

SOLICITOR-GENERAL (A. R. CLARK) and KEIR for the respondents.

At advising—

LORD PRESIDENT—I think that the Sheriff is right in sustaining this plea. The fact alleged in the summons in support of the action is that the trustees took this ground in excess of their powers—took it unlawfully. That is the foundation of the action, and without that I do not see that there could be any relevant case. No doubt, the pursuer goes on to say, that having unlawfully and without legal notice taken they have retained possession of the land ever since. But that does not alter the character of the action, or take it out of the operation of the 118th section of the General Road Act of 1831. The plea (above quoted) maintained for the pursuer, explains most accurately the nature of the case, which is simply an action for compensation or damages. Now, the 118th section of 1 and 2 Will. IV., c. 43, provides that “all civil causes, petitions, complaints, and processes whatsoever, and prosecutions for expenses . . . and fines imposed by this Act or any local Turnpike Act, or for any damages incurred or any wrongs done or injuries suffered in any matter thereto relating, or for anything done in pursuance of any of the powers by this or any such Act given and granted, shall be commenced within six calendar months after . . . the damage shall have been incurred, or wrong done, or injury suffered, or fact committed, and not afterwards.” Now, when was the wrong alleged here done? It was done apparently before 1844, when the pursuer succeeded to the estate. Mr Campbell very ingeniously contended that it has been continuously committed year by year ever since; but I am afraid that such an interpretation of the facts of the case is impossible. Of course such a wrong continues always in operation and effect until redressed, but this does not prevent the date of the perpetration of the wrong being fixed at a definite point of time. I am therefore clearly of opinion that the 118th section of the Act applies, and that the action when it was raised was incompetent.

LORD DEAS—I am of opinion that, looking to the framework of the summons, nothing can be given the pursuer except for wrong done. If that be so, it is plain that the action is barred by the 118th section of the General Road Act.

LORDS ARDMILLAN and KINLOCH concurred.

Agents for the Pursuer and Appellant—Maitland & Lyon, W.S.

Agents for the Defenders and Respondents—H. & A. Inglis, W.S.

Thursday, March 2.

## SECOND DIVISION.

SOMNER v. ANDERSON (SOMNER'S TRUSTEE).  
*Conjugal Rights Act 1861, § 16—Provision to Wife.*

A wife concurred in a deed, whereby in consideration of a sum of money her share of the residue of her father's estate was conveyed to the lenders, under reversion of the balance to her husband. Her husband thereafter conveyed this reversion to his creditors. Held that section 16 of the above Act applied, and that provision must be made to the wife out of the fund.

Mrs Somner brought this action against the trustee under a voluntary trust-deed executed by her husband for behoof of his creditors, and also against the executors of her father, the late John Clay, for their interest, concluding to have it found and declared that the defender, as trustee foresaid, was not entitled to uplift or receive the share of residue provided and bequeathed to the pursuer under the settlements of her said father, except upon condition of making therefrom a reasonable provision for the support and maintenance of the pursuer, under the 16th section of the Conjugal Rights Act. The said section, *inter alia*, provides “when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti*, or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim be made therefor on her behalf, and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session, according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*.”

It appeared from the statement of the pursuer that her father died on 26th June 1866, and her mother, who liferented his whole moveable estate, on 18th June 1870. On 10th April 1867 Mr Somner, the husband of the pursuer, borrowed the sum of £500, and for this sum granted a bond, in which the pursuer concurred, assigning her share of the residue of her father's estate in security of the said loan, and providing that if the creditors, in virtue of the said assignation, should receive payment of the whole of said share, they should be bound, after satisfying their own claims, to pay over the balance to Mr Somner, the husband. On 4th June 1869 his affairs became embarrassed, and he executed the trust-deed in favour of the defender, specially assigning the said share of residue under burden of the prior assignation. On 5th July 1870, a few days after the death of the liferentrix, the pursuer made a claim under the Act. The defender pleaded—“(1) The pursuer's share of the residue of her father's estate having vested absolutely in her husband, the said John Usher Somner, *jure mariti*, and the said John Usher Somner having assigned the same to the defender for behoof of his creditors, and the said assignation having been duly intimated, all before any claim on the said share was made by the pursuer, the defender has obtained complete and lawful possession of the said share, to the exclusion of the pursuer's claim under ‘The Conjugal Rights (Scotland) Amendment Act, 1861;’ and he is therefore entitled to decree of absolvitor, with expenses. (2) The pursuer having concurred with her husband, the said John Usher Somner, in a prior assignation of the said share, must be held to have waived any right which she may have had to claim a provision therefrom.” He further pleaded that, in any view, the sum claimed by the pursuer (£1250) was in excess of a reasonable provision for her support and maintenance.”

A proof was led before the Lord Ordinary (JERVISWOOD) who pronounced the following interlocutor:—

"*Edinburgh, 23d December 1870.*—The Lord Ordinary having heard counsel for the parties on the proof and whole cause, and having made avizandum in terms of the preceding interlocutor of the 16th current—*Primo*, Repels the first plea in law stated on behalf of the defender Charles Anderson, and also repels the second plea for him, in so far as the same is pleaded to the effect of absolvitor in the action: *Secundo*, Finds that in or about the month of June last (1870) the pursuer became entitled, under the terms of the deed of settlement of her father, the deceased John Clay, to a share of the residue of his moveable estate, which amounted, as in October last, to the sum of £1787, 17s. 11d. or thereby: *Tertio*, Finds that on or about 10th April 1867 Mr John U. Somner, the husband of the pursuer, borrowed and received for his own uses the sum of £500, and granted therefor, with concurrence of the pursuer, a bond and assignation in security, all as set forth in the 3d article of the condensation, and that the said sum and interest due thereon, amounting together to £548, 19s. 3d., were, under said assignation in security, and on or about 10th October last, paid to the creditors therein by the executors of the said deceased John Clay out of the pursuer's said share of the residue of the moveable estate of her father, the said John Clay, conform to the discharge and retrocession, which forms No. 21 of process; and that, after payment of the said sum of £549, 19s. 3d. as aforesaid, there remains in the hands of the said executors a balance of said share amounting to £1238, 18s. 8d., as at said 10th October last: *Quarto*, Finds that in or about the year 1869 the affairs of Mr Somner, the husband of the pursuer, became embarrassed, and that on or about the 4th June 1869 he executed a trust-deed for behoof of his creditors, as set forth in the fourth head of the condensation for the pursuer: *Quinto*, Finds that at the date of the said trust-deed neither Mr Somner nor any party in his right had obtained complete and lawful possession of the balance which remained unassigned of the said sum of £1787, 17s. 11d.: And *Sexto*, Finds that the defender Charles Anderson, trustee for the creditors of the said John U. Somner, is not entitled to uplift or receive the foresaid balance of the pursuer's share of the residue of her father's moveable estate otherwise than under and subject to the condition of investing and settling therefrom, for behoof of the pursuer, the sum of One thousand pounds (£1000) sterling, but exclusive always of the *jus mariti* and right of administration of the said John U. Somner, as concluded for: Finds no expenses due to either party, and decerns."

The Trustee reclaimed.

MUIRHEAD and DARLING for him.

WATSON and RANKINE for Mrs Somner.

At advising—

LORD JUSTICE-CLERK—I am of opinion that the 16th section of the Conjugal Rights Act applies to the present case. It is contended for the trustee—1st, that the intimated assignation in his favour contained in the trust-deed, executed by Mr Somner for behoof of his creditors, gave him complete and lawful possession in the sense of the Act to the exclusion of the wife's claim. But, as was ably pointed out for the wife, marriage itself operates a completed assignation of property, and therefore something more than a completed assignation must be contemplated by the statute. Complete possession is, in various branches of the law, something different from a complete title, and while

the trustee has undoubtedly the latter, I do not think he ever obtained the former. He contends, in the second place, that the prior assignation for £500, to which the wife was a party, and which contemplated in a certain event the payment to the husband of the balance of her share, amounted to a waiver of her right to claim a provision out of that share. But this assignation must be viewed in its true light as a security, and, beyond what was necessary to secure the assignees, it gave nothing that can now affect the wife's right. The money thereby obtained must be regarded as for the husband's benefit, and as augmenting his assets. I am therefore of opinion that the wife's claim is not excluded either by complete and lawful possession having been obtained by the trustee, or by acts on her own part amounting to renunciation of her right to make it. With regard to amount, that is a question entirely for the discretion of the Court. The provision is intended for the "support and maintenance of the wife." No mention is made of children. We must therefore merely give Mrs Somner an annual income. I think an allowance of £40 a-year would, in the circumstances, be reasonable. Whether it is to be secured by the purchase of an annuity, or by setting apart a capital sum which after her death shall revert to the creditors, is a point for the parties to settle.

LORD COWAN—I concur. The wife has made her claim in sufficient time, for the fund did not emerge so that possession could be taken of it till the death of the life-rentrix, and the claim was made a few days after that event. The proviso in the statute is intended to protect the interests of third parties. In estimating the amount of the provision, we must look to the whole fund, and in this case we must view the £500 as paid to the husband. I think the course suggested by your Lordship is the right one.

LORD BENHOLME concurred, remarking that the case arose under a statute which had not yet been of wide application in this country, and was interesting as for the first time presenting the words of the Act for judicial interpretation.

LORD NEAVES concurred, referring to the old cases requiring confirmation before a right could vest by succession, unless the heir got possession of the *ipse corpora* of moveables, or, in the case of *nomina debitorum*, obtained a bond of corroboration from the defunct's debtor. He also expressed a doubt whether it was competent for a wife to renounce her right to claim a provision under the Act.

The defender's counsel having stated that he would prefer sinking a sum sufficient to yield an annuity of £40 to investing a sum of £1000, afterwards to revert to the creditors, the Court adhered to the first five findings of the Lord Ordinary's interlocutor, and recalled the sixth; in lieu thereof directing the executors of the late Mr Clay to purchase a clear annuity of £40 for the pursuer, and finding her entitled to the expenses of process.

Agents for Pursuer—J. & J. Turnbull, W.S.

Agent for Defender—J. Stormonth Darling, W.S.