chase. I agree with your Lordship that the only person entitled to insist on making this demand is an heir of entail, and the present pursuer not now possessing that character, but coming in a totally different character and demanding this money to put in his own pocket, I do not think he is entitled to succeed.

Lord Mure, who was absent when the case was heard, gave no opinion.

The Court adhered.

Counsel for Pursuers—D.-F. Mackintosh, Q.C. —Pearson — Ferguson. Agents—Auld & Macdonald, W.S.

Counsel for Trustees and Defenders—Comrie Thomson—Lorimer—Moody Stuart. Agents—S. Greig, W.S., and J. P. Bannerman, W.S.

Friday, June 11.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DONALDSON *v.* TAINSH'S TRUSTEES.

Succession—Husband and Wife—Jus relictæ—*Election of Testamentary Provisions.*

After the death of a testator his widow attended a meeting of the trustees to which she had been called, and signed a minute of the meeting bearing that after the whole circumstances had been explained to her she "expressed herself as desirous of carrying out the wishes of her late husband as expressed in his settlement," and in token of her approval she signed the minute. She had at the time no separate legal advice. Thereafter for four years she continued to receive the testamentary provisions without objection, and at the end of that time raised an action of count and reckoning with the object of taking her *jus relictæ*. *Held* (*rev.* judgment Lord Kinnear, *dub.* Lord Rutherfurd Clark) that she was not barred from claiming an accounting in virtue of and in accordance with her legal rights.

William Tainsh, grocer, Greenock, died on the 11th December 1881. He left a widow and four children, one of whom died shortly after him. He left a holograph trust-disposition and settlement dated 31st January 1880, by which he appointed the Rev. A. Davidson, E.U. minister, Greenock, and his brother John Tainsh, grocer, to be his trustees and executors. By this settlement he bequeathed to his wife for her own behalf and that of the children "the entire sum of money at credit of my private account in the firm of Robert Lusk & Co., wholesale grocers, Greenock," directing the trustees to invest it as they should see fit, the interest of such investment to be paid over to his widow at such time as she might require it, but no part of the capital was to be paid unless under such circumstances that the trustees considered it absolutely necessary. In the event of his widow's death or marriage the interest was to go in equal proportions to each of his surviving children, so long as they remained unmarried, when in such case they were each to receive £50 as a gift. His wife was also to receive a gift of £10. After mentioning one or two other small legacies, he directed that the residue was to be equally divided among the various schemes and funds of the Evangelical Union. Besides the estate dealt with in this trust settlement, Mr Tainsh left a small amount of other moveable property, of which his executor came into possession. The whole estate was moveable property.

On 28th March 1882 a meeting of the trustees was held at Greenock in the office of Mr Dunlop, the law-agent of the trust, at which Mrs Tainsh was present. She had been by letter invited to attend a meeting of the trust to be held for the purpose of assuming an additional trustee, "thereafter a statement of how matters stand with the trust will be laid before you." She signed a minute, of which the following is the part material to this case:—[*After narrating the assumption of the new trustee*]—"The factor [John Tainsh] reported that he had received payment of the deceased's interest in the firm of R. Lusk & Co. and the other assets of the estate, and had deposited in name of himself and Mr Davidson as trustees the sum of £1147, 18s. 7d., in the Royal Bank's branch, West Blackhall Street. In the Provident Bank there is in name of the trustees the sum of £7, 9s. 11d. He stated that he had in hand the £21, 9s. paid today by the Prudential Assurance Company. The factor submitted a statement showing the above balances in cash and on hand. Mrs Tainsh, who was in attendance, having been called in, the position of the estate was shown to her, and the law-agents read over the settlement and explained the rights of Mrs Tainsh and the children under it, and also their rights at common law. Mrs Tainsh expressed herself as desirous of carrying out the wishes of her late husband as expressed in his settlement, and in token of her approval and concurrence she subscribes this minute." Thereafter the interest of the estate was paid to her for the support of herself and her three children, until the beginning of 1883, when she married John Donaldson, clothier, Glasgow. The interest of the invested sums of money continued to be paid to her, but for the use of her children, by a weekly allowance, the receipts for which were signed by Mrs Donaldson. The form of receipt was as follows:—"Received . . . the sum of sixteen shillings and sixpence sterling, being weekly proportion of interest which said estate yields, and paid to me for behoof of said William Tainsh's children.—Mrs John Donaldson."

Both before and after the second marriage the widow made various requests to the trustees for assistance. One of these applications, which was made through a solicitor in 1882, she, in applying for it, referred to the power of the trustees under the will to draw on the principal if they should think it indispensable, and representing that it was necessary to do so.

The trustees also, in January 1884, advanced £12 to her on account of the children's interest in the estate for the purpose of paying a half-year's rent and taxes on the house in which she lived.

In May 1885 Mrs Donaldson intimated that she claimed her legal rights, and on 28th September 1885 raised an action of count, reckoning, and payment against Tainsh's trustees, concluding for an accounting for her *jus relictæ* and payment of

£300, or such sum as should be found due as *jus relictæ* to her.

The defenders averred that the condition of the estate had been fully explained to the pursuer on Tainsh's death, and that her legal rights had also been fully explained to her before she signed the minute of the meeting of the trustees above quoted, and that she had in these circumstances made her election to stand by the settlement; further, that she had frequently homologated it.

A proof was led.

The pursuer deponed that she was in ill-health at the time she attended the meeting of March 1882; that although she had a copy of her husband's settlement she had not understood it; that at the meeting a statement was read over to her showing how much money her husband had left; that she knew that she would get the interest of the sum invested, but did not understand that it would cease to be payable to her when she got married again; that no suggestion was made that she should take time to consider the matter; that she was willing to accept the provisions made in her favour out of respect for her husband's memory. On the other hand, Mr Dunlop, writer, the defenders' agent, deponed that a statement of the position of the estate was read over to her and the effect of the will explained. "I explained to her that at common law a widow was entitled, in the case of children being left, to a third of the estate; that the children were entitled, to a third; and that the remaining third was at the disposal of the deceased, and that it fell to the children in the event of its not being disposed of. I put a figure upon the third which would go to her in the event of her claiming her legal rights." In cross-examination he stated—"I did not tell her that if she took the £300 her re-marriage would have no effect."

Mr Dunlop also deponed that he had suggested to the pursuer to take time time to deliberate, and that she did not wish to do so.

The pursuer's brother deponed that she had told him just after the meeting that she had been informed that she could take a third of the estate.

The Lord Ordinary issued an interlocutor assoilzieing the defenders, but found no expenses due to or by either of the parties.

The pursuer reclaimed, and argued—The proof as to proceedings at the meeting held on March 1882 showed that the pursuer had not really understood what her legal rights were, and what would be the effect of her electing to stand by the provisions in the settlement in the event of her re-marriage. When a widow thus made her election in ignorance of her true position, the Court would not allow the mere fact that she had signed a minute adhering to the provisions contained in her husband's will to be a final bar to her restoration. In this case the necessary information had not been given to the pursuer—*M'Fadyen* v. *M'Fadyen's Trustees*, December 2, 1882, 10 R. 285; *Millar* v. *Durham and Others*, March 16, 1886, 13 R. 764.

Argued for the respondent—The pursuer had sufficient knowledge of what was the true state of her husband's estate, and what was the share due to her at common law and under the settlement. She had a copy of the will and explanation made to her at the meeting. Besides, she had homologated her signature at the meeting by her actings afterwards, as she had done nothing against the provisions of the minute for four years—*Hope* v. *Dickson*, December 17, 1883, 12 S. 222. The motive of homologation has nothing to do with the homologation itself—*Selkirk* v. *Law*, March 2, 1854, 16 D. 715.

At advising—

Lord Justice-Clerk—This case raises a question which has been frequently before us, whether a widow who has signed a minute drawn up by the trustees under the settlement of her deceased husband, by which she has accepted her conventional provisions, is bound by that signature, and is altogether debarred from recurring to her legal rights? Of course each case must be judged according to its special circumstances. As a general rule, I think that the trustees should not be content with explaining the purpose of the deceased's settlement to the widow themselves, but should insist that she should have legal assistance. Unless it has been shown that the widow had independent legal advice it would be a very strong case that would make me consider she had barred herself from recurring to her legal rights. That the widow should have independent advice I think is almost an essential in cases of this kind, and the trustees should see that she makes her election, not from feelings arising from some emotional desire to carry out what she may suppose to have been her husband's wishes, but from a calm and rational consideration of the circumstances.

In this case there was no preliminary ascertainment of what knowledge she had of her husband's will, and no time given her for consideration. She was much under the impression that in acting as she did she was following out her husband's wishes as expressed in his will, but she had no real knowledge of what the result would be as regards her provisions when she signed the minute. After she had done this, she no doubt thought that by so doing she had barred herself from making any attempt to recur to her legal rights. That being so, she did not with that deliberation and knowledge which is necessary make her election as to whether she would take the provision made for her under the settlement or recur to her legal rights. In those circumstances it is my opinion that there can be no objection to her so recurring to her legal right, all the more because in doing so nobody will be injured. I am therefore for altering the Lord Ordinary's interlocutor and finding that the trustees cannot resist payment of the *jus relictæ* from her deceased husband's property.

Lord Young—I am of the same opinion. This is an action of count, reckoning, and payment directed by a widow against the defenders, the executors and trustees under her deceased husband's settlement. I think as antecedent to the consideration of any other question that the widow is entitled to have an accounting. She has not had any accounting of her late husband's estate. The utmost that we know she got was a verbal statement by Mr Dunlop, the agent for the trust, of the amount that the estate was worth; but there was no accounting. We have not seen any accounting of the estate, and it is not said that any was read over to her.

She indeed announces on the face of her summons that she claims her *jus relictæ*, but she wishes an accounting to enable her to find out

what sum that *jus relictæ* would amount to. Now, there is nothing to prevent her claiming the *jus relictæ* except the signing of that minute of 28th March 1882, but that does not in any way prevent her having an accounting of her deceased husband's estate. It is admitted that the husband left other means besides those comprising the amount to his credit with the firm of Lusk & Co., but we know nothing of what has been done with those other means, and an undertaking by her to stand by the will so far as regards the money in Lusk & Co's account would not preclude her from having an accounting of these other means, as the will does not provide for the disposal of all her husband had left.

But further, I think that the signing of the minute of 28th March expressing her resolution to stand by the provisions conveyed to her by the will is no answer to the present claim for *jus relictæ*. I look with great suspicion at this meeting of trustees called at such an early date, and with the desire to get her to put her name to a paper containing a resolution so foolish. But the purpose of this meeting seems to have been a desire to get the widow to put her name to this paper so as to preclude her from afterwards claiming what she was legally entitled to claim. I say there was no reason to call a meeting of the trustees at such an early date, because the whole income that the property yielded was a sum of 15s a-week. She must have got it all for the support of herself and her family, if only to keep them from applying for parochial relief, and yet the minister of the Evangelical Union and her brother-in-law, presumably an office-bearer in the same denomination, meet to get her to put her name to a document which will have the effect of sending all this money to their Church. I do not look upon it as at all a creditable proceeding, and I do not think that her signing such a document will prevent her claiming her legal rights. But any way that minute is no answer to the pursuer's claim for an accounting.

I think that the validity of the action must be sustained and the case sent to the Lord Ordinary to proceed with the accounting if that should be necessary, and the result will be that she will get her *jus relictæ*. I do not see how she can have anything to pay back; she was entitled to get it all for the support of herself and her family, and if she did get any advances out of capital for the payment of rent, &c., which she could not be expected to pay out of that small sum of 15s. a-week, she has nothing to pay back there either.

Lord Craighill—I concur. I think that the case is quite clear, if read in the light of justice between the parties as well as in the light of the decisions. Looking at what she knew of the matter, or rather did not know, it is plain that the matter was not presented to the pursuer in such a manner that she can be said to have got proper advice in regard to her conduct as to election between her conventional provisions and her legal rights. And although the trustees knew that she had not got that advice, still they did not insist that a proper time and consideration and consultation as to that line of conduct which she ought to pursue must be given. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled.

Lord Rutherfurd Clark—In the case of *M'Fadyen* which was quoted to us I had some difficulty on the question between the widow and the representatives of the husband, although I did not differ from your Lordship's judgment, and I confess I have difficulty here also. The settlement was laid before her at the meeting and was explained to her, and that she did not at once object to the provision made for her is shown by her having kept to it for four years. I confess that in these circumstances I have some difficulty in holding that her claim for her legal rights is not excluded. I should be very sorry if the result of our judgment should be that her claim was defeated, and I am glad therefore to be able to surrender my difficulty, and do not differ.

The Court pronounced the following interlocutor:—

"Find that the pursuer is not barred from claiming an accounting from the defenders in virtue of and in accordance with her legal rights: Therefore recal the interlocutor reclaimed against: Repel the defences: Remit to the Lord Ordinary to proceed in the accounting: Find the pursuer entitled to the expenses hitherto incurred by her in the cause," &c.

Counsel for Pursuer—Rhind—Napier. Agent—A. R. Patrick, Solicitor.

Counsel for Defender—Guthrie. Agents—J. & J. H. Balfour, W.S.

Friday, June 11.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MAGISTRATES OF MONTROSE *v.* COMMERCIAL BANK OF SCOTLAND, LIMITED.

Property—Superior and Vassal—Burgh—Bounding Title—Foreshore.

A royal burgh which was the proprietor of lands situated on the shore of a tidal river-basin feued out a certain portion thereof, which in the feu-disposition was described as bounded on one side by the flood-mark. *Held* that the burgh was divested of their whole right seaward, and had no title to ground subsequently formed *alluvione* between the feu and the sea.

Hunter, &c. v. *Lord Advocate, &c.*, 7 Macph. 899, *followed.*

This was an action of suspension and interdict at the instance of the Magistrates of the royal burgh of Montrose against the Commercial Bank of Scotland, Limited, in which it was sought to interdict the respondents from "enclosing, or in any way interfering, by themselves or others acting under their authority or on their behalf, with that area or piece of open ground lying immediately to the west of the west boundary wall enclosing the respondents' property, situated on the west side of the High Street of Montrose, and extending said area or open piece of ground from said wall westwards, until the said area or