his plea of compensation was not sustained. As that plea has now been in my opinion properly repelled the pursuer is entitled to decree.

The Lord Justice-Clerk read the following opinion of Lord Moncreiff, who was present at the hearing but not at the advising:—

LORD MONCREIFF—The Lord Ordinary's judgment is clearly right. The first thing is to ascertain what were the legal rights of parties apart from the agreement between the trustee and the landlord. These are correctly stated by the Lord Ordinary on the second page of his note. On the sequestration of the tenant on 14th July 1902 and the appointment of the trustee, right to the crop, dung, straw, &c., which were the personal property of the tenant, passed to the trustee under his act and warrant. Over these the landlord had no security, and before the sequestration any poinding creditor could have attached them. On the bankruptcy of the tenant the landlord had no right to plead compensation in respect of the obligations in the lease. The cases referred to by the Lord Ordinary establish this, and in addition reference may be made to *Macgregor* (*MacLean's Trustees*), 13 D. 90, contrasted with *Davidson's Trustees*, 19 R. 808, 29 S.L.R. 664. In the latter case the landlord had obtained possession of the crop, &c., before the tenant's sequestration.

The recent case of *Jaffray's Trustee* v. *Milne*, 24 R. 602, 34 S.L.R. 401, does not conflict with this view, because there was no sequestration in that case. The tenant's trustee was acting under a voluntary trust.

The landlord having by his own act terminated the lease as at Martinmas 1902, before the sequestration of the tenant, there was no room for the trustee adopting it. The only question therefore is whether the trustee abandoned or waived his right, to the effect of enabling the landlord to plead compensation, by entering into the minute of agreement dated 21st and 28th August 1902, It is impossible, in my opinion, to construe that agreement as establishing any such waiver, because on its face it is expressly stated that the trustee disputes the landlord's right to retain any portion of the prices of the valuations on account of rents, and the agreement bears:—"It has been and is hereby agreed that the carrying through of this agreement and valuation shall not in any way affect the rights of parties thereto, the question meantime being left an open one for future decision."

I am therefore for affirming the interlocutor.

LORD YOUNG was absent.

LORD ADAM, who had not heard the case but was present at the advising in order to make a quorum, gave no opinion.

The Court adhered.

Counsel for Pursuer and Respondent—Dundas, K.C. (The Solicitor-General)—Hunter. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Defender and Reclaimer—Rankine, K.C.—Cullen. Agents—Mackenzie & Black, W.S.

Thursday, March 10.

SECOND DIVISION.

[Lord Low, Ordinary.

MACKAY *v.* MACKAY'S TRUSTEES.

Aliment—Liability for Aliment—Claim against Father-in-Law by Daughter-in-Law Deserted by her Husband.

Held (*aff.* judgment of Lord Low) that a father-in-law is not bound to aliment his daughter-in-law who is deserted by her husband.

Reid v. *Reid*, February 15, 1897, 4 S.L.T. 395, *approved.*

MRS JANE SPEER MONTGOMERIE or MACKAY raised the present action against the trustees of her deceased father-in-law Peter Mackay, slater, Greenock, seeking to recover aliment from the defenders.

The pursuer averred that her husband Daniel Mackay, sometime master slater in Greenock, who was the son of the deceased Peter Mackay, had got into financial difficulties in 1902, had turned her out of his house, and had gone abroad. She further averred that her husband had never made or had the means of making any payment of aliment to her; that he was resident in New Zealand, and was in indigent circumstances, and had received various remittances from the defenders towards his support. The nature of the pursuer's averments is further disclosed in the opinion of the Lord Ordinary *infra.*

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons."

On 8th December 1903 the Lord Ordinary (LOW) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"In this action the pursuer claims aliment at the rate of £50 a-year from the testamentary trustees of the deceased Peter Mackay, who was her father-in-law. The pursuer's husband Daniel Mackay, who is about thirty-three years of age, appears to have carried on business as a master slater in Greenock until early in 1902, when his affairs became embarrassed, and he granted a trust-deed for creditors. He thereafter went to New Zealand. The pursuer avers that her husband had turned her out of his house, that he did not communicate with her before going abroad, and that since he went abroad he has contributed nothing to her support. She further avers that he is incapable of steady work owing to his dissipated habits. The pursuer is living with her father. She says that the latter

is not able to support her, and that owing to bad health she cannot support herself.

"It is plain that Peter Mackay's testamentary trustees cannot be compelled to aliment the pursuer unless Peter Mackay would, if alive, have been bound to do so. The question of law therefore is, whether a man is bound to aliment the wife of his son who has deserted her?

"The old authorities on the point are very conflicting, and, so far as I can find, the only case in which the question has been directly raised since early in last century was that of *Reid* v. *Reid*, which Lord Kincairney (whose judgment was acquiesced in) decided in 1897. That case is only reported in the Scots Law Times (vol. iv. p. 395), and there the opinion delivered by Lord Kincairney is considerably abridged. I have, however, obtained a copy of the opinion. In it Lord Kincairney, upon an elaborate review of all the authorities and a consideration of the principles involved, came to the conclusion that the claim of a daughter-in-law against her father-in-law for aliment could not be sustained.

"I have examined the authorities with care, and I agree with Lord Kincairney. In these circumstances I do not think it necessary to repeat in my own language what has already been so well said by his Lordship, and I shall content myself with referring to his opinion as stating the grounds upon which I have come to the conclusion that the pursuer's claim, in so far as it is directed against the testamentary trustees of Peter Mackay, is not well founded.

"I shall therefore sustain the first plea-in-law for the defenders, and dismiss the action."

The pursuer reclaimed, and argued—The pursuer was entitled to support from her father-in-law while his son remained her husband—*Adam* v. *Lauder*, March 1, 1762, M. 398, July 11, 1764, M. 400; *Duncan* v. *Hill*, February 17, 1810, F.C. Apart from these decisions, the question was not settled by authority—*Belch* v. *Belch*, December 1, 1798, Hume's Decisions 1; *Hoseason* v. *Hoseason*, October 21, 1870, 9 Macph. 37, 8 S.L.R. 8; *Reid* v. *Reid & Reid*, February 15, 1897, 4 S.L.T. 395. The quantum of aliment which a father was bound to pay for his son was measured by the wants not only of the son but also of his family. If her husband was a proper object of relief, which he appeared to be from the fact that remittances were sent to him, the pursuer had a right through him—*Brown* v. *Brown*, July 10, 1824, 3 S. 247.

Argued for the respondents—The weight of authority, as appeared from the cases cited, was against the pursuer's contention—*M'Allan* v. *Alexander*, July 7, 1888, 15 R. 863, 25 S.L.R. 606; *Clarke* v. *Carfin Coal Company*, July 27, 1891, 18 R. (H.L.) 63, 28 S.L.R. 950; *Chrystie* v. *Macmillan*, July 6, 1802, M. App. *v.* Aliment No. 5, Fraser, Husband and Wife, vol. i. 863, vol. ii. 971; *Pagan* v. *Pagan*, January 27, 1837, 16 S. 399; *De Courcy* v. *Agnew*, July 3, 1806, M. App. *v.* Aliment, No. 8, Fraser, Parent and Child, 87, 105; *Fea* v. *Trail*, February 8, 1710, Forbes' Decisions. A wife's sole right was through her husband; she had no right independently of him.

LORD JUSTICE-CLERK—I agree with the Lord Ordinary in this case and with the opinion of Lord Kincairney in the case of *Reid*. A son though married may still be entitled to claim aliment from his father. But this is a different case. The son has deserted his wife and gone to New Zealand, and the wife now claims aliment from her father-in-law as in her own right. I think there is no principle of law on which such a claim can be sustained.

LORD ADAM—The law of this question has been very carefully discussed by Lord Kincairney in a similar case, and the conclusions at which his Lordship arrived have been considered and adopted by the Lord Ordinary in the case before us. I agree with the Lord Ordinary. It is settled law that a wife living with her husband has no title to sue her father-in-law for aliment during the lifetime of her husband. So too when the marriage is dissolved by the death of the son, it is equally settled that the father is under no obligation to aliment his son's widow. If, then, she has no claim either when her husband is dead or when he is alive and she is living with him, I do not see how she can come to have a claim in the case where her husband is alive and has deserted her. The husband may himself be indigent and in need of support from his father, and it cannot be said that the latter is to be liable to two separate actions, one at the instance of his son and the other at the instance of his son's wife, or that he is to be obliged to apportion the aliment which he owes to his son between his son and his daughter-in-law. I know of no principle of law to that effect, and I am accordingly of opinion that the present action should be dismissed.

LORD TRAYNER—I entirely agree with the conclusions arrived at by Lord Kincairney in his carefully considered judgment in the case of *Reid*. A daughter-in-law as such has no claim for aliment against her father-in-law. Her husband has a claim as son against his father; his wife may share in what he receives, and the fact that the son is married and has a family to maintain may be a consideration in determining the amount of the aliment which the father is bound to pay to him. But that gives no right to the wife to claim directly against her father-in-law.

Apart from this, the case presents a peculiarity which is not present in any of the cases quoted. The defenders, the representatives of the father, have, as averred by the pursuer herself, been sending money to the son for his support. There cannot in addition to this be a claim against the defenders on the part of the wife for separate maintenance. The only course open to her is to join her husband, or otherwise make good her claim against him for support. I appreciate the practical

difficulty and perhaps hardship of this, when, as she says, her husband has deserted her and gone to New Zealand, but that cannot affect the question as between her and her father-in-law or his representatives.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—M'Lennan — Craigie. Agents — Miller & Murray, S.S.C.

Counsel for the Defenders and Respondents—Campbell, K.C.—M'Millan. Agent—W. B. Rainnie, S.S.C.

Saturday, March 12.

SECOND DIVISION.

MURRAY'S TRUSTEE *v.* M'INTYRE.

Heritable and Moveable—Goodwill—Public-House.

A publican who carried on business in a public-house owned by himself disponed the premises in security for a loan. After the loan had been called up, but not paid, the publican executed a trust-deed on behalf of his creditors.

Thereafter a sum of £950 was offered to the trustee as purchase price of the goodwill, fittings, fixtures, and working utensils of the business on condition that the purchaser was accepted by the landlord as tenant for seven years at a specified rent, and that the purchase money should be paid on the transfer of the licence to the purchaser. The trustee, with consent of the heritable creditor, accepted the offer, and the licence was transferred to the purchaser, who became tenant in terms of his offer. Of the purchase money, £900 was adjusted as the price of the goodwill.

Held, in a question between the trustee and the heritable creditor, that this sum was to be treated as being the proceeds partly of heritable and partly of moveable estate.

Observations (*per* Lord Moncreiff) on *Philps' Executor* v. *Martin*, February 1, 1894, 21 R. 482, 31 S.L.R. 384.

In January 1898 Daniel Murray, who carried on business as a publican in a public-house in Glasgow, of which he was the owner, disponed the premises to Douglas M'Intyre in security for a loan of £1415.

In 1901 M'Intyre called up the loan. Murray was unable to pay it, but continued to pay interest on it down to 20th February 1903.

On 5th February 1903 Murray, having got into difficulties, granted a trust-deed on behalf of his creditors in favour of Richard M'Culloch, accountant, Glasgow.

On 17th February 1903 the trustee received the following among other offers:—"Dear Sirs,—I hereby offer you the sum of nine hundred and fifty pounds sterling (£950) as purchase price of the goodwill, fittings, fixtures, and all working utensils of Mr Daniel Murray's spirit business situated at 40 Kinning Street, Glasgow, on the following conditions:—(First) that I be accepted by the landlord as a tenant, and a lease be granted me for not less than seven years from Whitsunday first at a yearly rental of £49; (second) that the purchase money be paid on my getting transfer of the licence at the Licensing Court in April first and possession given; (third) that stock in hand be taken over at mutual valuation and paid for in cash.—Yours truly, JOHN STIRLING."

The trustee requested M'Intyre to concur in granting a lease of the public-house to Stirling, and M'Intyre consented to do so on the condition that the question as to the person entitled to the price of the goodwill should be settled by special case. The trustee agreed to this, Stirling's offer was accepted, and in May 1903 the licence was transferred to Stirling, who became tenant of the public-house for seven years in terms of his offer. Of the purchase price of £950, £50 was adjusted as the value of the fittings, fixtures, and working utensils, and £900 was lodged in bank in the joint-names of the trustee and M'Intyre to await the decision in the special case.

The special case was thereafter presented to the Court, the parties to it being (1) the trustee, and (2) Douglas M'Intyre.

The questions of law were—"1. Is the said sum of £900 to be treated as being wholly the proceeds of moveable estate? 2. Is the said sum to be treated as being wholly the proceeds of heritable estate? 3. Is the said sum to be treated as being the proceeds partly of heritable and partly of moveable estate?"

The special case stated—"The parties have agreed on the allocation of the said sum in the event of the Court determining that it is partly heritable and partly moveable."

Argued for the first party—The price of the goodwill was moveable estate, and fell to him to be administered in terms of the trust deed. At anyrate, a portion of the price of the goodwill was moveable—*Hughes* v. *Assessor for Stirling*, June 7, 1892, 19 R. 840, 29 S.L.R. 625. The case of *Philps' Executor* v. *Martin*, February 1, 1894, 21 R. 482, 31 S.L.R. 384, was distinguishable from the present, as in that case the question arose between an heir and an executor, and in such a question the Court refused to consider the value of the goodwill apart from the premises.

Argued for the second party—The goodwill of the public-house was heritage, and formed part of the value of the premises which belonged to him as heritable creditor. The price of the goodwill therefore belonged to him — *Philp's Executor* v. *Martin*, *supra*; *Bell's Trustees* v. *Bell*, November 8, 1894, 12 R. 85, 22 S.L.R. 59.

At advising—

LORD TRAYNER—I am not prepared to assent to the proposition that the goodwill of a public-house business goes with the