in re Globe New Patent Iron and Steel Company, June 26, 1875, L.R., 20 Eq. 337.

Argued for the respondents—The creditor was not entitled to a winding-up order, for the debtor *bona fide* disputed the debt, and there was no evidence of insolvency other than non-compliance with the notice served under the Companies Act. Not only was the debtor not insolvent, but he was possessed of property far in excess of the debt, and there was no averment of the existence of any other creditors—*In re London and Paris Banking Corporation*, Nov. 21, 1874, L.R., 19 Eq. 444; *in re The Catholic Publishing Company, Limited*, March 7, 1864, 33 L.J. Ch. 325.

It appeared from admissions at the bar that on other transactions altogether, as to which there was a current-account between the petitioners and respondents, the petitioners owed the respondents a sum which at the date of the discussion amounted to £1200. The respondents, on the suggestion of the Court, offered to consign the £600, which was the difference between this sum and the £1800 in respect of which the petition was brought, the Court intimating that such consignation would receive consideration on the question of expenses.

At advising—

Lord President—There was no doubt a disputed debt owed by the respondents to the petitioners. The petitioners were in possession of two past-due bills which had been granted by the respondents, and they had it in their power to raise the questions by doing diligence on these bills in the ordinary way. If they had done so the respondents might have given security in the ordinary way in the Bill Chamber, and the issue between the parties might then have been tried; but instead of taking that course they have come here with a petition stating that the respondents are insolvent, and that they have neglected for three weeks to pay the debt due by them, and accordingly praying for a liquidation order under the Companies Acts. The petition was preceded by a correspondence, of the terms of which I cannot approve—letters containing threats in order to get payment of money which is said not to be due. The application is for the amount of a disputed debt, and not only is no insolvency proved, but it is plain that the respondents are possessed of a large and valuable property. This petition ought never to have been presented. A charge was the proper mode of getting payment. In the whole circumstances, I am of opinion that the petitioners should be found liable in the expenses of this application.

Lords Mure, Shand, and Adam concurred.

The Court pronounced this interlocutor:—

"The Lords . . . in respect of the consignation of £600 now made by the respondents the Walkinshaw Oil Company, conform to deposit-receipt therefor, . . . dismiss the petition, and decern: Find the petitioners liable to the respondents in expenses."

Counsel for the Petitioners — Pearson — M'Kechnie. Agents—J. & F. Anderson, W.S.

Counsel for the Respondents—Balfour, Q.C. —W. Campbell. Agents—J. & J. Gellatly, S.S.C.

Wednesday, November 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WEBSTER *v.* TAIT (WEBSTER'S TRUSTEE).

Bankruptcy — Sequestration — Bankrupt's Obligation for Annuity to Woman who had been Living with Him — Deceased Wife's Sister — Turpis causa.

A man lived with his deceased wife's sister for some years, having first gone through a form of marriage with her in a country where such marriages are legal. After a time he left her, but agreed by a minute of agreement to pay her a certain aliment while they should survive and live apart. His estates were thereafter sequestrated. *Held* that as the aliment was not to be paid *ob turpem causam*, but as a reparation to the woman on the cessation of their illicit relation, she was entitled to claim as a creditor on his estate.

In February 1868 the wife of John Webster, a commission agent in Glasgow, died, and her sister, the claimant in this case, came to live in his house and take care of the child of the marriage. She became attached to him, and in consequence of his requests she consented after a time to go to Norway (where marriage between such relations is not forbidden by law) with him, and they went through a form of marriage at Christiana, in the British Consul's office there, on the 21st May 1869. He represented to her, as she stated in this action, that the marriage being then valid by the law of Norway, would be valid in Scotland. Thereafter they returned to Scotland and lived together for thirteen years as man and wife at a villa at Helensburgh which belonged to her. She borrowed various sums of money on the security of the villa, which money was applied in the housekeeping. They lived together till 1882, when they agreed to separate, and they entered into a minute of agreement of separation, executed on the 14th of August 1882. By this agreement John Webster agreed to pay the claimant, who was designed in the agreement as "Mrs Isabella M'Diarmid or Webster, the wife of the said John Webster," the sum of £1 sterling per week regularly "during the joint lives of the parties, and so long as they continue to live separate." On her part Mrs Webster agreed that she would not molest or disturb him, or "endeavour to compel him to live with her, or to compel restitution of conjugal rights, or compel him to allow her more or greater aliment than is hereinbefore provided." She also agreed not to contract debt in his name. The claimant then lived separate from him, letting her house. Shortly afterwards Webster married another woman. On the 24th March 1886 his estates were sequestrated by the Sheriff of Lanarkshire, and William Couper Tait, C.A., was appointed trustee in the sequestration. Before his sequestration the bankrupt had failed to make the promised payment of £1 weekly with punctuality, and a considerable sum of aliment was due.

On 22d July 1886 the claimant made a claim upon John Webster's sequestrated estate for £500 as the capitalised sum of an annuity of £52 sterling per annum during the life of the claimant, who

was then 67 years of age, in implement of the agreement of 1882. The trustee rejected the claim *in toto*, "in respect that the claimant is not the wife of the bankrupt, and that the claim is one which cannot be ranked under the Bankruptcy Statute." The claimant appealed to the Sheriff, and a record was made up, in which the above facts were stated.

The claimant pleaded—"(1) Assuming that the appellant is not the wife of the bankrupt according to the law of Scotland, the agreement founded on is valid and effectual, both in form and in substance, and being both probative and duly stamped, constitutes the appellant a creditor of the bankrupt. (3) No objection having been taken by the respondent to the agreement, either in form or substance, the first reason assigned for rejecting the claim, viz., that the appellant is not the wife of the bankrupt, is the very reason why the claim should have been admitted. (6) Either the bankrupt and the appellant for the foresaid thirteen years were lawfully married persons, or they lived during that period in a state of concubinage; in the former case, the agreement founded on might not be valid to the effect of securing a ranking on the bankrupt estates, in the latter it certainly is. (7) Assuming that the appellant lived during the former period in a state of concubinage with the bankrupt according to the law of Scotland, the appellant having been induced so to do on the misrepresentation of the bankrupt, she is entitled to reparation for the injury she has sustained thereby."

The Sheriff-Substitute (Erskine Murray) recalled the deliverance of the trustee, and ordained him to rank the claimant in terms of her claim, and found neither party entitled to expenses.

"*Note.*—[*After stating the facts as above given.*]—"Now, while it is true that, legally, appellant is not the bankrupt's wife, it is clear that there was an obligation on him to make such a provision. This is not like an agreement void *ob turpem causam* in consequence of its being granted as the price of prostitution. Even in a case of ordinary irregular connection, it has been held that 'a compensation for injury already sustained' is not voidable. See Bell's Principles, sec. 37, and Bell's Illustrations, i., pp. 59 to 61, and especially the case of *Gibson* v. *Dickie*, therein referred to on p. 61. In *Gibson's* case the man bound himself to pay back to the woman certain sums she had given him, besides paying so much a-year for her life; in the present case there is no obligation to repay the moneys received through advances on her property, but only the aliment, so even had this been a case of irregular connection, it would have been the stronger of the two. But when there is taken into consideration the fact that, after having gone through the form of a marriage with appellant, and lived thirteen years with her, and resided in her house, and got advances of money thereon, Webster left her for the purpose of marrying another, the wrong done her was so great and manifest that Webster's obligations to make compensation was clear, and the compensation under the agreement was noway excessive. The fact that appellant is called his wife in the agreement does not alter the case. It is argued for the trustee that to sustain the claim would be to put her in a better position than a legal wife of the bankrupt, but this is not so, for the claim of a legal wife would not come to an end by bankruptcy, whereas a simple claim of compensation for an injury does."

The trustee appealed to the Court of Session, and argued—The bond that had been granted for payment of the annuity was reducible. If two persons lived together without being married, and the man granted a bond to the woman on the cessation of the illicit intercourse, that bond might be good in law, as granted for reparation to the woman. But the case was different if the woman was a prostitute, or the persons were knowingly living in adultery. That had been decided in the case of *Hamilton* v. *De Gares*, 1765, M. 9471; Bell's Commentaries, i. 318; *Hamilton* v. *Main*, June 3, 1823, 2 S. 356 (N.E. 313). The same principle applied here as in the case of persons living in adultery, as they were within the forbidden degrees and could not marry. The bond in the case of *Hamilton* v. *De Gares* was "probably," according to the report, given on account of the cessation of the illicit intercourse, and that case was therefore an exact parallel to this case. The agreement therefore was reducible because granted *ob turpem causam*, and the trustee did right in refusing to rank the woman as a creditor in the sequestration—*Durham* v. *Blackwood*, 1622, M. 9470; *Young* v. *Johnson & Wright*, May 19, 1880, 7 R. 760.

Argued for the respondent—This case was different from that of *Hamilton* v. *De Gares*, inasmuch as the bond there was truly granted in respect of the woman having lived in adultery with the granter, while here it was for the cessation of the irregular connection, and therefore fell under the ordinary rule by which it was admitted that the bond was good, as the parties here were not living in adultery, nor was the woman a prostitute. If, however, the case of *Hamilton* should be construed as the appellant did it, and should be held to apply, then the *bona fides* of the woman here took this case out of the ruling in that case. The parties had gone to Norway to be married, and there was nothing to show that the woman did not think, as she averred, that a marriage which was legal in Norway would be legal in Scotland afterwards.

At advising—

Lord Justice-Clerk—No doubt this is a somewhat peculiar case, but I am satisfied to adhere to the Sheriff-Substitute's judgment upon it, and that for the reasons he has given. The question is no doubt one of considerable interest. The bond in question, the obligation to pay which forms the subject of discussion in the present case, was given to enable this woman, the claimant, to live honestly after the bankrupt had left her, and in respect of the termination of their connection. In my opinion the statement of the law as laid down in the case of *Gibson* v. *Dickie*, which the Sheriff quotes, is enough for the judgment of this case. It is a very unpleasant case, and I do not think that it is necessary to go into all the details of it. I therefore think that we should adhere to the judgment of the Sheriff-Substitute.

Lord Young—I am of the same opinion. I think in the circumstances it was right and proper for the man to make a settlement upon the woman such as he did. If he had not done so his conduct would have been almost brutal. He took her to Norway, where a marriage ceremony was gone through between them, coming back to

Scotland, and living with her as his wife, principally in a house belonging to herself, for several years, and then throwing her over because he wanted to marry another woman. I cannot conceive any circumstances in which a man was more bound in honour and justice to provide for the woman who had been his companion. I think the settlement ought to be sustained. I confess I am surprised at the opposition which has been made to the claim. I quite assent to the rule of law of which several cases that were cited to us are illustrations. But they are no more than illustrations, and I agree with Lord Deas [in *Young* v. *Johnson and Wright*, *supra*] in thinking that some of the cases go beyond illustration of the rule and apply the rule of law with a sternness that we should not follow. Now the rule is this. If a bond is given for a sum to be paid as an inducement to vice, or for a *turpis causa*, then the bond is not maintainable in law. It may be stated even in the bond itself that that was the reason for which it was granted. Or it may appear otherwise than in the narrative of the bond, and if the Court is satisfied that it was granted as an inducement to vice, the result is the same, *i.e.*, the bond is reducible. But there is a distinction where the bond is granted to make reparation to the woman with whom the granter of the bond has been living, when the intention of granting the bond is to put her beyond the reach of destitution after the connection between them has ceased. That is not within the rule of law. The case of *Hamilton* is a peculiar one. I do not say whether in a case in which the same circumstances arose I should follow the same course as in that case, although I rather think I should not. In that case the man was living in adultery with a married woman, and there was also living in the house a daughter of the woman. Sir James Hamilton granted an heritable bond of annuity to the woman with whom he was living, and a like bond to the daughter. I suppose—but it is not clear—the adulterer's connection continued after the bond was granted until the death of the granter. An action was brought against his executors for the amount in the bond, and it was not sustained so far as the instance of the woman with whom he had committed adultery went, but it was sustained so far as regarded the bond granted to her daughter. But as I said before, I think I would decline to follow the authority of that case, even if the same circumstances should arise. But in this case I have no hesitation in deciding that in my opinion the bond ought to be sustained on the simple consideration that in granting it the man was merely fulfilling the ordinary obligations of honour and justice, and that with the approbation of the law, as not to have made some provision for this woman would have been brutal conduct.

Lord Craighill—I think that the appellant has not been able to show any case against the judgment that is to be pronounced. I think so, because, in the first place, he has not shown any *turpis causa*, and in the second place, because the circumstances are such as to make it a matter of obligation that such a bond should be granted.

Lord Rutherfurd Clark—I am of the same opinion. I do not think that this case comes within the rule laid down in the case of *Hamilton* or the doctrine deduced by Professor Bell from that case. There is no doubt that if the woman acted in *bona fides* as to her marriage—and I see no allegation that she did not so act—she might think that a marriage that was legal in Norway was legal all the world over, and therefore might regard herself as a married woman in Scotland. But I state no opinion as regards that point.

In regard to the case of *Hamilton*, I can only say, to use the words of an eminent legal writer, that it "deserves to be considered."

The Court pronounced this interlocutor:—

"Dismiss the appeal: Affirm the judgment of the Sheriff-Substitute appealed against, except in so far as neither party is entitled to expenses: Of new ordain the appellant William Couper Tait to rank the respondent Mrs Isabella M'Diarmid or Webster in terms of her claim: Find the respondent Mrs Isabella M'Diarmid or Webster entitled to expenses in the Inferior Court and in this Court: Remit," &c.

Counsel for Appellant—Comrie Thomson—Salvesen. Agent—James Skinner, S.S.C.

Counsel for Respondent—Guthrie Smith—Shennan. Agents—Gill & Pringle, W.S.

Wednesday, November 17.

SECOND DIVISION.

[Sheriff of Inverness.

MACLEOD AND ANOTHER *v.* DAVIDSON AND OTHERS.

Property—Interdict—Encroachment.

The assertion judicially by a party, of rights which are subsequently admitted not to exist, is such a threatened encroachment on the rights of the party against whom they are asserted as will justify the granting of interdict in his favour against the person so asserting them.

Where the owner of a field sought interdict against encroachment thereon by certain persons, and they stated on record a legal right to encroach thereon, but subsequently, after maintaining such right before the Sheriff, admitted in an appeal that it did not exist—*held* that the fact of its being put forward was a good ground for the granting of an interdict.

This was an action by Alexander MacLeod, tenant of the farm of Scuddaburgh under William Fraser, Esq., of Kilmuir, in the island of Skye (concurring pursuer), his landlord, for interdict against the Rev. James M. Davidson, minister of the *quoad sacra* parish of Stenscholl, Skye, and tenant of two lots of the township of Garrafada, Kilmuir, and a number of other persons, also tenants of lots in the same township. The petition was brought in the Sheriff Court of Inverness, Elgin, and Nairn at Portree, and asked the Court to interdict the defenders, or others acting for them, "from encroaching upon or in any way interfering with that field or park of land called Staffin Park, extending to 42 acres or