to Elizabeth Clark in the course of the present action. He did not aver knowledge on the part of the defenders, other than Clark, of the death of the child.

He also founded on certain alleged irregularities in the diligence; and, in particular, (1) that the fiat on the application for warrant to imprison was not written on the extract-decree as it should have been, in accordance with what he maintained was the true construction of the Personal Diligence Act, §§ 11 and 14; and (2) that the recorded execution of the charge was disconform to the warrant on which it proceeded.

The Lord Ordinary (JERVISWOODE) pronounced the following interlocutor:—

"1*st November* 1871.—Assoilzies the defender Adam M'Kenzie from the whole conclusions of the summons, and decerns: Finds him entitled to expenses: Farther, approves of the issue, No. 25 of process, as now adjusted and settled, and appoints the same to be the issue for the trial of the cause."

The issue was in the following terms:—

"Whether, on or about the 4th day of March 1871, the defenders, or any and which of them, wrongfully apprehended and incarcerated the pursuer, or wrongfully caused him to be apprehended and incarcerated, to the loss, injury, and damage of the pursuer?"

Damages laid at £200.

Rollo and Mitchell reclaimed.

DEAN of FACULTY and SCOTT, for them, argued that there was no relevant charge against them, and that they should be assoilzied as well as Mackenzie. An agent is liable only to his own employer, except for delict, or some irregularity on the face of the proceedings. There was no such irregularity as to invalidate the diligence.

RHIND, for the pursuer, referred to *Stewart*, July 6, 1784, M. 13,989; *Wilson*, July 23, 1847, 9 D. 7, and Session Papers; *Carne*, June 25, 1861, 13 D. 1253, see 5th issue.

At advising—

LORD PRESIDENT—As regards the first ground of action, the overcharge, that is certainly a perfectly relevant ground of damages against Elizabeth Clark. The money was due under a decree obtained before the Sheriff-court of Fife, and the pursuer was charged for aliment for a considerable period after the child who was to be alimented was dead. That is a matter on which there could be no mistake on the part of the woman. But whether the agent employed by her, and the Sheriff-officer who executed the charge, are liable because diligence was done for a larger sum than was due depends on whether they were cognisant of the overcharge, or at least were in such a position that they ought to have been cognisant. We must assume that they had not the slightest knowledge of the overcharge. I have heard of a client being responsible for his agent, but it is quite new to hold the agent responsible for the client, where it is not alleged that the agent was in the knowledge of the wrong. On the first ground, then, the action fails against Mitchell and Rollo.

The other grounds are purely technical. It is necessary to look minutely into the diligence. It became necessary for Elizabeth Clark to make her decree effectual within the Sheriffdom of Perth. Her agent proceeded, in terms of the Personal Diligence Act, to request the concurrence of the Sheriff of Perthshire. For this purpose he presents the extract-decree to the Sheriff-Clerk-Depute, and craves warrant of concurrence. That application is written immediately after the extract-decree, and then the fiat is subjoined. Then follows the execution of the decree. That execution contains a clerical error, one of the dates of the decree on which the charge was given being written 18th March instead of 16th March. The charge served on the pursuer has the date accurate. That no injury could arise to the party charged from a clerical error in a document which never comes to his notice, though a necessary step in the diligence, is perfectly clear. This objection fails.

The next point is this—The execution, and what follows thereon, viz., the minute craving caption and fiat upon it, are written upon a separate sheet of paper from the extract-decree. It is material to observe that the execution begins on the same sheet as the extract-decree. This sheet is exhausted, and the execution is contained on a second sheet, connected by a catch-word with the former, and stitched together. I do not see that there can be any room for misuse of the fiat. What the parties did was reasonable in itself, and not inconsistent with the provisions of the Personal Diligence Act.

The only matter which remains is the objection stated against the Sheriff-Clerk-Depute. This cannot be disconnected from what was done by the agent and messenger. If there is nothing to subject them in liability, still less is there anything to subject the Sheriff-Clerk-Depute in liability for merely proceeding on what had been done by them.

The whole defenders must be assoilzied except Elizabeth Clark.

The other Judges concurred.

The Court recalled the interlocutor of the Lord Ordinary, except in so far as it assoilzies the defender Adam Mackenzie; assoilzied the defenders James Rollo and Robert Mitchell, with expenses; and *quoad ultra* remitted to the Lord Ordinary.

Agents for Pursuer—Menzies & Cameron, S.S.C.
Agent for Defenders—George Begg, S.S.C.

Tuesday, November 21.

THE GREAT NORTH OF SCOTLAND RAILWAY CO. *v.* THE HIGHLAND RAILWAY CO.

Arbitration—Subject of Reference. Where two railways were authorised by Act of Parliament to maintain a joint station at their joint terminus, and to appoint a joint committee for its management; and where a question arose between them as to the payment of wages to an additional porter employed at the said joint station in terms of a resolution of the joint station committee, but which employment was averred to have been recalled by one of the Companies, by a letter from their secretary addressed to the manager of the other Company,—*held* that the question, Whether the recall had been validly made, and the consequent liability for wages, fell under a clause in the statute referring to arbitration all disputes arising in regard to the construction, arrangement, management, or use of the said joint station, or in regard to any agreement as to the matters foresaid, or any of them, or otherwise in relation thereto; and that consequently the action was excluded.

In this action the pursuers, the Great North of Scotland Railway Company, sued the defenders, the Highland Railway Company, for the sum of £135, 10s. 8d., with interest, being one-half of the wages, from 31st August 1864 to the date of the summons, of an additional porter employed at the joint station of the two Companies at Keith, alleged to be due in terms of certain agreements.

Keith being a joint terminus of the Great North of Scotland Railway and the Inverness and Aberdeen Junction Railway (in whose room the Highland Railway now stands), the Act passed in 1856, incorporating the Inverness and Aberdeen line, contained the following clause:—"57. Arrangements and agreements may in like manner be made between the Company and the Great North of Scotland Railway Company for the formation, maintenance, arrangement, management, regulation, and joint use of a station at Keith, for the accommodation of the respective traffic of those Companies; . . . . and it shall also be lawful for those Companies to appoint a joint committee, composed of such number of their directors respectively as they think fit, for the regulation and management of the joint station, and to agree on regulations as to the appointment and duties of such joint committee, and to depute to such joint committee powers to agree to, and from time to time to vary or rescind, regulations respecting the management and use of such joint station." This provision was followed by a clause, on which the present question mainly turned: — "58. If any questions, disputes, or differences shall arise between the Company and the Great North of Scotland Railway Company in regard to the construction, arrangement, management, or use of the said joint station at Keith, or in relation to the lands acquired, or to be acquired, for the purposes of the said station, or in regard to any agreement as to the matters aforesaid, or any of them, or otherwise in relation thereto, the same shall from time to time, so often as they shall arise, be settled by arbitration in the manner provided by 'The Railways Clauses Consolidation (Scotland) Act 1845' with respect to the settlement of disputes by arbitration."

At a meeting of the directors of the two Companies, held on 3d September 1858, upon an estimate that the cost of maintenance and working the joint station at Keith would amount to an annual sum of £1300, it was agreed that the Inverness and Aberdeen Company should pay the sum of £500 for the joint use; it being further agreed that, if found necessary by the joint station committee to increase the present staff of servants or the station accommodation, each Company should contribute thereto in equal proportions. At the same meeting a joint traffic committee, consisting of three directors of each board, was appointed, the said joint traffic committee to be also the joint committee for the management of the Keith Station. At a meeting of this joint committee held shortly afterwards, on 20th November 1858, it was agreed that the services of an additional porter were required at Keith Station, and that one should accordingly be employed, "his wages to be paid jointly by the Companies." A formal agreement was entered into by the two Companies on 29th November and 2d December 1859, embodying the results of the above mentioned and other meetings of directors. The wages of the additional porter employed in accordance with the above resolution of the joint committee were disbursed by the Great North of Scotland Railway Company, and the half due from the other Company was regularly recovered from the Inverness and Aberdeen Junction Company, and subsequently from the Highland Railway Company, up to 31st August 1864, but since that time no part of the said wages had been paid by the Highland Railway Company.

Upon 5th June 1865 Mr Dougall, the secretary of the Highland Railway Company, addressed the following letter to Mr Milne, the manager of the Great North of Scotland Railway Company:—

"*Inverness, 5th June* 1865.

"KEITH STATION.

"I observe that you are still charging us, in addition to the £500 of rent which we pay for the above station, one-half the wages of an extra porter, amounting to £20, 13s. 4d. per annum.

"As this Company's traffic at Keith is now much less than it was when we consented to the extra porter being appointed, I hope you will be able to relieve us of this charge.—I am, &c.,

(Signed) "AND. DOUGALL."

No answer was returned to this letter, and the employment of the additional porter was never cancelled by the joint station committee.

In these circumstances the pursuers pleaded in support of their action—"(1) The porter having been an extra porter appointed by the joint committee, and never having been dispensed with by them, the pursuers, who have regularly paid his wages, are entitled to repayment of one-half of the same, with progressive interest, as sued for. (2) The clauses of arbitration referred to do not apply to the present claim."

The defenders founded upon the clause of reference contained in the statute above quoted; and also upon the following clause of the agreement of 1859—"All disputes or differences regarding the true intent and meaning of this agreement, or arising out of the same in any manner of way, shall be referred to and settled by arbitration in the manner provided by the 'Railways Clauses Consolidation (Scotland) Act 1845.'"

They therefore pleaded, as a preliminary defence,—"(1) In terms of the statutes referred to in the defenders' statement of facts, and also of the agreement referred to in article 4 of pursuers' condescendence, the question raised in this action falls to be determined by arbitration, and the action should therefore be dismissed. (2) The present action is barred by the clauses of reference in the said Act of Parliament, and in the said agreement."

They farther pleaded on the merits—"(3) The defenders are not liable as concluded for, in respect that in June 1865 they intimated that they did not for the future require the services of the porter, and called on the pursuers to relieve them from the expense of the same"

The Lord Ordinary (MURE) pronounced the following interlocutor:—

"*27th October* 1871.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, sustains the first plea in law for the defenders, dismisses the action, and decerns: Finds the defenders entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the Auditor to tax and report.

"*Note.*—This action is rested on the allegations—1*st*, That by a resolution of the Joint

Traffic Committee of the Great North of Scotland Railway Company and of the Inverness and Aberdeen Junction Railway Company, the latter of which is now represented by the defenders, relative to the station at Keith, which was passed in November 1858, and confirmed by an agreement entered into between the parties in December 1859, in regard to the joint management and use of Keith Station, an additional porter was appointed for that station, whose wages were to be paid jointly by the companies; 2*d*, that this resolution has never been recalled; and 3*d*, that the wages of this porter have been regularly paid by the pursuers, who were re-paid the one-half of the wages by the defenders down to the end of August 1864; but that since that date no part of the wages have been paid by the defenders. And the summons concludes against the defenders for payment of one-half of the wages paid since that date, and progressive interest thereon.

"In the defences it is not denied that the above resolution was passed, and that an agreement of the nature founded on was entered into and has been acted on; and it is admitted that under this arrangement the defenders have paid their share of the wages up to the end of August 1864. But they dispute their liability for any part of the wages paid after the month of June 1865, because they allege that the services of an extra porter were at that date no longer necessary, and that they made an intimation to that effect to the pursuers. And they plead that in respect of this intimation, to which no answer was made, they cannot now be called on to pay any part of the extra porter's wages subsequent to the month of June 1865.

"Now the question thus raised appears to the Lord Ordinary to be one arising out of the resolution and agreement founded on in regard to the management and use of the station of Keith, and to resolve substantially into a dispute or difference relative to that agreement. Whether the defence thus raised against the pursuers' claim is well founded, the Lord Ordinary does not consider himself entitled to offer any opinion. Because he is precluded, as he conceives, from doing so by the terms of the 13th article of the agreement founded on by the defenders, which provides that 'all disputes and differences regarding the true intent and meaning of the agreement, or arising out of the same in any manner of way, shall be settled by arbitration, in the manner provided by "The Railways Clauses Consolidation Act 1845,"' and also by the 56th section of 'The Highland Railway Act,' which appears to him to exclude the jurisdiction of courts of law in all such questions or differences relative to agreements about the management and use of the Keith Station, by making them the subject of statutory arbitration. The Lord Ordinary has therefore sustained the first plea in defence, and dismissed the action."

Against this judgment the pursuers reclaimed.

Solicitor-General (CLARK) and BIRNIE, for them, contended that this was not the kind of dispute intended by the Legislature or the framers of the agreement to be referred to arbitration.

SHAND and LANCASTER for the respondents.

At advising—

LORD PRESIDENT—There has arisen a great deal of unnecessary confusion in this case, in consequence of the inaccurate method of statement of parties on record. But if I understand the matter rightly, the existing and regulating statute at the time the agreement founded on by the pursuers was entered into was the Inverness and Aberdeen Junction Railway Act 1856, which conferred powers upon the Inverness and Aberdeen Railway Company to enter into certain arrangements with the Great North of Scotland Railway Company. The 57th section of that Act provided that an agreement might be made between the two Companies for the formation, maintenance, management, and use of a joint station at Keith, the point of junction of the two lines, and by the same section power is conferred to appoint a joint committee for the regulation and management of the joint station so to be erected. Now, this clause of the Act of Parliament does not define or prescribe the powers of this joint committee. It merely gives power to the Companies to appoint such committee, and leaves to the Companies themselves to decide what powers that committee shall have. Consequently, any question that may arise as to the extent of the powers and authority of this joint committee must come to depend, not on the statute, but upon the agreement entered into by the two Companies in virtue of the powers conferred upon them by the statute. Then there is another section, which provides that if any question should arise between the Companies in regard to the construction, management, or use of the said joint station at Keith, or in regard to any agreement as to the matters aforesaid, or any of them, or otherwise in relation thereto, the same shall from time to time, so often as they arise, be settled by arbitration in the manner provided by the Railways Clauses Consolidation Acts 1845 with respect to the settlement of disputes by arbitration. The question is therefore, Whether the dispute that has arisen is or is not within the arbitration clause of that statute of 1856?

It would appear that on 8d September 1858 an agreement was made between the two Companies, proceeding upon an estimate that the annual expense of maintaining the joint station at Keith would amount to £1300 or thereabout; that the Inverness Company should pay £500 per annum for the use of the said station; and that if it should be found necessary to increase the present staff of servants, or the station accommodation, each party should contribute thereto in equal proportions. Thereupon a joint traffic committee was appointed, the said joint traffic committee to be also the joint committee for the management of the Keith Station. Two months after their appointment under this agreement, the joint committee had a statement laid before them showing the necessity of employing an additional porter at the joint station at Keith, and it was agreed that this should done, and the expense be defrayed equally by the two Companies, in terms of the agreement.

It was under the minute of meeting of the joint committee at which this was arranged that the additional porter in question was engaged, and, so far as we can see, he has ever since continued part of the staff of the joint station. His wages were paid in equal shares by the two Companies up to 31st August 1864. But it now appears that the Highland Railway, as coming in place of the Inverness and Aberdeen Junction Railway, have declined to pay their half since that date, and the reason why they refuse to pay such share is, that they say they have effectually recalled the agreement about the employment of an additional porter, and the joint payment of his wages, by the

letter of their secretary, dated 5th June 1865, and they contend that any question on this subject falls under the arbitration clause of the Companies' Acts. It is contended, on the other side, that this letter could have no such effect, and could raise no question for the determination of an arbiter under the submission clause of the statute, because the employment or dismissal of the additional porter is a matter properly for the adjustment of the joint committee, and has not yet been brought before them by the defenders.

Now, if the questions were entirely under the statute I should be inclined to sustain that argument, because I do not think that it is any part of the arbiter's duty to determine the construction and applicability of the statute. But there is no dispute about the construction of the statute. It is admitted that that statute gives authority to the companies to appoint a joint committee. The powers of that committee are not conferred by statute, but left to be determined by the agreement of the companies. Now, the construction of any such agreement plainly falls within the arbitration section of the statute, for it includes in so many words questions, disputes, or differences arising "in regard to any agreements as to the matters foresaid." Upon this ground I think that the interlocutor of the Lord Ordinary is well founded. The present question between the companies falls under the arbitration clauses of the statute, and the action has been rightly dismissed.

The other Judges concurred.

The Court accordingly recalled the Lord Ordinary's interlocutor, and found the action excluded by section 58 of the Inverness and Aberdeen Junction Railway Act 1856, and therefore dismissed the action with expenses, and decerned.

Agents for Pursuers—Henry & Shiress, S.S.C.
Agents for Defenders—H. & A. Inglis, W.S.

Tuesday, November 21.

SECOND DIVISION.

MILLER (FINLAY'S TRUSTEE) *v.* LEARMONTH AND OTHERS (MR AND MRS FINLAY'S MARRIAGE-CONTRACT TRUSTEES).

Husband and Wife—Postnuptial Marriage-Contract—Alimentary Provision—Provision to Wife—Conjugal Rights Act, sec. 16. A husband is not entitled by a postnuptial contract to confer on himself, and place beyond the reach of his creditors, an alimentary provision out of a fund to which he had succeeded through his wife, and he is not bound under sec. 16 of the Conjugal Rights Act to make a provision for his wife out of the fund, which was his absolute property.

John Finlay, printseller, Glasgow, was married in 1845 to his present wife, a daughter of Mr Alexander, of the Theatre Royal. Mr Alexander died in Dec. 1851, leaving a considerable fortune. Mrs Finlay's share of legitim from her father's estate was afterwards ascertained to amount to £2600. In February 1852 Mr and Mrs Finlay executed a postnuptial marriage-contract, by which Mr Finlay bound himself, on or before 1st January 1862, to pay £1999 to trustees, and in the meantime to insure his life for that sum, and assign the policies to the trustees; and further, to aliment the children of the marriage, of whom there were then three, till twenty-five years of age. Mr and Mrs Finlay by that deed conveyed to the trustees the whole estate, heritable and moveable, then belonging to Mrs Finlay, or which she should acquire or succeed to, and particularly all that she had succeeded to or should succeed to or acquire from her father and mother or any other persons. The husband renounced his *jus mariti* right of administration; the wife did not renounce her legal rights. The trust purposes, after payment of expenses, were—To give the husband an alimentary liferent of the whole trust property, a similar alimentary liferent thereafter to the wife, and the fee to the whole children of the marriage. The whole provisions to the spouses and children were declared alimentary, and not attachable for debt. Mr Finlay did not pay the £1999, nor did he assign policies of insurance for that amount to the trustees. The whole sum to which Mrs Finlay had become entitled was the £2600 before mentioned, which had been attached before coming into the hands of the marriage-contract trustees. Mr Finlay was sequestrated in 1860, and the whole of this sum was claimed by the trustee in his sequestration. In an action brought in 1863, and concluded in the House of Lords in 1870, it was decided that in the marriage-contract "the assignation by Mr Finlay of the legitim (£2600) was, in the circumstances of Mr Finlay, no more than a reasonable provision for his wife and children," and that the marriage-contract trustees were entitled to administer the fund for the trust purposes. But the question now raised by the claim of Mr Finlay's trustee was expressly reserved, viz., Whether the liferent alimentary right of Mr Finlay was not carried to his creditors by the sequestration. This claim was made on the ground that Finlay was not entitled to confer on himself, and place beyond the reach of his creditors a liferent alimentary provision out of a fund that (though coming through his wife) had become absolutely his own before the marriage-contract was executed.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 27th May* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process, Finds that the liferent interest or provision made in favour of John Finlay by the postnuptial contract of marriage between him and his wife libelled on fell under the sequestration of the estates of the said John Finlay, and is vested in the pursuer as trustee for behoof of the creditors in the said sequestration: Therefore finds, declares, and decerns in terms of the declaratory conclusions of the libel, in so far as regards the whole interests, dividends, or other annual profits or proceeds which have accrued upon the sum of £2600 libelled from and since 15th December 1851, and also in so far as regards the whole interests, dividends, or other annual profits or proceeds which shall accrue or become due upon the said sum of £2600 so long as the said sequestration shall subsist during the life of the said John Finlay, together with any interest which has or shall become due upon the said interest, dividends, or other annual profits and proceeds; and appoints the cause to be put to the roll in order that it may be proceeded with in accordance with these findings.

"*Note.*—On 30th June 1845 John Finlay married Mary Anne Alexander, eldest daughter of Mr Alexander, proprietor of the Theatre Royal, Glas-