which she was entitled to the liferent—and she continued to live with him till his death on 30th January 1856. William Roberton paid to the trustees under the settlement, as the residue of Mr Roberton's estate, the sum of £7500, and also a sum of £8000 to meet the widow's jointure and the younger children's provisions. Mrs Robertson was entitled during her life to the income of both these sums.

Under his father's settlement James Roberton was left during his mother's life without any provision except a sum of about £31 a-year from certain property in Glasgow. Being a married man, he had no legal claim upon his mother under the provision in the settlement by which she was bound to support the younger children of the marriage. It seemed proper, therefore, that some provision should be made for his maintenance, and it was understood between Mrs Roberton and her husband that he should be properly provided for. Mrs Roberton accordingly entered into an agreement with James, her son, with reference to that matter, of date 23d July 1850, which was in the following terms:—"The parties considering that by the deed of settlement of the said John Roberton a liferent was given by him of the residue of his whole estate (exclusive of the portion thereof previously disponed to his eldest son William) to the first party, but on the understanding between her and the said John Roberton that she was to provide in a suitable manner for the maintenance of the second party during her lifetime, and considering that the parties hereto have arranged to their mutual satisfaction on the terms underwritten, Therefore it is hereby provided and agreed as follows:—1. The first party hereby gives up and renounces to the second party the liferent of Lauchope Cottage, garden, and offices, and the whole ground on the south side of the road between Glasgow and Edinburgh, with the whole furniture, plenishing, stock, and

cropping thereon, and she hereby lets and locates the same to him during her lifetime, his entry and possession to commence at the date hereof: 2. It is hereby agreed that during the lifetime of the first party the interest and annual proceeds of the whole of the residue of the said John Roberton's estate shall be collected by William Towers, writer in Glasgow, and that after paying the provision of £50 per annum secured to Mr Matthew Perston by his contract of marriage with the late Helen Roberton, and the annual interest of the provision made by the said John Roberton to Matthew Carolan, and the expenses of management, the free proceeds of the annual income of the said residue shall be divided equally between the parties hereto, and that at two periods in each year, viz., on the first of June and the first of December."

It was this agreement which gave rise to the present action, in which the pursuer Mrs Catherine Roberton or Hewat, as sole executrix and universal legatory of her deceased mother Mrs Roberton, sought to have her brother James Roberton ordained to pay the sum of £5752, 10s. sterling, with interest at 5 per cent. per annum on £3900 thereof, being principal, from 15th May 1869 till payment.

The above narrative of the facts of this case is taken from the judgment of the Lord Ordinary.

The ground of action was stated by the pursuer in the ninth article of her condescendence, which ran in the following terms:—"The result of the said minute of agreement was that Mrs Roberton senior gave up one-half of the income derivable from the residue settled upon her by her husband in favour of the defender, besides allowing him to occupy gratuitously Lauchope Cottage and grounds, and other land attached thereto, but under the agreement she did not relinquish any part of her life annuity or jointure of £400. Mrs Roberton senior frequently afterwards complained that she was not made aware, and she was not in fact aware, of the import and effect of the said agreement at the time she signed it. Further, under colour of the said agreement the defender unwarrantably retained and applied for his own use one-half of the jointure of £400 settled by John Roberton on his widow, and in respect thereof he is resting-owing to the pursuer, as sole executrix and universal legatory of her mother, under her last will and testament, and codicil mentioned in the summons, in the sum of £5752, 10s. as at Whitsunday 1869, with interest on £3900 thereof, being principal, at 5 per cent. per annum, till payment."

With reference to the intromissions of the defender with other sums under the said agreement, the pursuer expressly reserved her right to challenge the agreement, and her right to recover all sums that might have been withheld from her mother over and above the half of the jointure, which she maintained did not fall under the agreement, but yet under cover thereof had been withheld from her mother.

She pleaded—"(5) The defender having unwarrantably retained and applied to his own uses one-half of the jointure of £400 a-year settled by John Roberton on his widow, from and after Whitsunday 1850, the pursuer, as executrix and universal legatory foresaid, is entitled to decree therefor, with interest thereon, in terms of the conclusion to that effect. (6) The alleged agreement of July 1852 could confer no right on the defender to any part of the widow's provisions, in respect that the settlement of Mr Roberton senior declared these to be alimentary, and not assignable."

The defender pleaded—"(1) The statements of the pursuer are not relevant or sufficient to support the conclusions of the action. (2) The statements of the pursuer being unfounded in fact, the defender should be assoilzied. (3) The pursuer's alleged claims were barred by prescription, *mora*, and acquiescence."

Mr Towers Clark, writer in Glasgow, who managed the trust-estate, and was cognisant of the execution of the agreement, stated in a letter to the defender that Mrs Roberton had anxiously considered the terms of the agreement of 1850; and from the sederunt-book of the trustees, and certain receipts produced, it appeared that up to the death of Mrs Roberton the trustees had acted on the footing that the whole of the widow's income should be divided between her and her son, and had paid the income as it fell due to the son that he might so divide it. One or two receipts were signed by Mrs Roberton herself.

The Lord Ordinary (ADAM) assoilzied the defender from the conclusions of the action. He appended the following judgment, in which after narrating the facts he said:—It is under the second clause of the agreement that the question arises. "The pursuer maintains that the defender James Roberton was under it only entitled to one-half of the income of the residue of John Roberton's estate—that is, the residue as left to Mrs Roberton by the codicil of 1840. The defender, on the other hand, maintains that he was entitled to one-half of the whole income which she derived from her husband's estate. The income which she derived from her husband's estate was her jointure or annuity of £400, *plus* the income of the residue of the estate left her by the codicil of 1840, so that the question between the parties practically comes to this—Whether Mrs Roberton intended to give up to her son one-half of her jointure as well as one-half of the income of the residue? It is no doubt true that throughout the settlement and codicils the jointure or annuity is treated as quite distinct from the income of the residue of the estate. The ultimate destination of the sum set apart to meet the annuity and the younger children's provisions is different from that of the residue of the estate, and it appears to me that had the question depended on the construction of Mr Roberton's settlement and codicils, the income derived from the sum so set apart could not have been considered as income arising from the residue of his estate.

"The question, however, does not primarily depend upon the construction of Mr Roberton's settlement, but upon the construction of the agreement itself, and it appears to me that the word 'residue' as there used does not mean the same thing, and is not used in the same sense, as in Mr Roberton's deeds. I think the agreement itself explains the sense in which it is used. The agreement proceeds on the narrative that by Mr Roberton's deed of settlement a liferent was given by him to Mrs Roberton of the residue of his whole estate, exclusively of the portion previously disponed to William Roberton. In point of fact, there was given to Mrs Roberton the liferent of Mr Roberton's whole estate after payment of debts, and it is in that sense that the word 'residue' is

used in the agreement. The whole estate is treated as residue except that portion conveyed to William. There is no exception of the £8000 which was to be set aside to meet the younger children's provisions. That this is so also appears from the direction to Mr Towers, who was to collect the income of the residue, and to pay out of it before division the annuity of £50 secured to Matthew Perston. By the codicil of 1834 Mrs Roberton was bound, and she bound herself, to pay this sum out of the jointure provided to her by the deed of settlement. Had it been intended that Mrs Roberton should get her jointure of £400 over and above one-half of the income from the rest of the estate, she would, no doubt, have been left to pay their annuity of £50 out of it. But if it was intended that the income of the whole estate should be equally divided between them, then it became necessary that this payment should be made before division, as otherwise it would have remained a burden on Mrs Roberton. It was because Mr Towers was to intromit under the agreement with the income of the £8000, as well as of the rest of the estate, that he was directed to pay this sum. I am therefore of opinion that the defender is right in his construction of the agreement, and that it was intended to give him one-half of the whole income derived by his mother from her husband's estate, and it is difficult to come to any other conclusion than that the parties themselves so understood it, seeing that they all along acted upon that construction of it.

"Mrs Roberton lived for upwards of nineteen years after the agreement came into operation, and during all that time she was settled with on the footing that the whole income of the estate was to be equally divided between her and her son. She died upwards of eleven years ago, and it is only now that that construction of the agreement is challenged.

"I am therefore of opinion that the pursuer's claim is not well founded, and that the defender must be assoilzied from the conclusion of the action applicable to it."

The pursuer reclaimed, and argued—Mrs Roberton was not in full possession of her faculties at the time she entered on the agreement. But even if she was, the defender had not taken a sound view of the construction to be made of the agreement with reference to the previous settlements. In them there was a clear distinction between the annuity which was to be secured by a sum of £8000 to be paid to trustees on John Roberton's death, and which was declared to be alimentary and unassignable, and the liferent of the residue which was given by a later codicil and made a personal burden upon the eldest son William Roberton.

Authorities—*Mackenzie* v. *Mackenzie's Trustees*, June 12, 1873, 11 Macph. 681; *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786.

The defender replied—The averment as regards Mrs Roberton's state of mind was untrue. On a sound construction of the agreement the defender was quite entitled to one-half of the whole income which his mother derived from her husband's estate. The sederunt-book and a few receipts showed that the division had been made and the income paid to the son that he might divide it between himself and Mrs Roberton on these terms. Mrs Roberton had consented to this construction of the agreement during twenty years, and the pursuer could not now competently come forward and aver that her mother meant something different. The plea that the annuity was unassignable might possibly have been available if this had been an action at the defender's instance against his mother for half of her jointure under the agreement, but the fact that she had of her own free will allowed her son during her lifetime half of her jointure, barred the pursuer in objections brought after her death.

The Court made avizandum with the case.

At advising, the Lord Justice-Clerk delivered the opinion of the Court in the following terms:—The Lord Ordinary in this case has gone very carefully over the different instruments on which to a certain extent it depends, and has given so clear a narrative of the facts, as far as we have them disclosed, that I think it quite unnecessary to preface the remarks I am now to make by any resumption of these preliminary matters.

The facts being so—as they are stated by the Lord Ordinary—it becomes necessary to attend with care to the demand which is made in this action, and the precise legal category on which it proceeds. This is stated in the ninth article of the condescendence, which is as follows. It first narrates the minute of agreement in 1850, and then proceeds thus—"The result of the said minute of agreement was that Mrs Roberton senior gave up one-half of the income derivable from the residue settled upon her by her husband in favour of the defender, besides allowing him to occupy gratuitously Lauchope Cottage and grounds, and other land attached thereto, but under the agreement she did not relinquish any part of her life annuity or jointure of £400. Mrs Roberton senior frequently afterwards complained that she was not made aware, and she was not in fact aware, of the import and effect of the said agreement at the time she signed it. Further, under colour of the said agreement the defender unwarrantably retained and applied for his own use one-half of the jointure of £400 settled by John Roberton on his widow; and in respect thereof he is resting-owing to the pursuer, as sole executrix and universal legatory of her mother under her last will and testament and codicil mentioned in the summons, in the sum of £5752, 10s. as at Whitsunday 1869, with interest on £3900 thereof, being principal, at 5 per cent. per annum, till payment."

Now, that is the ground of action, and under it the pursuer requires the defender to account for all the sums drawn or retained by him, so far as these exceed one-half of the annuity or jointure paid from John Roberton's estate from 1850 to 1869.

Now, it will be observed, first, that this statement raises no question as to whether the defender fully accounted for one-half of the sums paid in respect of the jointure, and in the argument from the bar no question was raised on that point at all. It also by inference admits that Mrs Roberton accepted these payments. Further, there is no allegation that the widow, notwithstanding her great age, was incapable of managing her affairs, or was under any error or misapprehension in regard to them, or was in any respect deceived or defrauded. These well-known categories of challenge are entirely excluded. There is no doubt a

general statement that she did not know the purport of this particular instrument. But even upon that no proof has been offered, none has been undertaken by either side, and therefore it may be assumed that the fact was not so. The ground of action is that these sums are unwarrantably retained, and that only because the agreement of 1850 did not give the defender a right to retain them. That is all that we have in the present action, and the question now is, whether the pursuer has succeeded in making good that claim?

Now, generally on a demand like this, made at the distance of thirty years, and after the person said to have been injured acted on the footing that these sums were properly retained for the last nineteen years of her life, it is a very hard task to establish the contrary. That which persons of sound mind, perfect capacity, and subject to no error, deception, or control, do with their property, must be presumed to be what they intend to do with it. It is enough to raise this presumption that such has been in fact their course of action, and that element alone is sufficient warrant for it. If Mrs Roberton for a series of years permitted her son to retain these sums, it is in vain to term such retention unwarranted, for it is quite enough that she authorised it.

It is said, no doubt, that the agreement of 1850 does not embrace the annuity, and that therefore James Roberton had no right to retain, and his mother was under no obligation to surrender, the sums in question. The Lord Ordinary has found that, reading this agreement in the light of the subsequent actings of the mother and son, the agreement is open to a construction which would embrace the jointure right as a fund falling under its provisions; and were this necessary to support the conclusion at which I have arrived, I feel the force of his reasoning, and should not be disposed to differ from him. There is a great deal of cogency in his views. But there are also grave considerations on the other side.

Had the construction of this instrument come before us in an action by James Roberton to enforce his right to the annuity, I should have hesitated much before I could have sustained his contention. The agreement is a pure gift, wholly gratuitous, of a portion of a trust estate, executed by a beneficiary in favour of the trustee. I can see that it might be held that such a deed of gift ought to be construed with some strictness *contra preferentem*. Further, while some latitude of construction may be allowed in reading an informal instrument between mother and son, this is a regular and technical deed carefully prepared by an eminent conveyancer. Hence it might be said that the terms used must be confined to their legitimate and technical sense. I am impressed with this view. If the instructions of the conveyancer were to prepare a deed assigning one-half of Mrs Roberton's jointure of £400 a-year, or of the interest of the £6000 invested to secure it, it seems difficult to suppose that he would even have employed the expression "liferent of the residue" for that purpose. However flexible the term "residue" may be, the liferent of the residue of John Roberton's estate was a right quite specific in itself, and quite distinct from the annuity charged on William Roberton's estate, or the capital invested to secure it. The two rights are distinctly and accurately so dealt with in the agreement of 1850. If it was intended to include the jointure in the agreement of 1850, there could be no difficulty in expressing that intention, and as it is not expressed, it might be inferred that there was no intention to include it.

These considerations are material. Perhaps the arrangement ultimately acted on, and some of the provisions of the agreement itself, are sufficient to outweigh them. But they were urged upon us, and are not without materiality, especially the direction to Mr Towers Clark to pay the annuity, and the fund from which it was proposed or intended that he should collect Mr Roberton's annuity as well as the liferent residue. The force of these things I am far from disputing.

But the Lord Ordinary has so held, and, as I have said, I am not prepared formally to dissent from him. But the inclination of my opinion lies in a different reading of that instrument, which would sufficiently account for the terms employed, and yet lead to the same result as that at which the Lord Ordinary has arrived.

It could not fail to occur to an experienced conveyancer that an attempt to assign an alimentary annuity, and that in favour of a trustee who could not even recognise it without a breach of trust, was a proceeding which might raise very serious questions, and might even endanger the validity of the rest of the deed. I presume James Roberton wanted the security of an operative contract or assignation to render his future safe. That to the extent of the interest of the residue there was no difficulty in giving him. But an assignment *de futuro* to the alimentary annuity was another affair. It could not be validly assigned, but each term's annuity, when reduced into possession, was of course at the absolute disposal of the owner. In that view the agreement about the annuity remained merely verbal on the mutual understanding of mother and son, and when Mr Towers Clark paid over each term's annuity to James Roberton, his mother was entitled to exact it or to leave it in his hands, as she thought fit, even although there was no stipulation about it in the written document. The only question, therefore, which arises in this case is, whether these payments were made by the direction, and were retained by the consent and by the authority, of the person to whom they belonged? She might not, and probably could not, have been obliged to give that consent, but she was entitled to do so. The only remaining matter for inquiry is whether in point of fact she so consented.

It seems beyond controvorsy that the bipartite division made and the bipartite receipts taken term by term by Mr Towers Clark were so made and taken by Mrs Roberton's directions. Neither party would undertake any proof on that matter, and excepting the episode in 1864, which is very material, there is not a trace of discontent, and I suspect the discontent even then was rather on the part of the pursuer than on the part of the mother.

The receipts which charge the defender with the money bear on the face of them the way in which it is to be divided, and it is not now disputed that the defender accounted in terms of them. That is material, because the charge against the defender is that he received this money on these receipts, which expressly direct him to pay one-half to Mrs Roberton and to retain the other half. The entries in the sederunt-book of the trustees recognise this bipartite division; and there have been pro-

duced one or two receipts, signed by the widow herself, in which this division is directly adopted. Lastly, on this head the intervention of Mr Graham in 1864, and the statement of Mr Towers Clark at that time, seem to me to put the question of the widow's assent entirely at rest. Owing to an impression, how produced we do not see, which seems to have prevailed with her, the widow, then at the age of ninety-three, appointed Mr Graham to uplift her money instead of her son. He inquired into the matter, and was perfectly satisfied with the arrangement subsisting, but thenceforward he drew precisely the same sums from Mr Towers Clark on account of the annuity as those which had been in use to be paid. If I add to this the explicit statement of Mr Towers Clark that the arrangement of 1850 was the subject of anxious consideration by the widow, I come with no hesitation to the conclusion that every one of these sums was paid by the directions, and retained with the consent and approval, of the widow herself.

If, therefore, we are to treat this case as one concluded on the facts, and as no proposal for further proof has been made on either side, I am of opinion that the widow agreed that her jointure should share in the division, and that although she could not have been compelled by action to act on this agreement, she did so, and was entitled to do so. The omission of reference to the jointure in the written instrument I have already explained, but it seems to me of no moment, seeing that the widow's own authority was quite a sufficient discharge, term by term, of the sums retained.

That is the judgment of the Court. We are of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The Lords therefore adhered.

Counsel for Pursuer and Reclaimer—Lord Advocate (Balfour)—Trayner—Pearson. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Defender and Respondent—J. P. B. Robertson—Douglas. Agents—J. & J. H. Balfour, W.S.

Wednesday, November 30.

SECOND DIVISION.

[Lord Lee, Ordinary.

DUDGEON *v.* ELLIOT.

Property—Co-Feuar—Mutual Gable—Liability for Share of Cost.

A proprietor of part of a tenement, founding on the terms of a feu-charter which contained a stipulation that the builder of the tenement should be entitled to recover from the feuars of the adjoining ground half the cost of erection of the mutual gable—*held* entitled to claim from an adjoining feuar a share of the cost of erecting that portion of the gable which was mutual to their respective properties, although a claim had been intimated against him by the builders of the tenement for the same debt.

Observed that the proper mode for determining such a double claim is a process of multiplepoinding.

Messrs J. & W. Elliot, builders, Edinburgh, disponed to Mrs Dudgeon the southmost shop and dwelling-house on the street and sunk flats of a tenement situated at the corner of Bellevue Place and Claremont Terrace, Edinburgh. This tenement, of which Mrs Dudgeon's property formed part, was built upon ground contained in a feu-charter in favour of John Elliot and William Elliot, and the survivor of them, as trustees for their firm of J. & W. Elliot, and of their or the survivor's heirs and assignees whomsoever, granted by the trustees of Donaldson's Hospital, whereby it was stipulated "that the east and south gables of the foresaid tenement were to be built so as to suit as mutual gables for said tenement and the tenement to be erected on the adjoining ground to the east and south thereof, and that the said gables should be built, one-half on the ground disponed, and the other half on the adjoining ground," of which the said trustees for Donaldson's Hospital were originally proprietors. The feu-charter also stipulated that "the said John Elliot and William Elliot, as trustees foresaid, or their foresaids, who build the said mutual gables and division wall, shall be entitled to recover from the adjoining feuars half the cost of erection of the said mutual gables or division walls, as the same shall be ascertained by a surveyor mutually chosen by the feuars concerned."

The defender Mr John Elliot junior began to build on the adjoining piece of ground, which he had acquired from the trustees of Donaldson's Hospital, taking advantage of the said mutual gable in the erection of his tenement. The pursuer Mrs Dudgeon claimed, in terms of the feu-charter, her share of the cost of erection of the said mutual gable. The defender refused payment, and maintained that the right to recover from the adjoining feuars half of the cost was limited by the feu-charter to the builders of said gables, and that the whole of the said tenement, including said gables, was erected by Messrs J. & W. Elliot. This firm was dissolved in 1879, and the business carried on by Mr John Elliot, on whose sequestrated estates a trustee was appointed in March 1880.

The defender averred that the trustee on Mr John Elliot's estate had claimed from him the cost of erection of the said gables, and that he had arranged with him the price to be paid when the present claim by the pursuer was raised.

The Lord Ordinary remitted to Mr Watherston, valuator, to examine the mutual gable and division walls in dispute, and report his opinion on the value thereof, and thereafter decerned against the defender for the sum of £35, 4s., being the sum which the reporter held to be the value of the proportion of the gable and division walls effeiring to the defender.

The defender reclaimed, and argued—That a demand for the whole cost exigible from him in respect of his share of the said gable had been made by the trustee on Mr John Elliot's sequestrated estate. In view of this fact it was unjust to hold him responsible to Mrs Dudgeon on the same account. He asked the Court to pronounce an interlocutor which would relieve him of the responsibility of double payment in respect of this portion.

At advising—

Lord Justice-Clerk—I think that the Lord