between the enactment for valuing railways and the exemption which these parties claim under this Statute. If, for instance, a railway was made wholly within one parish, not going into any other parish, and wholly upon land acquired from any one person, it would be exempted, and in that case I apprehend that the word "railway" in the one Act would be equivalent with the word "railway" in the other, and that the liability would rest upon the landowner; but in other cases there would be very great difficulty. The question is, whether a rule which is not generally applicable, but only partially applicable, is to be held as overturning the state of law which existed before, or whether it is only to be held as creating a difficulty in the application of it?

But in this particular case it appears to me the railway company who claim an exemption from liability have so mixed up the acquisitions of land which were exempt in their hands with lands which were not exempt—they have so complicated the matter, that it is impossible or unfair to put upon a parochial board the duty of expiscating, as they seem to be endeavouring to do, the particular parcels, which seem to be almost infinite in number, and which are placed in different positions, with reference to the tenure by which they are held. I think, therefore, that they are not in a position in this cause to plead a suspension of the charge. I do not see very well how the matter is to work out in the end. The railway is to be liable to the assessment. Well, is the landowner to be liable as he was before the Act of 1845?—Is he to bear a certain proportion of the assessment for land which is not in his possession? Can that legislation have altered a clause which was a clause of total exemption, imposing a burden upon another person, into a clause of relief of some kind? Is the railway company now to have relief against the landowner for something, and if so for what? I see great difficulty in all that, but in this case I concur in the judgment. I think that, in the state of things into which the railway company have brought the matter, they are not in a position in which they are entitled to the right of exemption. I shall give what aid I can in framing the terms of the findings.

*Interlocutor reversed, with a declaration.*

*Appellant's Agents*, J. Gellatly, S.S.C.; William Robertson, Westminster.—*Respondents' Agents*, Morton, Whitehead, and Greig, W.S.; Grahames and Wardlaw, Westminster.

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MAY 17, 1870.

JOHN MILLER, TRUSTEE on Seqestrated Estate, *Appellant*, *v.* THOMAS LEARMONTH and Others, *Respondents*.

Bankrupt—Wife's Legitim—Postnuptial Contract—Onerosity—Intimation of Assignation—*Mrs. F.'s father having died in* 1851, *she and F., in* 1852, *executed a postnuptial contract, whereby F. bound himself to settle* £2000, *and Mrs. F. disponed and conveyed all her lands, goods, etc., then belonging to her, or which might come to her, and in particular all interest in her father's estate, to trustees for F. for life, then for Mrs. F. for life, and then for the children, some of whom were then alive. The fund was declared to be alimentary, and not attachable for debts. One of the trustees was the executrix of Mrs. F.'s father, and as such bound to pay Mrs. F.'s legitim. F. in* 1852 *was solvent, but in* 1860 *was made a bankrupt, and M. was his trustee.*

HELD (affirming judgment), (1.) *That Mrs. F.'s legitim had not vested in the husband, but was assigned by the postnuptial contract to the trustees;* (2.) *as one of the trustees was debtor in the legitim, and signed the postnuptial contract as an accepting trustee, this was sufficient intimation of Mrs. F.'s assignation of legitim;* (3.) *that the postnuptial contract being executed when F. was solvent, and being reasonable, was binding on F.'s creditors.*

QUESTION, *Whether F.'s life interest in the legitim fund was validly assigned to the trustees?*[1]

This was an appeal from a decision of the Second Division, as to the effect of the husband's bankruptcy upon a postnuptial marriage settlement. The late Mr. Alexander, proprietor of the Theatre Royal, Glasgow, died in 1851, leaving property valued at £54,000, and in his trust settlement he settled part of his property on his widow for her life, and thereafter on the children equally. One of his daughters had married Mr. Finlay, a carver and gilder in Glasgow, and in 1852 they executed a postnuptial settlement or contract, the husband binding himself to pay the marriage trustees £1999 on 1st January 1862, and in further security he bound himself to assign certain policies on his life. The wife, on her part, disponed and assigned all lands, heritages, goods, debts, and sums of money to which she had or might have any title or interest, and all

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[1] S. C. 42 Sc. Jur. 418.

right, title, and interest which she then had or might have in her father's estate, and all rights she might have in the succession or estates of her mother; and the deed provided, that the whole of the foresaid provisions, both in favour of the spouses and the children of the marriage, should in nowise be attachable for debt, but that the same should be considered alimentary; and the husband renounced his *jus mariti*. At the date of this marriage contract, Mr. Finlay was alleged to be in prosperous circumstances, and was solvent immediately after the date of the contract. Mrs. Alexander, one of the trustees, had notice of the marriage contract and assignation. She refused, however, to pay any legitim to her children, or to Mrs. Finlay's trustees. In 1858 three daughters raised actions against their mother, Mrs. Alexander, for their respective legitim, and obtained decrees in their favour; and Mrs. Finlay obtained a decree for £2427. Mrs. Alexander and Mr. Finlay held shares in the Western Bank of Scotland, and suffered by the insolvency of that bank. Ultimately, in 1860, the estate of Mr. Finlay was sequestrated, and Mr. Miller was appointed trustee. Several actions were then raised, which were consolidated, and in the course of the actions, accounts having been taken, it appeared, that the amount of legitim to which Mrs. Finlay was entitled was £2432, which was afterwards agreed to be fixed at £2600. Mr. Miller, as trustee for the creditors, claimed the legitim as part of the husband's estate; but the Lord Ordinary and the Second Division held, that the legitim had been duly assigned to the marriage trustees of Mrs. Finlay, and had been duly intimated to Mrs. Alexander, the executrix of Mr. Alexander, and the debtor in the obligation. The Court having further allowed a proof as to the solvency of Mr. Finlay at the date of his postnuptial contract, and the reasonableness of its provisions, his solvency was held to be proved; that, therefore, it was valid against his creditors; but the Court reserved all questions as to the right to the interest and proceeds of the legitim during the life of the husband. The trustee for the creditors, Mr. Miller, now appealed against those interlocutors.

The following interlocutors were pronounced in the cause:—"*23d June* 1865.—Finds, that the postnuptial contract of marriage libelled, dated 28th February 1852, contains a due and effectual assignation to the trustees therein named of the right of legitim from the estate of her father, the deceased John Henry Alexander, held by Mrs. Mary Anne Alexander or Finlay: Finds, that the said contract was recorded in the Books of Council and Session on 7th December 1857: Finds, that the said assignation was duly and effectually intimated to Mrs. Elizabeth Riddell or Alexander, the executrix of the said deceased John Henry Alexander, at a period anterior to the said 7th December 1857; and appoints the cause to be enrolled, in order to be further proceeded with."

"*5th December* 1866.—Finds it proved, that the postnuptial contract of marriage libelled was executed on 28th February 1852, and was delivered to the trustees therein named, and the trust accepted by the said trustees in the month of March immediately following: Finds, that, by the said delivery to the said trustees, of whom Mrs. Elizabeth Riddell or Alexander, widow and executrix of the deceased John Henry Alexander, was one, the assignation of the legitim accruing to Mrs. Mary Anne Alexander or Finlay, as a child of the said deceased John Henry Alexander, contained in the said postnuptial contract was duly intimated to the said executrix: Finds it proved, that, at the date of execution, and also at the date of delivery of the said postnuptial contract, John Finlay, the husband of the said Mrs. Mary Anne Alexander or Finlay, and granter along with her of the assignation of the said legitim, was solvent; and that the assignation by Mr. Finlay of the said legitim was, in the circumstances of Mr. Finlay, no more than a reasonable provision for his wife and children: Finds and declares, that, by virtue of the said assignation, intimated as aforesaid, the trustees named in the said postnuptial contract, and acceptors and survivors of the same, were and are entitled to recover and receive the amount of legitim due to the said Mrs. Mary Anne Alexander or Finlay, from the estate of her father; and to hold and administer the same for the purposes of the trust declared in the said deed; and that the trustee and creditors in the sequestration of the said John Finlay have no right or interest in the said legitim, except to the effect and extent of claiming and receiving from the said trustees the amount of the liferent interest vested in the said John Finlay by the said postnuptial contract, and decerns; and appoints the cause to be enrolled, that, in so far as the conclusions of the summons are unexhausted by the foregoing findings, the case may be proceeded with, and brought to a close in accordance therewith."

"*26th March* 1867.—Refuse the desire of the reclaiming note for John Miller, and find him liable in expenses since the date of the Lord Ordinary's interlocutor reclaimed against: Refuse the desire of the reclaiming note for Thomas Learmonth and others also with this explanation, that all questions between the parties, *hinc inde* in reference to the interest or annual proceeds of the legitim funds are reserved entire: Find no expenses due in reference to the last mentioned Reclaiming Note: Remit to the Auditor to tax the expenses above found due and to report, and to the Lord Ordinary to decern therefor, and to proceed further in the cause as shall be just."

The Lord Ordinary appended the following notes to two of the preceding interlocutors:—(*23d June* 1865.)—"The postnuptial contract of marriage conveys to the trustees every debt due

to Mrs. Finlay, and in particular, 'all right, title, and interest which she or the said John Finlay, her husband, now has or may hereafter have, in the succession or estates, heritable and moveable, of her father, the said deceased John Henry Alexander.' The Lord Ordinary cannot doubt, that Mrs. Finlay's claim of legitim is comprehended in this conveyance.

"This postnuptial contract was recorded in the Books of Council and Session on 7th December 1857, as the extract produced shews. There is recorded as part of the deed a minute attached to it, running thus :—'We, the trustees within named and designed, do hereby accept of the office of trustee.' This minute is signed, amongst others, by Mrs. Elizabeth Alexander, who was executrix of John Henry Alexander, and as such was debtor in the legitim. The Lord Ordinary cannot doubt, that this is a sufficient acknowledgment of intimation of the assignation to the executrix. The minute acknowledges intimation of the deed, and does something more. The minute is not dated, but the extract shews that it was attached to the deed and subscribed at a period anterior to the date of the extract. It was understood, that the pursuers did not desire a more definite date to be inquired into."

(*5th Dec.* 1866.)—"It is clearly proved, that Mr. Finlay was solvent at the date of the postnuptial contract of the 28th February 1852, and considering his circumstances at the time as a prosperous carver and gilder, the Lord Ordinary is of opinion, that the assignation of the legitim arising to Mrs. Finlay herself out of her father's succession, and amounting at most to about £2400, (stated by the defender White (Art. 17,) as not more than £2000,) as a provision to be held by trustees for behoof of Mrs. Finlay and the children of the marriage, was a fair and reasonable provision. The Lord Ordinary is of opinion, that this conclusion is not affected by the circumstance that Mr. Finlay further bound himself to pay, in the year 1862, (ten years afterwards,) an additional sum of £2000 for the same purposes, a provision of contingent realization, and which Mr. Finlay's bankruptcy has reduced in value to nothing.

"The question which then arises is, whether this assignation of the legitim, being itself a reasonable provision by a solvent man for his wife and children, was so completed as to be effectual in competition with the sequestration of Mr. Finlay's estates. It appears to the Lord Ordinary, that this question receives an easy answer in the affirmative; for by the intimation of the assignation in March 1852, the right to the legitim was from that moment made real in the person of the trustees, and could not be affected by the sequestration, which only issued in January 1860, nearly eight years afterwards. The trustees, therefore, were, and are, entitled to hold the right in opposition to the sequestration, for all the trust purposes legally constituted by the deed. One of these purposes is the payment of the interest of the legitim fund to Mr. Finlay during his lifetime; and there appears no room for doubt, that to this extent the creditors in the sequestration come in room of Mr. Finlay, and are entitled to draw the interest from the trustees during Mr. Finlay's life. Another is the payment of the interest to Mrs. Finlay, after the death of her husband, and this is a purpose for which it is thought very clear, that the trustees legally hold the right so completely vested. The last purpose of the trust is the payment of the fee to the children; and as to this, some discussion arose before the Lord Ordinary. There can be no doubt that the case of children differs from that of wife, and this under an antenuptial not less than a postnuptial contract. In general, they have no *jus crediti*, but merely *spes successionis*, (ineffectual against creditors), in regard to provisions, which are not payable, principal or interest, till after the father's death. But it is trite law, that an effectual *jus crediti* may be constituted in their favour in many ways, and amongst others, by the constitution of a trust vesting a security for the provision in the person of the trustees during the father's lifetime. This appears to the Lord Ordinary to be substantially the case in the present instance. The completion of a real right to the legitim fund in the person of the trustees, appears in principle not different from what the case would have been, had the security been a conveyance of a landed property completed by infeftment. In such a case the right of the children would, according to the authorities, be fully effectual in competition with the father's creditors—*Herries, Farquhar, and Co.* v. *Brown*, 16 S. 948.

"The Lord Ordinary can at present go no further than to fix the general principle as to the nature and effect of the right vested in the trustees under the postnuptial contract. How that right is to be practically wrought out in the circumstances appearing from the record, must be the subject of separate discussion."

The Second Division adhered: and the trustee on Mr. Finlay's sequestrated estate appealed.

*Sir R. Palmer* Q.C., and *Mellish* Q.C., for the appellant.—The legitim of the wife vested, *ipso jure*, on the marriage, in the husband—*Macdougal* v. *Wilson*, 20 D. 658. The marriage contract did not import an assignation of the legitim fund to the husband—*White* v. *Finlay*, 24 D. 38. There is no evidence that the postnuptial contract was ever delivered to or accepted by the trustees—Ersk. iii. 2, 43; M 3249; *Fraser* v. *Lord Advocate*, M. 17,008; *Brodie*, M. 12,275. Nor was the trust fund ever taken possession of, and the assignation completed by assignation to Mrs. Alexander as executrix of her husband and the debtor in the fund—Bell's Pr. § 1462; Bell's Convey. 292; *Stevenson*, M. 858-9. Private knowledge by Mrs. Alexander was not enough—2 Bell's Com. 18; *Bain* v. *M'Millan*, M. 863; *Newton*, M. 850. But even if the post-

nuptial contract was duly intimated, it was invalid against his creditors, because Mr. Finlay was not solvent at the time it was executed, and the *onus* of proof lay upon the wife's trustees—1 Bell's Com. 643. Even if the assignation was completed, it was revocable by Mr. Finlay, and his bankruptcy operated as a revocation—*Dunlop* v. *Dunlop's Trustees*, 3 Macph. 758; 1 L. R. Scot. App. 109, *ante*, p. 1439; *Steven* v. *Dunlop*, 1st Feb. 1809, F. C.; *Shearer* v. *Christie*, 5 D. 132. Besides, it was an unreasonable and excessive provision to the wife, and should be cut down to what is reasonable—*Gartashore* v. *Brand*, M. 987; *Campbell*, M. 988.

The *Dean of Faculty* (Gordon), and *Anderson* Q.C., for the respondents.—The postnuptial contract was an onerous contract as containing reasonable provisions to his wife and children—*Galloway* v. *Craig*, 4 Macq. App. 267, *ante*, p. 1047; *Dunlop* v. *Johnston*, 1 L. R. Sc. App. 109, *ante*, p. 1439; *White* v. *Finlay*, 24 D. 38; *Hepburn* v. *Brown*, 2 Dow, 342. It was duly delivered and intimated, for Mrs. Alexander, the debtor in the obligation, was one of the trustees, and signed the deed as an accepting trustee, and that alone is equivalent to intimation to her. A *jus crediti* was vested in the children who were then alive by the marriage contract—*Goddard* v. *Stewart*, 6 D. 1018; *Herries* v. *Brown*, 16 S. 964; *Morrice* v. *Sprot*, 8 D. 918; *Wilson's Trustees* v. *Wilson*, 18 D. 1096. The legitim was included in the marriage contract and conveyed to the trustees. The interlocutors were therefore right, and as the question as to payment of the interest during Mr. Finlay's life was reserved, there was no foundation for this appeal.

LORD CHANCELLOR HATHERLEY.—My Lords, this case, after much painful litigation, has been brought before us by the appellant, who is the trustee of Mr. Finlay, whose estate is under sequestration, and who was the defender in an action which had been brought by the trustees of a certain marriage settlement executed by Mr. Finlay after his marriage. The trustees of the marriage settlement desired to be placed in the possession of certain funds constituting the legitim of Mrs. Finlay, together with other property vested in the trustees for the purpose of that postnuptial settlement.

The settlement itself was executed in 1852, and was a settlement by which, in the first place, Mr. Finlay, then carrying on business as a carver and printseller in Glasgow, entered into an engagement by covenant, to pay at about 10 years' date from the settlement, (which would be in 1862,) a sum of nearly £2000, (short £1 of that sum,) and, in the mean time, he engaged to insure his life, and to keep up the premiums of insurance, the insurance to be made for the sum which he was so to pay at the expiration of that period. Then, beside that, he having entered into that engagement on his part, the mother of Mrs. Finlay, viz. Mrs. Alexander, joining and concurring in the engagement, entered into this stipulation on her part, that inasmuch as under a deed which had been made in the lifetime of her late father, between the father and mother of Mrs. Alexander, she Mrs. Finlay, was entitled, as one of the children of Mr. and Mrs. Alexander, to certain heritable property, namely, an interest in the Theatre of Glasgow, subject to her mother's life interest, and inasmuch as, by the death of her father, which had taken place before the execution of this settlement in 1852, she was entitled to legitim in the share of her father's estate, which she would take, subject to her mother's life interest; and she engaged that both her share of the heritable property and her share in legitim should be settled upon the trusts declared by that deed of 1852. And these trusts were for Mr. Finlay, the husband, for his life, and after his decease for Mrs. Finlay, his wife, for her life, and after the decease of both of them to the children of the marriage.

There was a declaration contained in the deed that these limitations, all of them, as I understand it, should be alimentary, and that they should not be attachable for debts.

The main question that seems to have arisen in the Court below is this, whether or not that settlement could stand as regards the legitim of Mrs. Finlay. And a previous question was raised also by Mr. Miller, the appellant, as trustee of Finlay in the sequestration, whether the legitim was in effect included in the settlement. I have stated that to be so; that being the decision of the Court below upon it. I think there can be no reasonable doubt about it. It has not been argued on the part of the appellant that the case was otherwise.

Now the form of the action was this:—It was asked, in the first place, by the trustees and those interested in this deed, viz. the wife and children, that it should be declared that the trustees were entitled to the whole of these funds, which I have described, by virtue of the settlement, including the legitim. Secondly, it was asked, that it should be declared that Finlay, the husband or rather his trustee, had no interest whatever in the funds. And thirdly, it was asked, that it should be declared, that the pursuers were entitled to receive payment of the legitim from a third person not yet named, viz. Mr. White. White being a trustee under the sequestration which had been obtained against Mrs. Alexander, the mother, Mrs. Alexander being the person in whose hands the fund constituting the legitim was found at the date of the sequestration, and who also held some portion of the legitim in specie, a remedy was asked against White, as far as the portion held in specie was concerned, and it was asked as regards the property not in specie, that there should be a charge against the estate of Mrs. Alexander in his hands, as trustee under the sequestration.

That being the remedy sought, a decree was, in the first instance, obtained against White, as trustee of Mrs. Alexander, for payment of the legitim. An interlocutor was made for that purpose in a very early stage of the proceeding, and is one of the eight interlocutors appealed against. Mr. White seems in an early period of this litigation to have succumbed, and not to have continued the contest with the trustees, who were seeking to have their remedies against him in respect of the recovery of the legitim.

And it may be said, that if it had not been for the interposition of Mr. Miller, the present appellant, the fund would have been long ago in the hands of the trustees of the settlement. But Mr. Miller has interposed and raised these objections. He said—"I, as representing Finlay, assert, that, according to the law of Scotland, this legitim became, on the opening of the succession of Mr. Alexander, the property of the husband in right of his wife, and therefore one portion of the fund, which you seek to include in the settlement, if it be therein included, would be the husband's property, and I should be entitled, as trustee under the sequestration, to insist, that the settlement being postnuptial, I stand in the position of his representative, in such a position that you cannot, as against this estate now under sequestration, any longer claim the legitim, supposing it to have been originally included in the deed." But further than that, he says, it is not included in the deed, and for that purpose he relied upon the wording of the deed itself; but the words of the deed are so plain and clear as including all property vested either in Mr. Finlay or his wife, that it was impossible to carry on that contention at the bar of your Lordships' House; and that point, therefore, was very properly waived by the counsel for the appellant.

Then what were his next objections? They were these,—*first*, that the deed was never accepted by the trustees; *second*, that it was never intimated to the holder of the fund; *third*, he said, supposing even it were made out, that the deed had been accepted and been intimated to the holder of the fund, yet it being a purely voluntary deed, and the property being entirely the property of Mr. Finlay, the deed can be of no avail against me as representing his estate, and I claim accordingly, as representing his estate, to be entitled to that property which he was not justly in a position to assign. And upon that point he raises this question, viz. whether or not at the time the deed was executed, Mr. Finlay was not indebted to such an extent as to render the deed invalid against those who might claim under a subsequent sequestration. Further than that, he raised a subordinate point, which, however, was never raised in argument before the Court, but has been touched upon here, viz. that, even if all those difficulties were got over, and assuming, that the deed, including the legitim, and that it was accepted by the trustees, and was intimated to the holder of the fund, still that the provision was excessive, and that it ought, at all events as against the trustees of the sequestration, to be reduced so as to bring it down to what was right and proper, and curtailed as to the excess of provisions so made for children. I ought to have mentioned another objection to the efficacy of the deed itself. First, he said that the deed was not accepted by the trustees, then, that it was never intimated, and that it was never delivered. Now, as to its being delivered, Mr. Bell was one of the trustees, and was at the same time the law agent of the settler, Mr. Finlay. If he is to be taken as the sole settler, Mr. Bell received the deed. It is said, however, that he, being the law agent, is not to be taken necessarily as receiving it in his character of trustee.

Now, as to the first question, viz. whether or not the deed was accepted by the trustee, there can be no question, that the acceptance of the trust is signed by all the trustees. The deed is dated in February 1852; it is sworn as being signed in or about March 1852. As regards the acceptance of Mr. Bell, the whole is holograph as regards Mr. Bell, including, of course, his signature. And, therefore, no question can be raised as to Mr. Bell's acceptance of the trust.

But authorities were cited to shew, that, unless you can shew some distinct acting, or intromission in the trust, there is no evidence *omni exceptione major* as to the trust having been accepted by the majority of the trustees. But what do we find in this case? We find evidence of acts being done, which seems scarcely to admit the possibility of contradiction, coupled with the other evidence in the case, viz. we have the fact sworn to by Mrs. Alexander herself, one of the trustees and the holder of the fund, that she was applied to by Mr. Bell, as trustee, to hand over this fund, as she ought to have done, to the trustees under the settlement, and that her answer to him was, "You take care of the deed, and I will take care of the money," speaking of their relative position as trustees of the fund. The fact is further borne out by a document which Sir Roundell Palmer read to us, in which Mr. Bell, about this date in the year 1852, writes to Mr. Finlay telling him of his efforts to obtain from Mrs. Alexander the custody of the document itself, and of her refusal to accede to his request. One of those letters is in these words:—"I was favoured with yours, and spoke to Mrs. Alexander, but much to my surprise, she pointedly refuses to hand over Mrs. Finlay's patrimony to her marriage trustees. I think this is most unreasonable, and I told her so, but she is quite inexorable. Her reasons are quite arbitrary and unreasonable, and you must either submit quietly or betake yourself to your legal rights at the risk of giving mortal offence." That was written in May 1852. It is impossible, therefore, to believe that this instrument was not acted upon, and that Mr. Bell did not hold this deed as

a co-trustee. He has sworn, that he applied to his co-trustee to hand over Mrs. Finlay's patrimony to her marriage trustees, but she told him, "You take care of the deed and I will take care of the money." Mr. Bell tells Mr. Finlay exactly what had taken place, and we have the exact correspondence with Mrs. Alexander on the subject.

I apprehend, therefore, there can be no possible reason for doubting the acceptance of the trust by the trustees; and their acting upon the trust, so far as making the demand, although it does not appear to have been successful or to have been persevered in, still it must be remembered always, that Mrs. Alexander was herself a trustee, and was so far a person who had a right as one of the trustees to be in possession of the fund, but it should have been a joint and not a sole possession.

Then with respect to the intimation, we are told, that the law of Scotland is much more stringent than ours with respect to notice, and that it requires very formal notice to be given, and to be proved by witnesses. I asked if any authority could be produced for that, but no authority was cited to us. But where it is clearly and distinctly proved, that the person in possession of the fund was also a trustee, common sense requires, that if that person has received intimation of the execution of the deed, that is a sufficient acceptance of the trust. It was, indeed, argued that she had no distinct intimation of the nature of the trust. But a person cannot be allowed to indorse an instrument saying, that he accepts the trust, and at the same time to say, there is no proof that I knew what I was doing. Having accepted the trust, he must be taken to have knowledge of the existence of the instruments on which he makes that indorsement. It is satisfactory, that the Lord Ordinary and the other learned Judges in the Court below took that view, because it is so entirely accordant with every conclusion of an ordinary understanding, that one cannot conceive that the appellant could have any hope of reversing the decision upon that point.

If then the instrument was delivered, if the trust was accepted, if it had been, so far as I have described, acted upon, if it includes the legitim, and if, being in the hands of Mrs. Alexander, it was duly intimated to her, that the assignment was made, the only point that remains is the alleged insolvency of the person making the assignment. I assume, for this purpose, that the instrument was in that sense voluntary, that it was made after marriage, and not made for consideration.

A point has been argued before us by the Dean of Faculty, with reference especially to Mrs. Finlay having to pass over the heritable property to be affected by the trust. I pass that by, and will simply consider how it stood with reference to this gentleman making a provision for his wife and family. It appears, that by the law of Scotland he was capable of making that provision, supposing he was not so indebted at the time of making the settlement as to incapacitate him from making a settlement which would bind parties claiming under a sequestration. Now the evidence has unfortunately only made that too apparent, by the very absurd and improper course which has been taken, which cannot be too much reprobated, of printing these documents. We have a full catalogue of all the property extending over some hundred pages. I cannot look upon it without indignation as a gross and shameful abuse on the part of those who have gone to the expense of printing a vast mass of matter which could by no possibility be of any use to any one concerned, and which could not possibly assist the tribunal before whom the case should come in arriving at a conclusion, not one item of that ridiculous document having been read to us—all that it was necessary to state being, that a witness was called who proved that this gentleman had property to the amount represented in that document. And the production of this document and the printing it *in extenso*, a kind of catalogue going into the most minute details, was altogether most unnecessary and most improper. For without the aid of that document it was proved, that this gentleman was abundantly solvent at the time he executed the deed. That being so, I see no evidence at all to shake it. We have nothing but dim and faint suggestions of his borrowing money, at certain times afterwards, and living in a style likely to exhaust his means, and his being found insolvent in the year 1867, this instrument being executed in 1852. But when you ask, whether there was a single debt remaining unpaid which existed in 1852, we are told, that there was not a single debt that remained unpaid.

That being so, the deed being found to be complete in all its parts, and executed in such a manner as to enable him to bind those who might afterwards become his creditors, if any question still remains it may possibly be, whether that provision be excessive. I entirely agree with the Court below, that looking at the property which this gentleman possessed at the time, and the amount of property made over by the deed, there is nothing which can be considered excessive, or which would be any ground of reduction on the amount of the provision.

That being so, it seems to me, that the interlocutors complained of only decide what is right and proper between the parties. The only doubt I entertained was, whether, looking to this litigation, which appears to shew a determination on somebody's part to occasion a great deal of needless expense, we could possibly save the unfortunate litigants some further expense by determining whether or not Mr. Finlay's life interest is entitled to stand, and he is entitled to assert it against these claims. The Lord Ordinary did no more in the interlocutors complained of than reserve the right of making a declaration, that Miller, the trustee, had no interest under

the settlement, except so far as he has a right to receive the interest under the trusts of the settlement. That in effect shews, that he was intending to reserve that right. And the same course was taken substantially by the other Judges in the Court below. The respondents, however, were not quite satisfied with that form. They thought it went rather too far towards giving Miller a right which they contended he was not entitled to. And therefore Miller himself appealing from the interlocutors generally, the respondent also appealed from that portion of the interlocutors. The result, therefore, was, that the Judges of the Inner House decided, that that point should be reserved. They have not said, that it should be the subject of another suit; but not thinking the matter ripe for decision, as not having all the materials before them, they say they reserve it, leaving it to some other stage in this unhappy litigation. We were in hopes, that we might have been able to carry the case to a complete conclusion and decision. But looking at the whole case, and the points which have been suggested by the Dean of Faculty as points reasonably arguable in the course of the investigation of this case, we do not feel, that we are in a position to come to a determination of that point, or to do more than the Judges of the Inner House have done in reserving that question, as they have done in fact, free from prejudice on the one side or the other. The conclusion, therefore, at which I have arrived is, that all the eight interlocutors complained of should be affirmed, and that this appeal, as against them all, should be dismissed with costs.

LORD WESTBURY.—My Lords, this is a very simple case when it is understood, but I regret to say I did not quite understand it until the end of the address of the Dean of Faculty. The trustees of this nuptial contract brought an action in the Court below to recover this sum. The present appellant resisted that action, and said your deed is void by reason of a variety of causes. The Court of Session overruled the objections, and held the deed to be good, but having given judgment to that effect, they declined to proceed to any adjudication as to the manner in which the income of the trust fund should be applied, and what I consider to be the effect of the order is this: that the income of the trust funds will remain in the hands of the trustees, and of course be accumulated there in the present state of circumstances. Then, the appellant having brought his appeal here, and not having a favourable opinion of the likelihood of success, he has endeavoured to graft on to his insufficient appeal another complaint, that the Court of Session have not determined the question of the right to the liferent.

Now I do not think it necessary to deal with the objections to the deed. They have been detailed at length by my noble and learned friend. And he has advised your Lordships, and I concur in that advice, that no one of the objections is worthy of any support. The deed, therefore, must be taken to be a valid deed, but when you come to look at the deed, there are incidental questions of great importance that will arise upon the contents of the deed, and which I think could not have been conveniently dealt with or decided in the form of proceeding in the action in which this appeal is presented. For some time we were all of us anxious (in a case like this every one would naturally feel anxious) to find some way to determine the whole question, at least so far as the right of the sequestrator was concerned, because if that could have been determined, there might have been some chance of peace hereafter; but when you look at the deed you find there, that there are very important obligations incurred by it which certainly appear to give the character of onerosity or valuable consideration to the deed. You also find that there is included in the trust, a trust which probably has not yet fallen into possession, and it may become requisite with reference to the unfulfilled obligation of the husband to deal hereafter with the life interest of the husband. All, therefore, I think, that the Court of Session could possibly do, was to suspend any order touching the enjoyment of that life interest until the time should arrive, and until a suit was presented to them on all the questions with regard to the unfulfilled obligation of the husband, and the consequent right of the other beneficiaries under the settlement, which have to be determined. I think, therefore, that the Court of Session arrived at the only conclusion that in the present state of circumstances they could arrive at, touching the administration of the fund. This appeal must be considered as having come here merely for the purpose of setting up again unfounded objections to the trust deed, and the appellant had no right to imagine, that a final adjudication for decision has been reached as to the life interest. Therefore, I heartily concur in the advice of my noble and learned friend, that these interlocutors be all affirmed, and that it is our duty to dismiss these appeals with costs.

LORD COLONSAY.—My Lords, I am of the same opinion. I think, that, on all the matters which were the subject of contention in the Court below, the appellant was wrong. It may be a question, whether the point he has raised in this appeal is or is not within the scope of the summons. It is by no means a clear matter, and certain it is, that it was no part of his contention in the Court below, because his case was put in a different shape altogether, and was totally silent upon that matter. The Court seems to have doubted whether it was within the scope of the action before them; at all events they did not adjudicate upon it. There are important questions involved in that matter, and I think, that the Court did quite right in reserving that question. I think the judgment of the House ought to be as advised by my noble and learned friend.

LORD CAIRNS.—My Lords, I entirely concur in the course which has been proposed. It may not be absolutely necessary, but it may perhaps save some future litigation, if your Lordships thought right to add to the dismissal of the appeal the costs, without prejudice to the question as to the right to the interest or annual proceeds of the legitim funds reserved by any of the interlocutors appealed from.

LORD WESTBURY.—That, my Lords, will be a very wholesome addition, and may perhaps prevent your Lordships' order being made a peg on which to hang further litigation.

*Interlocutors affirmed, and appeal dismissed with costs, without prejudice to the question as to the right to the interest or annual proceeds of legitim funds reserved by any of the interlocutors appealed from.*

*Appellant's Agents*, Gibson and Ferguson, W.S.; Loch and Maclaurin, Westminster.—*Respondents' Agents*, W. Officer, S.S.C.; Holmes, Anton, Greig, and White, Westminster.

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## JUNE 16, 1870.

## WILLIAM TAYLOR KEITH, *Appellant*, *v.* MARGARET REID, *Respondent.*

Lease—Premises to be used as Shop—Sale of Goods by Auction—Inversion of Possession—*Where premises are let for a shop without any specific stipulation on the subject:*

HELD (reversing judgment), *That there is no implied condition, that no sale of goods by auction shall take place in such shop; and it lies on the landlord to make an express stipulation to that effect, if he wishes to prohibit sales by auction during the lease.*[1]

This was an appeal from a decision of the Second Division of the Court of Session. Miss Reid, the proprietor of a shop in Union Street, Aberdeen, in 1862, presented a petition to the Sheriff to interdict and prohibit Mr. Keith, the occupier of the shop, from selling goods on the premises by public auction. In her condescendence she set forth, that the shop had been let to Mr. William Fraser as a grocery and wine business, for two years from Whitsunday 1861, and that it was a condition between the parties, that assignees and subtenants should be excluded, unless such as should be approved of by the landlord. Mr. Fraser, after occupying the premises some time, removed to another shop, and the appellant Keith applied to take the respondent's shop for a china and glass shop, but expressly stating, as was alleged, that he did not intend to hold any auction there. Ultimately the appellant arranged with Mr. Fraser to take the lease off his hands, and agreed with the respondent to get a new lease prepared, and meanwhile he obtained possession. When he entered, he at once began to use the shop for sales by auction, and Miss Reid objected to execute the lease. The appellant, in answer, stated, that all through the negotiations the landlord well knew the purpose for which he intended to use the premises, and that her agent consented to this use. The Sheriff allowed a proof, and dismissed the petition. On appeal, the Lord Ordinary (Jerviswoode) held, that Miss Reid had failed to prove, that any condition against sales by auction was annexed to the letting, and that there was nothing to prevent the tenant holding such sales, and that they did not amount to an inversion of the possession. The Second Division unanimously reversed this interlocutor, and held, that no such use of the shop had been consented to by the landlord, and that she was entitled to have the interdict. The present appeal was then brought.

*Sir R. Palmer* Q.C., and *J. T. Anderson*, for the appellant.—The appellant, on succeeding to the lease of Fraser, took the premises on the terms on which Fraser held. In Fraser's lease there was no express prohibition of sales by auction, nor any restriction to a particular trade. And the appellant was not an auctioneer in the common sense of the term, but merely sold off his old stock by auction. Whether he entered into a special stipulation not to sell off his stock by auction, as he did, was a question of fact, and the Sheriff and Lord Ordinary found, that the appellant had not entered into any such stipulation, and that the respondent knew, that he intended to do what he did. There is no presumption of law on the subject one way or the other —1 Hunter, L. & T. 235. In the law of England the *onus* of making a specific covenant to prevent such a sale would clearly be on the landlord, and unless there was a covenant to the con-

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[1] See previous report 6 Macph. 768; 40 Sc. Jur. 393. S. C. L. R. 2 Sc. Ap. 39; 8 Macph. H. L. 110: 42 Sc. Jur. 425.