equally among them, share and share alike, all and sundry my heritable and moveable estate of whatever nature or denomination the same may be, which shall belong and be addebted to me at the time of my decease, with the whole writs and evidents.' On the other hand the defender in like manner conveyed to her husband, and his heirs and assignees whomsoever, the whole estate which might belong to her at her death. But it does not appear that at the time she had any separate estate. The defender claims the property as belonging to her under the mutual settlement.

"I think it settled that where a man has executed a general settlement, the general disponee, not the heir-at-law, has right to after acquisitions of the disponer, though the rights to them have been taken in favour of 'heirs and assignees.' The decision in *Robson* v. *Robson* in 1794 (M. 14,958) has been followed in subsequent cases (*Patons* v. *Hamilton*, 1797, M. 11,376, and *Ogilvie's Trustees*, in 8 D. 1244), and appears to me to be in point. The doctrine of Erskine (iii. 8, 47) is to the same effect.

"The pursuer cited the cases of *Webster's Trustees* (4 R. 101) and *Farquharson* v. *Farquharson* (July 19, 1883, 10 R. 1253). But in my opinion neither of them is applicable to the present case. In *Webster's Trustees* the title taken to the subjects after acquired contained a special destination to the testator's sister, failing himself and his assignees and disponees; and the disposition bore that the destination was so taken 'at the special request of the said James Webster as evinced by his subscription to these presents.'

"In the case of *Farquharson* the judgment of the Court was that the prior settlement did not convey lands. And although opinions were given by the Lord Justice-Clerk and Lord Young, which went beyond the judgment, I think that they were expressed in such guarded terms as not to support the doctrine contended for by the pursuer, that if the maker of a general settlement dealing with his whole estate shall subsequently acquire a special subject, taking the title to himself and heirs and assignees whomsoever, he must be held to have made a special destination of that subject. With regard to one class of the after acquired subjects, the testator in that case had made a special destination to himself and his wife 'in conjunct fee and liferent for her liferent use allenarly, and to his 'heirs and assignees whomsoever,' which the Lord Justice-Clerk held to be clearly inconsistent with the mutual disposition. With regard to the Leith Street subjects there was more difficulty. But I think it must be assumed that in that case there was good ground in the deeds for the opinion of the Lord Justice-Clerk, that the expression 'heirs and assignees' as there used meant future assignees or disponees of the special subject. Lord Young appears to have had difficulty as to these subjects. He did not commit himself to a decided opinion on the point. Lord Rutherfurd Clark takes care to explain that his opinion was based entirely on the ground stated by the Lord Ordinary, viz., that the settlement did not deal with land.

"I am therefore unable to regard these cases as supporting the pursuer's claim.

"I think the mutual settlement is as effectual in favour of the testator's wife as it would have been in favour of any other person. Any legitim due to his children will of course be claimable by them.

The pursuer reclaimed, and argued—A destination of what a man may have at his death did not comprehend *acquirenda* the title to which was in such terms as here. The effect of the destination of 1884 was to carry the Buckhaven heritage to the pursuer. Had that not been the intention the title would have been taken to the defender after the deceased. The case of *Farquharson* (Lord Justice-Clerk) was conclusive.—*Mearns*, February 20, 1759, 6 Pat. App. 724; *Farquharson* v. *Farquharson, &c.*, July 19, 1883, 10 R. 1253.

Counsel for the respondent was not called upon.

At advising—

Lord Justice-Clerk—I do not think it necessary to refer to my remarks in the case of *Farquharson* v. *Farquharson*, which I think were well founded with reference to the facts of that case. Here the case contended for goes beyond them. The question is, whether the destination to this property purchased subsequently evacuates as to it the conveyance in the mutual deed of settlement. The pursuer's argument really comes (as was said by Lord Young in the course of the debate) to this, that as a man not making a special destination can only take the title to his subsequently acquired property to himself and his heirs and assignees as was done here, therefore where a man has made a general settlement *acquirenda* cannot fall within it, and are not to be included in the ultimate distribution of his estate under the settlement. I cannot assent to that. I am of opinion, then, that the interlocutor is right.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court adhered.

Counsel for Pursuer—M'Lennan. Agent—James Skinner, S.S.C.

Counsel for Defender—Gloag—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Friday, December 11.

SECOND DIVISION.

RUSSELL *v.* CLELAND AND ANOTHER.

Proof—Presumption—Implied Discharge and Accounting.

A farmer who was advanced in years and in ill-health got D, his brother, to come and live with him, which he did, carrying on the farm and receiving all payments for stock and crop which he sold. As the brothers met daily no formal account of intromissions was ever rendered by D, and no books were kept. After his brother's death, D was sued by his trustees for an accounting, and averred that he had reported all his transactions from day to day, and that his brother was satisfied therewith. *Held* that the presumption was that D had, as stated, accounted from day to day during his brother's life, and that this

presumption not having been displaced by the proof led, was entitled to be assoilzied.

In this action the trustees of the late John Russell, a farmer at Branchel Burn, Cambusnethan, sought to obtain from Daniel Russell, brother of the deceased, a "full account of his intromissions as manager for the said John Russell of the farm of Branchel Burn aforesaid, for the period from Whitsunday 1880 till 12th November 1884," and also as factor for a small property situated in Bonkle in the said parish for a period of six months. The latter branch of the case need not be further referred to.

John Russell being old and in feeble health from heart disease, asked his brother, the defender, who was till then a mason, to come with his family and live with him at the farm at Whitsunday 1880, and accordingly at that term the defender and his family went to live there. The brothers then intended that the lease should be transferred to Daniel. Meantime he continued to live at and manage the farm. In 1882 the landlord, as the result of the negotiations anent transferring the lease, refused to do so. Daniel and his family, however, remained at the farm, and conducted the whole business of it, selling and buying stock, produce, &c. He paid the rent at certain terms, but not at Martinmas 1882 or Martinmas 1884.

On 12th November 1884 John Russell died. Daniel had kept no books, and could give no account of his management, and this action was brought in March 1885 by John's trustees to obtain from him such accounting.

The defender stated—"(Stat. 1) Prior to the term of Whitsunday 1880 the defender, who had been a mason at Cambusnethan, was invited by the said John Russell to reside with him at the said farm of Branchel Burn, and accordingly at that term the defender and his family took up their abode at the said farm. (Stat. 2) At the date of the defender's going to reside with the said John Russell it was arranged between them that the lease of Branchel Burn farm should be transferred to the defender's name, and negotiations were opened with the landlord of the farm to have that done. (Stat. 3) Such negotiations, however, having failed, the defender agreed to continue his residence and that of his family with the deceased, and to do all he could towards the management and supervision of said farm, for which he was to receive wages at the rate of 24s. per week for himself, and his family were also to be suitably remunerated for their services in the farm. (Stat. 4) The defender continued to reside with his family at the said farm until the death of the said John Russell, and during that time acted under the said John Russell as farm-overseer. (Stat. 5) All the transactions of the defender during the time of his residence in the said farm were reported verbally by him from day to day to the said John Russell, who approved of same, and expressed himself perfectly satisfied with the result of the defender's intromissions with the affairs of the farm and property at Bonkle. No books were kept by the defender of such intromissions, and he never rendered to the said John Russell an account thereof, nor was he ever asked by the said John Russell for such an account. (Stat. 6) The defender has rendered to the agent for the said deceased John Russell's executors an account of his intromissions in connection with the said farm from the date of the said John Russell's death to 27th February 1885 [when he left the farm], which account has been lodged in this process by the pursuers, and which shows a balance due by the defender of £2, 19s. 5d." He also stated that he had an account for wages to himself and his family, and that if any accounting were found to be required of him he had this account to set off against what the pursuers might be found entitled to receive.

He pleaded that having accounted to John Russell up to the date of his death for his intromissions, the pursuers had no title to sue him for an account of intromissions prior thereto.

The Sheriff-Substitute appointed him to lodge an account of his intromissions from Whitsunday 1880 to Martinmas 1884, the period embraced by the action.

He then lodged a minute stating that as he kept no accounts, and was not required by John Russell to do so, he could not lodge such account.

The Sheriff-Substitute then allowed him a proof of his averments, and to pursuers a conjunct probation.

At the proof the pursuers led evidence to show that John Russell had been obliged out of money he had saved to pay rents which the defender had not paid. It also appeared that the defender and his family had had their food and clothes out of the proceeds of the farm in addition to their living in the farmhouse. The defender had also given his son and daughter small sums of "pocket-money," but, as he deponed, no regular wages. John Russell and his aged sister had occupied a separate room in the house, and had got milk, butter, &c., from Daniel, and Daniel deponed that he had also given John money occasionally when he wished it, but not more than a few shillings at any time. He also deponed that the farm was not profitable, but only made ends meet. The pursuers led proof, by evidence of men who knew the district and farm, to show it was a profitable farm, and ought to have yielded a certain profit. There was evidence that John was not content with Daniel, and did not get money from him, and had complained of that, the sister who lived with him deponing that he did not get more than £5 from Daniel during the whole four years the arrangement lasted. It was not, however, made quite clear whether the dissatisfaction of John was with Daniel's management or with his failure to account. The brothers appeared to have met almost daily about the farm-steading, as John, though feeble, went out almost every day, but the defender's statement, that though they never made any regular settlement, John always knew of all he was doing on the farm, and made no complaint, and did not ask for or suggest any formal accounting, was not supported by any other evidence. The defender deponed that when he did not get the lease he thought of leaving, and John induced him to stay, offering him 24s. a-week for himself and his wife.

The Sheriff-Substitute (BIRNIE) pronounced this interlocutor:—"Finds (1) that at Whitsunday 1880 the defender entered on the farm of Branchel Burn, leased by his brother, the now deceased John Russell, on condition that he should pay for the stock at valuation, and obtain a transfer of the lease; (2) that he did not pay

for said stock at valuation; (3) that said transfer was refused by the landlord in 1882, and that the defender continued to occupy said farm until February 1885; (4) that in this action the pursuers, the trustees of the said John Russell, conclude for an accounting during the time the defender occupied said farm; (5) that the defender kept no books; (6) that there fall to be debited to him value of stock at his entry, £425; value of seed and labour at his entry, £40; rent at Martinmas 1882, Martinmas 1884, and Whitsunday 1885, paid by the deceased John Russell or the pursuers, £180; four and three-quarters years' profits at £20 per annum, £95—making in all £740; and that there fall to be credited to him price of seeds, &c., planted prior to his entry, but paid by him, £30; half-year's rent at his entry, paid by him, £60; proceeds of sale when he left the farm, £371; sum received by the pursuers from the incoming tenant, £40; and value of milk, meal, potatoes, butter, &c., supplied to the deceased and his sister until the death of the deceased at Martinmas 1884, at 15s. per week, £175, 10s.—making in all £676, 10s., and leaving a balance in favour of the pursuers of £63, 10s.: Finds the defender liable to the pursuers in the said sum, reserving to the pursuers to claim from the defender the value of any articles sold by them, and credited, as above, to the defender, which may be found not to have belonged to them: Finds the defender liable to the pursuers in expenses, &c.

"*Note.*—The defender says his deceased brother did not intend him to account, but that is not proved, and is improbable.

"The findings in the interlocutor explain themselves.

"The defender's son claims one of the horses sold by the pursuers, and their right of relief against the defender in the event of this claim being found good has been reserved.

"The defender claims wages and board-wages from February 1885 until the following Whitsunday, on the footing that he was a servant entitled to notice, but the circumstances will not bear that construction."

On appeal the Sheriff (CLARK) adhered.

The defender appealed, and argued—If there was to be an accounting the defender ought to be allowed wages, and the Sheriff, who treated him as liable to account, had allowed him none. But the case fell to be decided on the footing of implied accounting and discharge—Dickson on Evidence, sec. 620, and cases there cited; *Stuart* v. *Maconochie*, 1836, 14 S. 412.

Argued for pursuers—The interlocutor of the Sheriff was right. The defender had a duty to account, and met a demand for an accounting (which demand the pursuers were bound to make) by a simple statement that he had no account to give. The Sheriff had allowed him wages in reality though not in name in the accounting when rightly viewed. The case, however, was one of that kind in which a person of full age, and able to make a bargain if he wished, had given his aid to a relative, and the legal presumption from his making no bargain was that he meant to give his aid gratuitously—Fraser on Master and Servant, 44-5, and cases there cited. The cases on presumed accounting were very different. *Stuart* v. *Maconochie* was a case in which the intromissions (in 1818) of an illiterate person were called in question (in 1831) after a lapse of 13 years, and after the death of the original party who could have given an account. The element of *mora* went deeply into such cases, the presumption of accounting being applied to prevent an unfair accounting *post tantum temporis*. Here there was no delay, the defender being in the due course of administration called on for his account.

At advising—

LORD JUSTICE-CLERK—This case falls under the principle of *Stuart* v. *Maconochie's Trustees*—that is to say, it falls under the category of presumed payment or discharge, and I rather think it is a very favourable case for the application of the principle. It is clear the parties understood each other well from first to last. The elder brother was disabled from work by heart disease, and he got his brother to come to live with him, and proceeded to try and get a transfer of the lease in his favour, in which case he himself would have lost all interest in the farm. He, however, could not obtain the transfer from his landlord, and the result was that Daniel and his wife, son, and daughter remained at the farm, and lived with him there for four and a-half years, Daniel undertaking the management of the farm, conducting the sales, and receiving the prices, and buying everything necessary for the housekeeping and for the farm. The elder brother dies, and now an action of accounting is brought against Daniel to make him prove his intromissions. He kept no books or accounts, and he was not required by his brother to do so. On the whole matter I am of opinion that there is a strong presumption—and a legal presumption—that everything was settled up unless the contrary is shown, which in my opinion it has not been. We should then, I think, sustain the appeal and recal the judgment.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

"Find in fact, in terms of the 1st, 2d, 3rd, 4th, 5th, and 6th articles of the defender's statement of facts, and in law, that it must be presumed that the defender accounted to his deceased brother for his management of the farm mentioned in the record, and is not liable in any further accounting: Therefore sustain the appeal; recal the judgments of the Sheriff-Substitute and Sheriff appealed against; and assoilzie the defender from the conclusions of the action."

Counsel for Pursuers (Respondents)—Comrie Thomson—Sym. Agent—J. Douglas Gardiner, S.S.C.

Counsel for Defender (Appellant)—Scott—Gardner. Agent—Sturrock & Graham, W.S.