knew one of them before, and must have seen the state they were in—these are all circumstances from which their character ought to have been inferred. The further inference that the magistrate drew from the behaviour of the witnesses, especially the barmaid, is important; from all this I infer, and I think the magistrate was right to infer, that the barmaid at all events knew the character of these girls. An innkeeper ought to keep a sharp look-out on the character of his guests by himself or his servants, and not allow himself to be lulled to sleep and take it for granted, and then come here and make the excuse that he did not know.

LORD ADAM—I am of the same opinion. The facts found proved in the present case were quite sufficient to justify the magistrate in coming to the conclusion he did.

LORD JUSTICE-CLERK—I am of the same opinion. First, I think it is important to notice that the statute and form of license do not require actual knowledge on the part of the innkeeper, or that the prosecutor must prove such knowledge; notoriety is sufficient, and the statute reasonably infers that if there is notoriety the innkeeper ought to know it, and it seems to me that this is quite a right and proper provision. Secondly, I think that the notoriety must be in the place or district where the house is situated.

I think the magistrate here was right in his inference.

Appeal dismissed, with £7, 7s. of expenses.

Counsel for Appellant—M'Kechnie. Agent—Thomas M'Naught, S.S.C.

Counsel for Respondent—Mackintosh. Agent—D. Macara.

COURT OF SESSION.

Friday, November 14.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CORBET AND OTHERS (ELLIOTT'S TRUSTEES) *v.* WADDELL (ELLIOTT'S TRUSTEE) AND ELLIOTT AND SPOUSE.

Domicile—Marriage-Contract—Where Domicile of Spouses English, but Marriage-Contract Scotch.

A marriage-contract was executed at Aberdeen according to both the Scotch and the English form, but its entire phraseology and purposes were otherwise according to Scotch law and practice, and the trustees under it were Scotchmen resident in Scotland. The husband was and continued to be a domiciled Englishman; the wife was at the date of the marriage a domiciled Scotchwoman. *Held* that in accordance with the implied intention of parties the marriage-contract was to be construed according to the law of Scotland.

Provisions to Husbands and Wives—Marriage-Contract—Extrinsic Evidence to Explain Source of Funds.

In the construction of the terms of a marriage-contract, *held* (1) that it was competent to have recourse to extrinsic evidence in order to determine from what source certain funds conveyed therein had been derived, whether from the husband himself or from others; and (2) that as it appeared that they had come not from the husband but from a third party, under directions, which had been properly carried out, that they were to be alimentary, a claim to them made by the trustee upon the husband's bankrupt estate fell to be rejected.

Bankruptcy—Trustee in a Liquidation—Title to Sue—Act 32 and 33 Vict. cap. 71 (English Bankrupt Act), sec. 125, sub-sec. 5.

Section 125, subsec. 5, of the above Act provides that "all such property of the debtor as would, if he were made bankrupt, be divisible among his creditors, shall, from and after the date of the appointment of a trustee, vest in such trustee under a liquidation by arrangement, and be divisible among his creditors." *Held*, on the principle laid down in *Mann (Aikenhead's Trustee)* v. *Sinclair*, *supra*, vol. 16, p. 430, 6 R. 1078, that the trustee in a liquidation had no title to sue for the alimentary creditors of the debtor.

An antenuptial contract of marriage entered into between John Bardoe Bowes Elliott and Miss Mary Christian Corbet, dated 22d May and registered 2d July 1858, contained, *inter alia*, the following provisions:—"In contemplation of which marriage the said John Bardoe Bowes Elliott hereby assigns, dispones, conveys, and makes over to and in favour of the said James Corbet, Major William Gibb, late of the Honourable the East India Company's Service, residing in Aberdeen, and Lauchlan M'Kinnon junior, advocate in Aberdeen, and to the accepting survivors or survivor of them . . . . the sum of ten thousand pounds sterling, being part of the sum of twelve thousand pounds sterling lately remitted for his behoof from India by his father John Bardoe Elliott, Esquire, late of the Honourable the East India Company's Bengal Civil Service, and which sum of twelve thousand pounds is at present lodged in the hands of Messieurs Coutts & Company, bankers in London, and will be payable to the said John Bardoe Bowes Elliot in the month of July next, on the joint order and receipt of himself, the said John Bardoe Bowes Elliott, and of the said James Corbet; and the said John Bardoe Bowes Elliott and James Corbet bind and oblige themselves to grant, execute, and deliver to the said trustees herein, and their foresaids, all writs and deeds necessary for the more readily putting the said trustees herein and their foresaids in possession of the said sum of ten thousand pounds sterling, declaring that the said trustees and their foresaids shall hold the said sum of ten thousand pounds sterling in trust always for the uses, ends, and purposes following, *videlicet*—They shall hold or lend out the said sum of ten thousand pounds sterling in their own names as trustees foresaid on Government securities, railway debenture bonds, or such other good and undoubted security, personal or heritable, as they may select, and the interests or proceeds thereof shall be annually paid by them to the said John Bardoe Bowes Elliott during his lifetime, and

after his death to the said Mary Christian Corbet during her lifetime, declaring that the said interest or proceeds shall be alimentary, and shall not be subject to the debts or deeds of the said John Bardoe Bowes Elliott or Mary Christian Corbet, nor to be liable to be affected in any way by the diligence of their creditors." It was then provided that on the death of the longest liver of the spouses the capital of the sum of £10,000 should be paid to the children of the marriage on their attaining majority, or in the case of daughters at marriage, equally or according to the appointment of the spouses. Powers were given to the trustees at their discretion to expend before the period of payment arrived, either in whole or in part, for behoof of the children of the marriage, the principal sums to which they might be entitled out of the capital of £10,000. Failing children being alive at the death of the predeceaser of the spouses, the £10,000 was to go to the survivor. The deed then proceeded—"And the said John Bardoe Bowes Elliott binds and obliges himself, his heirs and executors, to aliment, entertain, and educate his said children suitably to their station until the term of their said provisions, or until they shall be otherwise provided for . . . . For which causes, and on the other part, the said Mary Christian Corbet, in contemplation of said marriage, hereby assigns, dispones, conveys, and makes over to and in favour of the said trustees herein and their foresaids the whole heritable and moveable property of every kind and description at present belonging to her, or which she shall acquire or become entitled to, or which shall vest in her during the subsistence of the marriage between her and the said John Bardoe Bowes Elliott, but in trust always for the uses, ends, and purposes following, namely—the whole sums above conveyed by the said Mary Christian Corbet shall be held or lent out by the said trustees herein and their foresaids in their own names on Government securities, railway debenture bonds, or such other good and undoubted security, personal or heritable, as they may select, and the interest or the produce thereof shall be annually paid by them to the said Mary Christian Corbet during her lifetime, exclusive of her husband's *jus mariti* and power of administration, and after her death to the said John Bardoe Bowes Elliott during his lifetime, declaring that the said interest or proceeds shall be alimentary, and shall not be subject to the debts or deeds of the said Mary Christian Corbet or John Bardoe Bowes Elliott. . . . . And it is hereby declared that the provisions hereby conceived in favour of the said Mary Christian Corbet, and of the children of the said intended marriage, are and shall be in full satisfaction to her of all terce of heritage, half or third of moveables, or other claims whatsoever competent to her by and through the decease of the said John Bardoe Bowes Elliott, in case she shall survive him, his goodwill only excepted, or that her executors or nearest of kin could make by and through her decease in case she shall predecease the said John Bardoe Bowes Elliott, and also in full satisfaction to the said children of all claims for legitim or executry, and of every other claim competent to them by and through the decease of their said father and mother: Farther, it is hereby provided and declared, that although the said intended marriage should happen to be dissolved within year and day of the same, and without a living child procreated thereof, yet the whole provisions hereby conceived in favour of either party shall subsist and take effect, any law or practice to the contrary notwithstanding. . . . And lastly, the said parties consent to the registration hereof in the Books of Council and Session, or others competent, therein to remain for preservation; and that letters of horning on six days' charge, and all other execution needful, may pass and be direct hereon in form as effeirs, and thereto they constitute George Monro and John Dick, Esquires, advocates, their procurators," &c. The testing clause then followed in the Scotch form, bearing that the deed was signed and attested in accordance with the practice both of Scotch and English law.

The following documents also related to the point in dispute:—

Letter, John Bardoe Elliott, Esq., to Messrs Coutts & Co., bankers, dated 2d March 1858.

"By the present mail Messrs Colvin, Cowie, & Co., of Calcutta, will transmit to you No. 1 of a set of bills on England for twelve thousand pounds (£12,000) at three months' sight, which I request you will oblige me by crediting on realisation to the joint names of my son John Bardoe Bowes Elliott, at present a captain in the 43d Regt. Light Infantry, and James Corbet, Esq., of Aberdeen, late of the Bengal Medical Service—£10,000 of this sum being intended as a marriage settlement by my son on his wife at his marriage with Miss Mary C. Corbet, daughter of the said James Corbet, Esq.

"I have to request that you will pay the said sum of £10,000 to the said Captain J. B. B. Elliott and James Corbet, Esq., on their joint receipt. The remaining two thousand pounds (£2000) to be paid to my son Captain Elliott on his marriage with Miss Corbet, and for which his receipt to you will be sufficient.—I am, &c.,

"J. B. Elliott."

Letter, J. Corbet, Esq., and Captain Elliott, to Messrs Coutts & Co., dated 16th July 1858.

"With reference to your letter of the 10th inst. to Mr Corbet's address, we have now the pleasure to enclose our joint receipt for ten thousand pounds, and to request that you will be good enough to pay over the amount to the Union Bank of London, to be placed to the credit of the North of Scotland Banking Company in Aberdeen on account of James Corbet, Esq.

"A favourable investment on the security of landed property at present presents itself in Aberdeen, otherwise we should have been very glad to have availed ourselves of your offer to invest the money.—We are, &c.,

"J. Corbet.

"J. B. B. Elliott, Captn."

Receipt by Mr J. Corbet and Captain J. B. B. Elliott, to Messrs Coutts & Co., dated 16th July 1858.

"Received from Messrs Coutts & Co., bankers, the sum of ten thousand pounds sterling (£10,000) remitted from India by John Bardoe Elliott, Esq. of Patna. "J. Corbet.

"Bengal Medical Service Retired List.

"J. B. B. Elliott,

"*16th July* 1858. Captn., 43d Lt. Infantry."

Receipt by Captain J. B. B. Elliott to Messrs Coutts & Co., dated 17th July 1858.

"*Chatham, July 17th* 1858.

"Received from Messrs Coutts & Co., Strand, London, the sum of £1997, 15s., being a portion of the sum of £12,000 sent from India by J. B. Elliott, Esq., of Patna, Bengal.

"J. B. B. ELLIOTT,
"Captn., 43d Lt. Infantry."

The trustees invested the above sum of £10,000 in the following manner, viz.—(1) In a mortgage for £1000 by the Great North of Scotland Railway, (2) one for £4000 by the Caledonian Railway, and (3) a bond and disposition in security for £5000 over certain lands in Aberdeenshire.

On 26th June 1878 Mr J. B. B. Elliott filed a petition in the Court of Bankruptcy in London for the liquidation of his affairs by arrangement; and subsequently at a meeting of his creditors it was resolved that his affairs should be liquidated by arrangement. On the 26th July following Mr James Waddell was appointed the trustee under the liquidation.

This was a multiplepoinding brought by the marriage-contract trustees in consequence of a demand upon them by Mr Waddell to be paid all interest of the £10,000, present and future. The object was to have the rights of parties determined, and the defenders were in the first place Mr Waddell, and secondly Mr and Mrs Elliott.

Mr and Mrs Elliott claimed "to be ranked and preferred to the whole fund *in medio*, the interest and proceeds of which the said fund consists to be annually paid by the said trustees to the claimant the said John Bardoe Bowes Elliott during his lifetime, and after his death to the claimant the said Mrs Mary Christian Corbet or Elliott, declaring that the said interest and proceeds are alimentary, and not subject to the debts or deeds of them or either of them, nor liable to be affected in any way by the diligence of their creditors. In any case, the claimant the said Mrs Mary Christian Corbet or Elliott claims the said interest and proceeds during her lifetime after the death of the said John Bardoe Bowes Elliott, declaring that the said interest and proceeds are alimentary, and not subject to her debts or deeds, nor liable to be affected in any way by the diligence of her creditors."

Mr Waddell claimed "to be ranked and preferred, as trustee foresaid, preferably and *primo loco* to the whole of the interest or proceeds which have accrued, and are now in the hands of the pursuers, and also to the interest or proceeds which shall hereafter accrue or become due during the lifetime of the said John Bardoe Bowes Elliott on the said sum of £10,000 sterling, and further to the contingent interest of the said John Bardoe Bowes Elliott in the said capital sum itself, as the same may be estimated and valued under the statutes."

Mr and Mrs Elliot pleaded, *inter alia*—"(2) The said sum of £10,000 never having been the property or in the possession of the said John Bardoe Bowes Elliot, the claim of the claimant James Waddell is excluded by the declaration contained in the said antenuptial contract of marriage, that the interest or proceeds which form the present fund *in medio* should be alimentary, and not subject to the debts or deeds of the present claimants, nor liable to be affected in any way by the diligence of their creditors. (3) The claimants are entitled to be ranked and preferred in terms of their claim in respect of the instructions of the donor of the said sum of £10,000, and of the above-mentioned declaration in conformity therewith. (4) *Separatim*, the claimants are entitled to be ranked and preferred in terms of their claim in respect that the said interest and proceeds are necessary for the aliment of themselves and their family."

The pleas for Mr Waddell were—"(1) The law to be applied to the facts is the law of England; and as according to that law, the fund *in medio* would be carried to the trustee in the liquidation, his claim ought to be sustained. (2) Assuming that the law to be applied is the law of Scotland, the trustee's claim ought to be sustained, because it is incompetent for the owner of property to withdraw it from creditors as a means for payment of their debts, by declaring it in his marriage-contract to be alimentary, and not affectable by creditors. (3) The whole property and estate of the said John Bardoe Bowes Elliott having passed to and become vested in the claimant, as trustee foresaid, the claimant is entitled to decree in terms of his claim. (4) In any view, the whole interest not being required for alimentary purposes, the trustee ought to be found entitled to a proportion thereof."

The Lord Ordinary (RUTHERFURD CLARK) ranked and preferred the claimants Mr and Mrs Elliott in terms of the first branch of their claim. He added this note to his interlocutor:—

"*Note*.—By marriage-contract dated 22d May 1858 between John Bardoe Bowes Elliott and Mary Christian Corbet, the former assigned to the trustees thereby appointed the sum of £10,000. This sum is described 'as part of a sum of £12,000 lately remitted for his behoof from India by his father John Bardoe Elliott, and which sum of £12,000 is at present lodged in the hands of Messieurs Coutts & Co., bankers in London, and will be payable to the said John Bardoe Bowes Elliott on the joint order of himself and of the said James Corbet.' Mr Corbet was the father of Mrs Elliott.

"The purposes of the trust are—(1) to pay the interest to Mr Elliott during his lifetime; (2) to pay the interest to Mrs Elliott during her lifetime if she should survive her husband; (3) to hold the capital for behoof of the children of the marriage; and (4) if there are no children or issue of children alive at the dissolution of the marriage, it is declared that the capital shall belong to the survivor of the spouses, 'or to his or her heirs or assignees.' It is provided that the interest which is payable to Mr Elliott, and after his death to Mrs Elliott, 'shall be alimentary, and shall not be subject to the debts or deeds of the said John Bardoe Bowes Elliott or Mary Christian Elliott, nor be liable to be affected in any way by the diligence of their creditors.'

"Mr and Mrs Elliott are both alive, and there are children of the marriage. Mr Elliott is bankrupt. His affairs have been put in liquidation under certain proceedings. The claimant Waddell is trustee in the liquidation.

"The fund *in medio* is the interest which is in the hands of the marriage-contract trustees, and which may hereafter accrue during the subsistence of the marriage. It is claimed by Mr Waddell as part of the estate of Mr Elliott which

falls within the liquidation, and it is claimed by Mr and Mrs Elliott as an alimentary fund which belongs to them, or at least to Mr Elliott.

"It is conceded on both sides that if the £10,000 is to be considered as belonging to Mr Elliott and settled by him, the interest of it cannot be withdrawn from his creditors by the declaration that it was to be paid to him as an alimentary fund. But it is contended by Mr and Mrs Elliott that the money belonged to Mr Elliott the elder, that it was settled in conformity with his instructions, and that Mr Elliott the younger never had any right to it beyond what is given to him by the marriage-contract. This is the question to be solved.

"The claimant Mr Waddell contends that it must be determined by reference to the marriage-contract only. The Lord Ordinary cannot adopt that view. The contract identifies the fund, and it is, it is thought, legitimate to ascertain by extraneous evidence to whom the fund belonged and by whom it is truly settled.

"£12,000 was remitted from India by the father of Mr Elliott, and placed in the hands of Coutts & Co. in the joint names of Mr Elliott and Mr Corbet. The letter of instructions by Mr Elliott the elder is produced. He directs Messrs Coutts & Co. to credit £12,000 to the joint names of John Bardoe Bowes Elliott and James Corbet, '£10,000 of this sum being intended as a marriage settlement by my son on his wife,' and he requests them to pay 'the said sum of £10,000 to Mr Elliott and Mr Corbet' on their joint receipt, and 'the remainder to be paid to my son Captain Elliott on his marriage with Miss Corbet.' The marriage-contract before mentioned was entered into and the marriage was solemnised.

"In the opinion of the Lord Ordinary the £10,000 cannot be regarded as part of the estate of Mr Elliott. He had no absolute gift of it, and if the marriage had not taken place it would, it is thought, have remained the property of his father. He thinks that the true view of the case is that the money was remitted in order to be settled under a marriage-contract in such terms as might be thought best for the spouses, and except through the marriage-contract Mr Elliott had no right to it. It is true that the only instruction given with respect to the £10,000 is that it is intended as 'a marriage settlement by my son on his wife,' and it has been suggested that except in so far as the wife took a direct interest in it, the money was to be regarded as coming from the husband, and as his property. But she was interested in seeing that due provision was made for the maintenance of the family during the subsistence of the marriage as well as for herself after its dissolution. The marriage, it is to be presumed, would not have taken place unless the money had been settled as it now is.

"It was urged that the fund was more than sufficient for an alimentary fund. The Lord Ordinary is not able to adopt that view."

Waddell reclaimed, and amended his condescendence by making, *inter alia*, the following averment in regard to a contention that the marriage-contract fell to be construed according to English law, by which a provision such as that in question would be void against creditors—"The said John Bardoe Bowes Elliott is a domiciled Englishman. Before and since his marriage he has been uninterruptedly domiciled in England, and at the date of the marriage it was the intention of the spouses to reside and be domiciled in England—an intention which they have carried into effect. His father, the said John Bardoe Elliott, was domiciled in Bengal, and died there. The sum of £10,000 mentioned in the summons was conveyed to the said John Bardoe Bowes Elliott by his father for his behoof in order that the son might make a settlement upon his marriage, and it became the son's property upon its being remitted to London, or at all events before the conveyance in the marriage-contract was executed and took effect."

It was admitted that Mr Elliott was at the date of his marriage, and continued to be, a domiciled Englishman.

Waddell argued on his first plea-in-law, to which the Court desired the argument to be confined in the first instance—The law of England ought to be applied. The domicile of the spouses was, and was intended to be, in England. The law of that country admittedly must regulate the position of the spouses *stante matrimonio* and their succession after its dissolution as to all matters not within the contract. Did the contract alter that rule in the present case? It was no doubt within the power of the parties to contract themselves into the law of another country. But they had not done so here and consequently the contract must be construed as an English contract.

Authorities—*Watson* v. *Renton*, Jan. 21, 1792, M. 4582; *Royal Bank* v. *Scott Smith, Stein, & Co.*, Jan. 20, 1813, F.C.; *Stair* v. *Head*, Feb. 29, 1844, 6 D. 904; *Valery* v. *Scott*, July 4, 1876, 3 R. 965; *Toubert* v. *Turot*, Dec. 11, 1703, 1 Br. Parl. Cases, 129; *Anstruther* v. *Adair*, June 10, 1834, 2 Mylne and Keene, 513; *Este* v. *Smith*, June 13, 1854, 23 L.J., Ch. 705, and 18 Beav. 112; *Duncan* v. *Cannon*, June 20, 1854, 23 L.J., Ch. 265, and 18 Beav. 128; *Byam* v. *Byam*, Dec. 4, 1854, 19 Beav. 58; *Watts* v. *Shrimpton*, Aug. 6, 1855, 21 Beav. 97; Dicey's Law of Domicile (1879), 273, 275; Westlake's Intern. Law, sec. 371; Philimore's Intern. Law, vol. iv., sec. 466; Wharlin's Intern. Law, secs. 190, 200, 201; Bishop on Mar. and Div. sec. 404; Savigny's Intern. Law (Guthrie) 178, 180; Story's Confl. of Laws, secs. 184, 199.

Argued for the respondents—The law to be applied was the law of Scotland. The contract was Scotch in form and in place of execution, the trustees were Scotch, and the investments were Scotch. There could be no doubt that the parties meant the law of Scotland to regulate the contract although they had not said so expressly. The marriage had taken place on the faith of the contract being carried out as the parties intended.

Authorities—*Ramsay* v. *Cowan*, July 11, 1833, 11 S. 967; *Thomson's Trustees* v. *Alexander*, Dec. 18, 1851, 14 D. 217; *Treveylan* v. *Treveylan*, March 11, 1873, 11 Macph. 516; *Mitchell & Baxter* v. *Dawson*, Dec. 3, 1875, 3 R. 208.

At advising—

LORD PRESIDENT—The question determined by the Lord Ordinary depends on the construction and legal effect of certain provisions in a contract of marriage which was executed between Mr John Bardoe Bowes Elliott and Miss Mary Christian Corbet on the 22d May 1858. The reclaimers contend that the construction and legal

effect is to be determined by the law of England, and the respondents by the law of Scotland. The ground upon which, as I understand, it is contended that the law of England should determine the construction is that the domicile of the marriage is English—in other words, that the husband was at the date of the marriage, and always had been, and still continues to be, a domiciled Englishman. Miss Corbet was a Scotchwoman, but of course on her marriage her domicile became that of her husband, and it is not disputed that Mr Elliott is a domiciled Englishman and always has been. But that does not appear to me to be at all conclusive of the matter. The question depends on the nature of the trust and of the fund to be administered. The solution of it is often to be gathered from the intention of the parties. It is so here, and it further appears to me to have been matter of contract.

The marriage was celebrated in Aberdeen, the lady and her father being resident in that town, and the contract of marriage created a trust which according to my view must be administered in Scotland, and could not competently be administered anywhere else, nor be subject to any other jurisdiction than that of this Court. The husband dispones, conveys, and makes over to certain gentlemen resident in Aberdeen, and to the accepting survivor or survivors of them, and to the heirs of such survivor, a sum of £10,000, being part of the sum of £12,000 lately remitted for his behoof from India by his father, to be payable on the joint order and receipt of himself and Mr James Corbet. Then Mr Elliot and Mr Corbet, in whose names the money had been lodged, "bind and oblige themselves," &c.—[*His Lordship here read the clause of the antenuptial contract as quoted supra*]—and then on the death of the longest liver the money is to become payable in certain proportions to the children of the marriage. On the other hand, Miss Corbet makes over her whole estate, and that in like manner is to be lent out—[*His Lordship here read the clause quoted above*]—and the destination is again in favour of the children of the marriage. The trustees have power to vary the securities for the investment of the trust funds from time to time; and they have also power to assume other trustees. Miss Corbet in consideration of the provisions made in her favour renounces her right to terce and *jus relictæ*, and further the provisions are declared to be in full satisfaction of all claims to legitim. Both parties consent to the registration of the deed, not only for preservation, but also that letters of horning on a six days' charge and all other needful execution may pass on it. And accordingly the deed is registered in the Books of Council and Session in terms of that clause.

Now, it appears to me that the administration of this trust under such a deed is essentially Scotch, and that if any question arose as to the nature of the securities in which the trustees should invest the funds, it would fall to be determined by the law of Scotland, because the words used are peculiar to Scotch Conveyancing, and the trustees are directed to have regard to their powers as expressed in that language. And if other questions arose as to the time of making payments, and above all as to the time and manner of making payment of the interest to one or other of the spouses, it appears to me that these too must be settled by reference to that law. In short, I cannot imagine that the trustees are expected to have regard to any other system of jurisprudence than that under which they live. They are Scotchmen, the deed is Scotch, and they are not bound to know the law of any other country.

It appears that the only estate coming under the trust is this £10,000, for Miss Corbet neither acquired nor succeeded to anything of her own. Now, that has been invested in the mortgages of Scotch railways and in heritable bonds over lands in Aberdeenshire, so that the investments are quite in harmony with the other characteristics of the trust. I cannot come to any other conclusion than that the deed is to be construed according to the law of Scotland. Therefore whatever may become of the interest after it is paid over, the trustees can only pay it in terms of the trust-deed. In this multiplepoinding they are asked to pay it in some other way; but that they have no power to do.

And let me add that the estate might come into the administration of this Court. Suppose that the trust were to lapse. A judicial factor would have to be appointed, and we would have no difficulty in sustaining our jurisdiction for that purpose. The Court would then be administering this estate through its officer. That seems to me a very conclusive test of the question. I have no hesitation in repelling the plea that the law of England ought to be applied.

Lord Deas—The deed here was prepared in Aberdeen by a Scotch conveyancer who knew very well how to prepare a deed in the Scotch form, but who would not be expected to know how to prepare one in the English form. It was executed in Aberdeen, and *ob majorem cautelam* it was executed according both to Scotch and to English practice—a precaution which is very common and very right, but which affords no indication as to which law is to be applied to the construction of the deed. That seems to me to be beyond all dispute a question of the intention of parties. I cannot for a moment doubt that if they had distinctly said that they intended to contract according to the law of Scotland, effect would be given to that intention.

The question is, whether, although the spouses have not said so, the deed may be read as implying an intention of that sort? I cannot doubt that that is its meaning. Its whole phraseology is easily intelligible according to the law of Scotland, but it is unintelligible according to any other law. It was agreed that it should be registered in Scotland, not for security merely, but for execution, and a decree of registration is just a decree of a Scotch Court. Then all the trustees are Scotchmen—resident in Scotland—and plainly it was understood and intended that they should be resident in Scotland, and that the contract should be carried out there. Further, all the acts of administration have taken place in Scotland, and I think must continue to take place there. If the trustees were to resign, it would fall to this Court to appoint new trustees. The wife by the contract conveys her whole means and estate which she may acquire or succeed to during the marriage. That is the consideration on her part; and I have no doubt how the provision is to be construed according to the law of Scotland; but how it would be according to English law we cannot

tell. Then when we come to consider what the provisions are, I do not think it is possible to have any doubt as to the meaning and intention of parties. It is declared that the provisions in favour of Miss Corbet "shall be in full satisfaction to her of all terce of heritage, half or third of moveables, or other claims whatsoever competent to her by and through the decease of" Mr Elliott. Now, every sentence of that is Scotch. It is impossible to doubt that this provision is to be construed according to the rules of Scotch law. And then there is a clause excluding the legitim of children, which is a Scotch provision. In short, I have no doubt that the deed is to be construed as a Scotch deed.

Lord Mure was absent in the Registration Appeal Court, but the Lord President intimated that he concurred in the judgment about to be pronounced.

Lord Shand—I am of the same opinion. It is quite true that where there is no marriage-contract the rights of parties will be construed according to the law of the husband's domicile or according to the matrimonial domicile, that is, the domicile at which the spouses intend to reside. And it is equally true that a marriage-contract will in the general case be construed in the same way. But this last rule is subject to an important exception. It is, in the first place, not disputed that the parties may make it a part of their contract that their rights shall be subject to the law of another country, and that if this point be made the subject of an express stipulation, the law of the country to which they desired to subject the contract will regulate these rights. But if that may be done expressly, the same result may be brought about if it is the fair inference from the terms and nature of the contract; and I am of opinion with your Lordship, that looking to the nature and terms of the deed here, it was intended that the law of Scotland should regulate the rights of parties.

Your Lordships have so fully discussed the provisions of the deed that it would be mere repetition on my part to go over them again; but I may be permitted to add that I think the argument on the merits goes a long way to settle what was the intention of the parties. For it is maintained by the appellant that it is incompetent by the law of England to settle property or the income of property in such a way as to defeat the rights of the husband's creditors. Now, on turning to the deed I find it plain that the parties intended this fund to be alimentary, so that if they intended the deed to be construed according to the law of England that clause would be of no effect. But I cannot assume that the parties intended to be subject to a law which would nullify one of the provisions of the deed.

Parties were thereafter heard on the other pleas for the reclaimer.

Argued for him—(1) The money was the husband's, or, what came to the same thing, the father gave it to his son absolutely; at least the contrary did not appear from the marriage-contract, and beyond its terms the respondents were not entitled to go. If, then, the money was the husband's, the marriage-contract would not stand against his creditors—*Kemp* v. *Napier*, Feb. 1, 1842, 4 D. 558; *Johnstone* v. *Dunlop*, Mar. 24, 1865, 3 Macph. 758; *Kerr* v. *Justice*, Nov. 7, 1866, 5 Macph. 4; *Miller* v. *Learmonth*, Nov. 21, 1871, 10 Macph. 107, and May 3, 1875, 2 R. (H.L.) 62. At all events (2) the trustee represented alimentary creditors, and could insist in his claim on their behalf. [The Lord President referred to *Mann (Aikenhead's Trustee)* v. *Sinclair*, June 20, 1879, 16 Scot. Law Rep. 630, 6 R. 1078.]

Argued for the respondents—The money was not the husband's, as it was not given by the father to his son alone, but in conjunction with the lady's father, to be invested as they should think fit for the purposes of the marriage. [The Court did not desire argument upon the question of the trustee's title to sue for alimentary creditors.]

At advising—

Lord President—The competing claimants in this case are Mr and Mrs Elliott, the beneficiaries under the marriage-contract, and Mr Waddell, who is the trustee under the liquidation of Mr Elliott. As to the second branch of Mr Waddell the trustee's claim we have heard no argument—I suppose for the very obvious reason that there is nothing in the hands of the trustees to which he could be preferred or which could be made the subject of a multiplepoinding. Of course if Mr Waddell can find a person willing to purchase his claim to the contingent interest he is entitled to sell it, but with that we have at present no concern. The only question is, whether the income of this £10,000 which under the marriage-contract is paid over to Mr Elliott can be attached by Mr Waddell as the trustee in his liquidation?

There is no doubt that if the money belonged to Mr Elliott himself it was impossible for him by any deed or any contract to settle it so as to put it beyond the reach of his creditors. That is an elementary principle in the law of bankruptcy which no one ever dreamt of disputing. The question is, whether this £10,000 was the property of Mr Elliott?

It is said that we cannot go beyond the terms of the marriage-contract itself. I cannot assent to that proposition. I do not say what would have been the case if there had been an express declaration in the deed that this £10,000 had been paid out of the husband's own funds. But so far from that being so it is quite plain from the marriage-contract that this money stands in a peculiar position. For it appears that it was placed under the joint control of Mr Elliott and his father-in-law. Therefore it seems to me that when the question turns upon a matter of fact—whose was this money?—we may have recourse to extrinsic evidence to settle the matter of fact. This evidence does not enter into the construction of the marriage-contract in the slightest, but it has an important bearing on the rights of the parties, for if it turns out that the money was the husband's, one result will follow; if it turns out that it was not his, then the result may be the opposite.

The money, as we see from the correspondence, belonged to Mr Elliott's father. It was sent home from India in the form of a draft on Mr Elliott senior's bankers—Messrs Coutts & Co.—who were directed to pay over to Captain Elliott the sum of £2000 as soon as his marriage with Miss Corbet should take place. Now this £2000

Mr Elliott directed to be paid to his son absolutely on his own receipt, but as regards another sum of £10,000 he gave perfectly different directions, it "being intended as a marriage settlement by my son on his wife at his marriage with Miss Mary C. Corbet, daughter of the said James Corbet, Esq." That is the purpose for which he provides this money; and in order to carry out this purpose he does not direct that it is to be paid over on his son's receipt alone, but it is to be paid "to the said Captain J. B. B. Elliott and James Corbet, Esq., on their joint receipt." Now, that having been done, what was its effect? Its effect was to put the money under the joint control of the son and Mr Corbet, for the purpose of making a marriage settlement. It was so tied down that unless both these parties agreed as to what should be done it could not be settled at all, for one could not act alone. Therefore the meaning plainly is, that the money is to be settled on such terms and conditions as Mr Elliott and Mr Corbet should agree upon. The consent of Mr Corbet was just as essential as that of Mr Elliott; and if Mr Corbet was of opinion that the money should be settled in the way in which it actually was settled, and Mr Elliott assented, then it must be held to have been settled in the way intended by the person from whom it came. Because the only rational construction of Mr Elliott's directions is—"I give this money to be settled in a marriage-contract between my son and Miss Corbet, but it is to be settled in such a way as may be agreed on between Mr Corbet and my son." Now, the way they settle it is upon the spouses and the longest liver of them in liferent and the children in fee, and they declare that the interest shall be alimentary both as regards the husband and the wife, and secure against the diligence of their creditors. Now, it appears to me that the money was settled in this way by the trustees in conformity with the intention of the person who gave it; and therefore the case falls under the well-known rule that when a person—whether a parent or a stranger—gives money, he is entitled to settle it on any condition that he pleases. Therefore on the question whether the trustee is entitled to carry off this £10,000 absolutely, I think that the interlocutor of the Lord Ordinary is perfectly sound.

But there is another question which was not, I think, argued before the Lord Ordinary, and it is, whether this trustee in bankruptcy is entitled to claim this fund for certain of Mr Elliott's alimentary creditors whom he says he represents? That looks very like the question we decided in the case of *Aikenhead's Trustee* last session (6 R. 1078). The trustee has vested in him the whole estate of the bankrupt. But the estate which is vested, as appears clearly from the English Bankrupt Act (31 and 32 Vict. c. 71), sec. 125, subsec. 5, is "all such property of the debtor as would if he were made bankrupt be divisible among his creditors." That can be read only as meaning divisible among his whole creditors. That is not the position of the fund here. I think therefore that the trustee, as representing the whole body and not a particular class who may come forward and claim in their own name, has no title to claim this fund. On the whole matter I am for adhering.

Lord Deas—I think the Dean of Faculty confined his arguments very properly and very ably to the question whether the correspondence is to be taken into consideration in the construction of this marriage-contract. Now, I think that there is abundant evidence in the deed itself to justify and to require us to refer to these letters. The deed narrates that Mr Corbet is the father of the bride, and that he is one of the trustees, and then sets forth the assignation by Mr Elliott junior in favour of the trustees of the sum of £10,000, being part of the sum of £12,000 remitted by Mr Elliott senior to be payable on the joint receipt of his son and Mr Corbet. Now, that narrative makes it absolutely necessary in order to understand the contract itself that we should see all the documents referred to. I have not the slightest doubt of this. And when we look at these documents we find that it was the father's money, to be given in view of the marriage. It was given to be settled according to the arrangement come to between Mr Elliott, the son, and Mr Corbet. In fact I think it was left to Mr Corbet altogether to see that the money was dealt with as Mr Elliott desired. That is quite plain from the way in which the sum of £2000 is dealt with as compared with the £12,000. I therefore think that Mr Elliott senior agreed to the terms of the marriage-contract.

On the other question I entirely concur. I think the liquidator represents the whole body of creditors, and that consequently he has no title to appear for the alimentary creditors of the husband.

Lord Shand—If this money is clearly shown to have been settled by the father on the terms and conditions which he desired, it cannot be disputed that these conditions will receive effect. The question is, whether the money has been so settled? I agree with your Lordships that we are entitled to look at these documents to see on what conditions the money was given and was held. Now, taking these letters and the contract together we find that Mr Elliott senior was not a party to the contract, but that he left it to Mr Corbet as his trustee or agent to settle the money as he thought fit in the interests of both spouses. And acting as Mr Elliott's agent Mr Corbet settles the money under the stipulation that it shall be alimentary only. It seems to me that no distinction can be drawn between Mr Elliott making that condition an express stipulation and making it in the way he did through an agent. I think therefore that the condition is an effectual one.

I think it right to add, however, that even had the money come from the husband, or from a stranger without any condition, I am not prepared to say that the condition in the marriage-contract declaring the fund to be alimentary would have been ineffectual. The money was intended for the aliment and maintenance of the children of the marriage, and was the only fund for that purpose. In *Kerr* v. *Justice*, 5 Macph. 4, on the other hand, the wife had a large separate estate, and that might make a difference in my view.

As to the claim of the trustee to appear for alimentary creditors, I concur with your Lordships. These creditors are entitled to appear for themselves, and must do so if they desire to insist in their claim.

The Court adhered.

Counsel for the Trustee (Reclaimer)—The Dean of Faculty (Fraser)—Taylor Innes. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for J. B. B. Elliott and Spouse (Respondents)—Kinnear—Begg. Agents—Morton, Neilson, & Smart. W.S.

Friday, November 14.

FIRST DIVISION.

[Lord Young, Ordinary.

PEDDIE AND OTHERS (MASTERS, PATRONS, AND MANAGERS OF ALLAN'S MORTIFICATION) *v.* THOMSON.

Salmon-Fishing—Fixed Engine—Net and Coble.

Mode of salmon-fishing where the boat was allowed to drift down with the tide, and where the net, which was left in motion all the time, was used as a means not of enclosure but of entanglement, which was *held* to be within the principle of fishing by net and coble, and therefore in the circumstances legal.

Opinion (per Lord Deas) that the fact that a certain mode of fishing is the only practical method of utilising certain portions of water for that purpose is an important element to be taken into account in the question of its legality.

The complainers in this case were the masters and the patrons and managers of Allan's mortification, Stirling, who were proprietors of the Longcrack salmon-fishings on the river Forth. The respondent was the tenant of the Tulliallan fishings, which were situated on the Forth below the Longcrack fishings, and extended from about a mile above Kincardine pier to about three miles below it.

The question related to the legality of a certain mode of fishing practised by the respondent. The following joint minute of admissions sufficiently sets forth the nature of the fishing:—"(2) The said portion of the estuary of the river Forth is not suitable for being fished by means of net-and-coble fishing, pursued by sweep-nets in the usual method; and fishing by that method is practically not possible in the said portion of the river. (3) The method of fishing practised by the respondent is as follows:—The net used by the respondent is 6 or 7 feet deep, and about 200 yards long. The meshes, which are made of very fine twine almost approaching to thread, are from 2½ to 3 inches wide from knot to knot—that is, from 10 to 12 inches round. A light head-rope runs along the whole length of the top of the net, to which are attached cork floats at intervals of about 3 feet, and to a similar rope running along the bottom are fixed light weights or sinkers at intervals of about 10 to 12 feet. The purpose of these floats and sinkers is to keep the net in an upright position in the water, and to keep the upper side of the net always on the surface. A portion of the kind of net used by the respondent, with head and foot ropes, floats, and sinkers attached, is produced. (4) In fishing with this net the practice is to fish about three or four hours every tide, commencing when the ebbing tide begins to slacken, and continuing a short time after the commencement of the flow. This period of the tide is selected because owing to the lightness of the material of which it is composed, if the net were used at a time when the tide flowed at its full strength, the strength of the tide acting with greater force on the floats than on the sinkers would carry the upper part of the net more rapidly than the lower part, and thus make the net take a horizontal position and float upon the surface. But for that circumstance the net might be used in any state of the tide. (5) The operation of fishing with the net is conducted in the following manner:—The boat with the net in it is rowed out into the stream. One end of the net, which may be called the far end or the loose end, is then begun to be payed out into the stream, and during the operation of paying-out the boat is rowed towards the shore, either directly across the stream or in such a direction as will allow sufficiently for the difference of the action of the wind and tide upon the net and the boat respectively. When the net is all payed out the end next the boat is attached by a short rope, one or two yards long, to the stern of the boat. The net is then in the fishing position. There is no direct connection between the far end of the net and the boat or its occupants; and the rope attaching the net to the boat does not for fishing purposes require to be held, and is not in practice held, by any of the occupants of the boat except when the net is being hauled in. The net is generally fished with in water much deeper than the depth of the net, and at a distance from the side sufficient to secure such a depth of water as will keep the net from coming in contact with the bed of the river. The fineness of the material of the net renders it necessary to keep it in a free and slack position, both from the circumstance that if it were kept strained or tight a strong fish would easily burst through it, and also that it would not serve so well the purpose of entangling the fish. The boat is rowed gently for the purpose of putting such a strain upon the net as will keep it extended, and also for the purpose of drawing and keeping the end of the net attached to the boat a little in advance of the middle portion of the net, in which position it fishes more successfully, but not so as otherwise to accelerate the motion of the net, which is allowed to be carried with the current. For the purposes above referred to, the man in charge of the oars requires to ply them constantly except on an occasion when a favourable wind, acting on the boat with greater force than on the floats of the net, renders a continuous use of the oars unnecessary. Occasionally, also, a strong wind blowing in the same direction as the current renders it necessary to restrain the boat so as to prevent it from putting too great a strain upon the net. The action of the tide being in general stronger at the centre of the river than at the shore, the outer end of the net gets gradually in advance of the boat until at length the net lies in a line parallel or nearly parallel to the shore. Being then in a position unsuitable for fishing, it is taken out of the water and again shot or payed out in the manner above described. Throughout the whole process the net and the boat are kept continually in motion in the manner above specified. (6) While the net is being fished as aforesaid, as soon