The question is one of fact and circumstance. The Court has a discretion to decide whether a new street is about to be formed by what it is proposed to do. I think that this is not such a case. Nor can I affirm that Mair, who has a right to use this public way, is not entitled to make a gap in his wall so as to obtain access to it. He is not bound to have a wall there at all, and I have no doubt of his right to pass on to and off this public road where his property abuts upon it.

LORD YOUNG—This is as simple a case of the character which comes before a Dean of Guild Court as can well be. The applicant is proprietor of a building stance adjoining a public road. The publicity of the road is admitted in the minute of admissions. The applicant presents an application to the Dean of Guild asking authority to build a cottage according to plans produced. It is not questioned that he is the proprietor of the ground. But the Dean of Guild has dismissed the application on the ground thus stated in his note—[*His Lordship quoted the note.*] Now, the procedure directed by the statute, which it is said has not been followed, is thus specified in section 146—[*His Lordship read the section.*] I think it is not matter for surprise that it did not occur to Mr Mair to submit to the Dean of Guild plans of a new street and the drainage system thereof. He was not in a position to do so. I think it would be ridiculous to hold that he was bound to do so. I am therefore of opinion that the view of the Dean of Guild is erroneous, and that we must set aside his judgment and remit to that Court to grant the application.

LORD TRAYNER—I concur. The Dean of Guild has refused the appellant's application in respect of the provisions contained in sections 146 and 152 of the Burgh Police Act 1892. I think that neither of these sections warrants the judgment. The former section refers to the case of persons who intend to lay out a new street. The petitioner (appellant) does not intend to do that. He intends to do nothing more than build a cottage on a small building stance about 60 feet deep by 54 feet broad fenced by a brick wall. Nothing is further from his intention than to form a street. It is worth noticing that there is no house near the appellant's feu, either at the side of it or opposite to it.

Then section 152 provides that the width of a new street formed under section 146 shall be 36 feet, but that clause only comes into operation if a new street is formed under section 146, which, as I have said, is not the case here.

I agree in thinking, that there being no other ground for rejecting the application, the Dean of Guild has erred, and that the case should be remitted to him to grant warrant as craved.

LORD MONCREIFF—I am of the same opinion. The Dean of Guild's judgment is based entirely on sections 146 and 152 of the Burgh Police Act 1892. I doubt whether either section applies to the case in hand.

I am inclined to think that section 146 is confined to the case of a proprietor of land who intends to construct a new street upon his own lands. This construction is confirmed by section 150 of the Act, which provides for the taking over by the commissioners of police of a private street formed by a proprietor of lands "through the lands of such person."

Section 152 is merely supplementary to section 146.

But apart from this nothing here can in any reasonable sense be said to indicate an intention on the appellant's part to form a new street. He simply proposes to build a cottage, which is to stand 10 feet within his own ground, and to make an opening in a wall, which separates that ground from a public right-of-way to which he has right of access.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Remit the cause to the said Dean of Guild to grant the warrant as craved."

Counsel for the Petitioner—Dundas, Q.C. —M'Clure. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—H. Johnston, Q.C.—Salvesen, Agents—Dove, Lockhart, & Smart, S.S.C.

Tuesday, December 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BELL *v.* BELL.

Succession — Legitim — Married Women's Property Act 1881 (44 *and* 45 *Vict. cap.* 21), *secs.* 7 *and* 8—*Marriage-Contract.*

By antenuptial marriage-contract a husband made certain provisions for his wife, "for which causes" she assigned and disponed to herself and her husband "in conjunct liferent for their liferent use allenarly, and to herself and her heirs whomsoever in fee," her whole estate.

The wife having predeceased her husband, one of the children of the marriage sued her executor for payment as at the date of her death of his share of legitim out of her moveable estate.

Held (1) that the pursuer was entitled to legitim out of his mother's estate under section 6 of the Married Women's Property Act 1881, but (2) (*following Fisher's Trustees* v. *Fisher*, November 19, 1844, 7 D. 129) that the liferent provided to the husband by the marriage-contract was a debt due to him by the wife's estate, and consequently that the pursuer was not entitled to claim payment of his legitim until that debt should have been discharged.

By antenuptial marriage-contract dated 10th June 1856, John Duncanson Bell, *inter alia*, bound and obliged himself, "in consideration of the provision in his favour hereinafter contained," to make payment to his wife, if she should survive him, of an annuity of £100, and further bound himself to make payment to the children of the marriage alive at his death of the sum of £1000. It was declared that the provisions in favour of the children should be in full satisfaction of all bairns' part of gear or legitim, "for which causes and on the other part" Jane Fraser Hogg, the wife, assigned, disponed, and made over "to herself and the said John Duncanson Bell in conjunct liferent, for their liferent use allenarly, and to herself, excluding the *jus mariti* of her said promised husband, and her heirs and assignees whomsoever in fee, all and sundry" her property and *acquirenda* other than her provisions before specified.

Mrs Bell died on 1st March 1896, survived by her husband and two sons, and leaving a general disposition and settlement, dated 27th February 1896, by which she nominated one of her sons, John Munro Bell, to be her executor, and bequeathed to him the whole of her means and estate.

On 2nd March 1897 the other son, Harold Fraser Bell, raised an action against John Munro Bell, concluding for an account of Mrs Bell's moveable estate, for payment of £200 as the amount of the pursuer's legitim out of the said moveable estate, and for delivery to the pursuer of certain pictures and articles of furniture in Mrs Bell's house at the time of her death, but alleged to belong to the pursuer.

The pursuer pleaded, *inter alia*—"(1) The late Mrs Bell having died possessed of moveable estate, separate from her husband's, of the value condescended on, the pursuer, as one of her two children, is entitled to one-sixth thereof as his legal share or legitim."

The defender averred that the pursuer had received large advances from his mother during her lifetime, and pleaded, *inter alia*—"(2) In any event, the pursuer is not entitled to a share of legitim during the lifetime of his father, his claim being barred by the terms of the antenuptial contract of marriage condescended on, and in the circumstances the pursuer is not entitled to decree under the first conclusion of the summons."

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), sec. 7, enacts—"After the passing of this Act, the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father."

Sec. 8.—"This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts."

On 20th January 1897 the Lord Ordinary (PEARSON) before answer appointed the defender to lodge an account of Mrs Bell's moveable estate, "bringing out the amount which would be due to the pursuer as legitim, on the assumption that he is entitled to legitim."

On 17th November 1897 the Lord Ordinary found that the pursuer's claim for legitim on his mother's death was not barred or discharged by the antenuptial marriage-contract, therefore repelled the defender's second plea-in-law, and before further answer allowed a proof, and on the defender's motion granted leave to reclaim.

Opinion.—"As to legitim, the defender maintains, in the first place, that it is excluded by the antenuptial marriage-contract of the parents, and that at all events the claim must be postponed until the father's death. By that deed, dated in 1856, Mr Bell makes certain provisions for his wife and children, and these provisions are accepted by the wife and children, as in full of the legal rights which they could claim upon his death. This plainly does not extend to claims arising on the wife's death. But in the wife's part of the contract she assigns to herself and her husband, in conjunct liferent, for their liferent use allenarly, and to herself, excluding the *jus mariti* of her husband, and her heirs and assignees whomsoever, in fee, her whole estate then belonging to her, or which she should acquire during the marriage, or which should belong to her at her death.

"The case of *Fisher's Trustees*, 1844, 7 D. 129, was referred to as ruling this case. But in that case the fee of the estate was conferred on the children. Here the wife settles nothing on the children, and even assuming that the right subsequently conferred by statute was capable of being discharged by anticipation, it could only be so if some provision were given in lieu of it. So far as her estate is concerned, the implied discharge of the children's legal rights accruing on her death would be gratuitous, and without any consideration."

The defender reclaimed, and argued—The pursuer had no claim to legitim. The children's right to legitim was discharged by the marriage-contract, which was, by the express provision of that statute, unaffected by the Married Women's Property Act 1881. [The LORD PRESIDENT referred to *Buntine* v. *Buntine's Trustees*, March 16, 1894, 21 R. 714.] *Fisher's Trustees* v. *Fisher*, November 19, 1844, 7 D. 129, was an authority for the proposition that the legitim had been discharged. At all events, the pursuer was not entitled to claim legitim until the expiry of his father's liferent. Provisions made by one spouse for another were of the nature of debts—Fraser, Husb. & Wife, ii. 986; *Fisher*, *ut sup.* The provision in consideration of which the husband expressly granted his provision in favour of his wife was this liferent and nothing more. If the executor handed over to the pursuer his share of legitim, the creditor's security for the fulfilment of the obligation would be *pro tanto* diminished.

Argued for the pursuer—The Lord Ordi-

nary was right as regards legitim. There could be no discharge of legitim unless a sum, no matter how small, was given in place of it—M'Laren on Wills, i. 136; *Earl of Kintore* v. *Countess-Dowager of Kintore*, June 28, 1884, 11 R. 1013, *per* Lord Fraser, Ordinary. Here there was no such payment or provision at all. *Fisher's* case was therefore easily distinguishable. Further, the pursuer had a right to payment as at the date of Mrs Bell's death. The liferent she provided to her husband was the liferent only of what she could leave him at her death; and at her death, by operation of statute, a portion of her moveable estate went to her children as legitim.—*Pöe* v. *Paterson*, December 13, 1882, 10 R. 356, established the proposition that the Act of 1881 applied to marriages contracted before, as well as to those contracted after, the passing of the Act.

LORD PRESIDENT—The right of the pursuer to legitim out of his mother's estate arises from the Married Women's Property Act 1881; and it is clear on the terms of the 8th section of that statute that a right appearing on the face of a marriage-contract cannot be affected by the new right to legitim created under that statute. The considerations arising on the section are discussed in the case of *Buntine*, to which reference has been made, but it is unnecessary to rest upon the authority of that case, because the terms of the Act are quite clearly applicable to the case before us.

It seems to me that the executor holding the whole estate of this lady is confronted by a contract-creditor in the person of the husband. This lady by contract entered into before her marriage obliged herself to make forthcoming to her husband the right which is expressed as being one of conjunct fee and liferent for liferent use allenarly; and the executor, finding himself in possession of her estate, is bound to pay her debts. That the husband's liferent is a debt is clearly shown by the case of *Fisher*, where the Lord Justice-Clerk expresses himself thus—"Before marriage a man is the free and uncontrolled proprietor of his whole disposable means and fortune, whether actually possessed or acquired. He is at liberty to enter into any obligation he chooses as to such property, and most certainly he is in a condition to contract effectually in favour of an intended wife any obligation he thinks proper over the whole property which may then or at any future time be at his disposal. Such obligation is a proper debt, and a debt therefore under an onerous contract antecedent to marriage, which must be fulfilled before any claims to children can arise." It is true that the husband is not here as a party to oppose this claim formally; but the debt appears on the face of the marriage-contract, and the executor is not bound, and is not entitled, to part with the estate which is subject to that undertaking on behalf of the wife. Therefore it seems to me that no decree for payment as at the wife's death can pass.

Accordingly, I do not agree with the course which the Lord Ordinary has taken in repelling this second plea-in-law. It is not very clearly expressed, because the second branch where the words "his claim" are used might be held to refer to his claim to legitim generally. On a sounder construction it merely means his claim to present payment, and the safer course will be for us to recal the interlocutor of the Lord Ordinary in so far as it repels that plea, to find that the pursuer's claim for legitim does not affect the right of this gentleman to the liferent of the estate, that the pursuer is not entitled to decree for payment until that right is satisfied, but that he is entitled to the accounting which is now proceeding. The rest of the interlocutor may stand.

LORD ADAM—I am of the same opinion. It appears that so long ago as 1856 Mr and Mrs Bell entered into an antenuptial contract of marriage under which Mrs Bell, in consideration of certain provisions made for her by her intended husband, disponed all her property to herself and her intended husband "in conjunct liferent for their liferent use allenarly, and to herself . . . and her heirs and assignees whomsoever in fee." The marriage was dissolved by the death of Mrs Bell on 1st March 1896. She was survived by two children of the marriage. If there had been no subsequent legislation affecting the rights of children in relation to their mother's estate no difficulty would have arisen, for it is provided as clearly as words can provide that the husband was to enjoy the liferent of the whole of his wife's estate. Prior to the Act of 1881 the children had no right to legitim from their mother's estate, but by that Act they have been placed, in regard to legitim, in exactly the same position with reference to the mother's as to the father's estate, and Mr Cooper maintained that the effect of the operation of the Act was to give the children here a right to claim immediate payment of legitim on their mother's death, with the result of carrying away one-third of her estate, and so diminishing the liferent of their father by one-third. That appears to me to be an altogether unsound contention, for sec. 8 of the Act provides, *inter alia*—"This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts." Now, this was a contract made by a married person before her marriage, and a more binding contract according to our law cannot be conceived. Such a contract the Act says is not to be affected, and, accordingly, the husband being under it entitled to a liferent of the whole of his wife's estate, it is sufficiently clear that the children are not entitled to claim immediate payment of legitim. It appears that at an earlier stage of the case it was maintained that the children were not entitled to legitim at all, but it is now admitted that as their right to legitim is not expressly excluded in the marriage-contract, and no provision is made in lieu of it, the children are entitled to legitim, but only under

burden of their father's liferent. That being so, the interlocutor of the Lord Ordinary must be recalled. I agree also with your Lordship that the executor, whose duty it is to make up a title to and administer the deceased's estate must as an act of administration pay the husband the liferent of the whole estate, for that is just a debt due from the deceased's estate. It is said by the children that one-third of the estate should be at once handed over to them, and that they will pay their father the liferent of that portion. That proposition appears to me to be quite untenable. The father would have no security whatever, and the executor, I suppose, would incur the liability of having to make good any deficiency which might arise if the estate were lost in the hands of the children. Or suppose there were numerous children, would the father have to go to each and demand payment *pro tanto* from each of his liferent? That appears to me to be quite out of the question.

LORD M'LAREN concurred.

LORD KINNEAR — I also agree entirely with your Lordship. I think there can be no question as to the rights created by this antenuptial contract of marriage. The wife not only comes under obligation to the husband to give him an interest in the estate that may belong to her at her death, but she makes an actual and *de præsenti* disposition and assignation of all the property belonging to her, or which she should acquire in favour of her husband and herself in conjunct liferent for their liferent use allenarly, and to herself and her heirs and assignees in fee. The effect of that was to give the spouses a joint liferent in all the property belonging to the wife at the date of the marriage, and also in all the property that might come to her during the subsistence of the marriage, and to give to the husband at her death a continuing liferent of the whole. I am very clearly of opinion with your Lordships that there is nothing in the Act of 1881 which afterwards conferred a right of legitim upon the children to invalidate or in any way affect the right of the husband under the marriage-contract.

Therefore whatever claim the children may have to legitim from their mother's estate must be subject to the father's right of liferent. I agree that it does not follow that the children's claim to legitim is altogether excluded. I do not think it is, not because the marriage-contract does not provide any equivalent for the right of legitim (which it could hardly have done since the right was not known at the time of the contract), but because the wife's property is disposed of in such a way as to render it subject to the law affecting her moveable succession at the time of her death. While a right of liferent is given to the husband, the fee is given to her own heirs and assignees whomsoever, and their right as gratuitous assignees must be subject to any right created against their testator by the Act of 1881 before their claim emerged upon her death. I agree therefore entirely with the view your Lordships have taken.

The Court recalled the interlocutor of the Lord Ordinary in so far as it repelled the second plea-in-law for the defender; found that the Married Women's Property Act 1881 did not affect the right of John Duncanson Bell to the liferent of the estate, and that the pursuer was not entitled to a decree for payment until that right was satisfied, but that he was entitled to an accounting: *Quoad ultra* adhered.

Counsel for the Pursuer—Cooper—Welsh. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defender—Guthrie, Q.C. —A. M. Anderson. Agents—Lister Shand & Lindsay, S.S.C.

Tuesday, December 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CAMBUSLANG WEST CHURCH COMMITTEE OF MANAGEMENT *v.* BRYCE.

Title to Sue—Church Committee of Management Suing for Subscription Promised to Minister—Promise of Subscription in Private Letter—Obligation.

The Committee of Management of a Chapel of Ease, with consent and concurrence of the minister, sued the defender for £100. They averred that proceedings had been initiated for the erection of the chapel into a *quoad sacra* church, that in order to provide an endowment fund subscriptions were invited by and on behalf of the management from persons disposed to further this object, that amongst others who promised to contribute was the defender, who, in a letter to the minister of the chapel, said, "I will give you £100 towards endowment should your subscriptions fall short," that the subscriptions had fallen short by £700, and that the defender, on application being made to him by the Committee, refused to implement his promise. The minister of the chapel was the defender's son-in-law, and the letter founded on was of a private character. *Held* (*diss.* Lord Young) that the Committee of Management had no title to sue upon the obligation in the letter, even assuming it to be binding in law.

Opinion by Lord Young that the letter imposed no legal obligation on the defender.

Opinions reserved by the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.

Process—Disclamation—Power of Quorum of Church Committee of Management to Raise Action in Name of Whole Committee.