

tions and conditions. The general rule of law, *assignatus utitur jure auctoris*, is followed by the corollary *resoluto jure dantis resolvitur jus accipientis*. The one follows the other, unless there is some special reason why that should not be the case. I am clear with all your Lordships that the conditions and qualifications imposed by public law are to be held as impressed on every contract. No man can be heard to say that a provision in a marriage-contract is not qualified by a condition imposed by public law; and this assignation is as much subject to the condition as if that condition had been expressed in terms in the contract. On the whole case I agree with your Lordships, that this provision was forfeited by the husband, and that by that forfeiture the right of his assignees was destroyed.

Agents for Pursuer—Jardine, Stodart, & Frasers, W.S.

Agents for Defender—Hope & Mackay, W.S., and John Galletly, S.S.C.

Friday, February 7.

## FIRST DIVISION.

M'ALLISTER v. MANN.

*Summary Diligence—Promissory-note—Consideration—Charge—Suspension—Sale.* Circumstances in which held, that summary diligence on a promissory-note in which the complainer was co-obligant was incompetent, the note not being granted for a debt due, but in consideration of a sale and conveyance of certain subjects, and it being clear that the counterpart of the obligation could not now be carried through.

James M'Allister, jeweller in Glasgow, presented this note of suspension against John Mann, C.A., Glasgow, factor for the trustees of the Glenarm Whiting Company, craving suspension of a threatened charge on a promissory-note granted by the complainer and Hugh Donaghy. The following issues were proposed:—

- "1. Whether the promissory-note, No. 31 of process was granted by the pursuer, and received by the defender as factor for the trustees of Hugh Donaghy, Glenarm, Ireland, in part payment of the price of the Glenarm Whiting Works, sold by the defender as factor foresaid to the said Hugh Donaghy, and upon the condition that the said works should be conveyed to the said Hugh Donaghy so as to enable him to give a security to the pursuer over the same: Whether the defender as factor foresaid, or the said trustees, failed to implement said condition: And whether the defender has wrongfully threatened to charge the pursuer to make payment of said promissory-note.
- "2. Whether the said promissory-note was granted by the pursuer, and received by the defender as factor foresaid, in part payment of the price of the said works, sold by the trustees, or the defender as factor foresaid to the said Hugh Donaghy: Whether the said trustees, or the defender as factor foresaid, retained possession of the said works, and refused to convey the same to Donaghy: And whether the defender has wrongfully threatened to charge the pursuer to make payment of said promissory-note.

"3. Whether the said promissory-note was granted by the pursuer, and received by the defender as factor foresaid, in part payment of the price of the said works, sold by the said trustees or the defender as factor foresaid to the said Hugh Donaghy: Whether during the currency of the said promissory-note, the said trustees sold the said works to Robert Robertson,

and allowed him to take possession thereof: And whether the defender has wrongfully threatened to charge the pursuer to make payment of said promissory-note."

The Lord Ordinary (BARCAPLE) reported the case on the issues, with this note:—

"The respondent maintains that the complainer must put expressly in issue the sale of the works by the defender to Donaghy. But the complainer is not seeking to set up the sale. He only maintains that his promissory-note was granted in part payment of the price of the works as sold by the defender to Donaghy. If there never was a completed or binding contract of sale, there is only the more reason why the charge on the note should be suspended, if it was true that it was granted as in part payment of the price of the works. The respondent further maintains, that there must be put in issue a direct undertaking by him to the complainer himself, to convey the works to Donaghy. The Lord Ordinary thinks it is sufficient for the purpose of this suspension, that the issues set forth that the note was granted by the complainer and received by the respondent on the footing set forth in the several issues. The Lord Ordinary thinks that the complainer is entitled to the issues proposed by him, except in so far as the second issue bears that the trustees, or the defender as their factor, retained possession of the works. There does not appear to be any statement to warrant that part of the issue. The complainer originally proposed the case should not be sent to trial, but that he should be allowed a proof. The respondent objected to this course; and, looking to the nature of the case, the Lord Ordinary thought it proper to order issues. The opinion of the Court will now be obtained on this point."

CLARK and W. M. THOMSON for complainer.  
PATRISON for respondent.

LORD PRESIDENT—This case was reported to us on issues by the Lord Ordinary, and of course that naturally led us to consider the statements made by the suspender almost exclusively. And, so long as we did that, the case appeared to be a very complicated one. But we have now the written agreement out of which this has arisen; and on reading that, and the statements of the respondent, it turns out one of the clearest cases I ever saw. I think the respondent cannot be allowed summary diligence, but I should not have found that out from the statements of the suspender. The facts may be shortly stated. Donaghy, who was originally tenant of Glenarm Mill, county Antrim, got into difficulties, and executed a trust in favour of the persons represented by Mann, having induced them to take the works on the representation that with a little advance of money the concern could be made profitable. But this turns out not to be the case, and matters became gradually worse, and in March 1865 the trustees found themselves in advance for actual outlay to the amount of £600. In these circumstances, negotiations were opened between Donaghy and the trustees with a view to his recovering the reversion of the lease of the mill—for

that was the nature of his right; and these negotiations ended in the written agreement we have before us. The important part of that agreement is that which is contained in a paragraph at the middle of page 4, regarding the terms on which the works were to be sold:—"The arrangements will therefore stand as follows: The works at Glenarm to be sold to you at the price of Six hundred pounds over and above the present bonds, payable thus—(1) £200 by your own pro. note to me as factor at six months from 5th instant; (2) £100 by you and James M'Allister's joint pro. note at twelve months from same date; £100 by you and Peter Murty's joint pro. note of same date and currency; and (3) £200 by you and Mrs Donaghy's joint pro. note at sixteen months from said date—making in all, £600." These are very clear and distinct statements of a contract of sale of the works by the trustees to Donaghy at the price of £600, and a distinct statement of the manner in which the price is to be paid. The way in which M'Allister comes to be introduced into the case is by having engaged to be grantor, along with Donaghy, of one of the promissory-notes for the price. If this sale was carried through, of course M'Allister was bound either to pay, or to see it paid by Donaghy. But the consideration for granting that and the other promissory-notes was a sale of the subjects. If that cannot be carried through, the consideration of the promissory-notes fails absolutely. It is not a promissory-note granted for payment of a debt of £600 due by Donaghy, but expressly and exclusively for the price of a subject sold. What follows? I take it from the statement of the respondent. He says—"The only security which the trustees had to look to for their reimbursement of their advances of £600 was the property which had been assigned to them, and they came under no agreement or undertaking at any time to vacate or divest themselves of that property without full payment of the above sum. A reconveyance to Donaghy was not considered by him to be for his interest, as it might expose him to trouble from creditors who had not acceded to the trust-deed, or whose debts were incurred subsequent thereto." Now, this shows that the trustees, according to their reading of the agreement, were not to part with the real security they had from possession of a title to the works till the price was fully paid; in short, that the transaction in that written agreement could only be carried out by the whole price of £600 being paid in money, *simul ac semel* with which a conveyance was to be granted. Then the 11th article runs thus:—"The trustees did not accede to these requests, and when the promissory-note for £200, being the first instalment of the price, fell due on October 1865, it was dishonoured. When the first half-year's rent of the mill fell due in November, Donaghy was unable to meet it. The landlord threatened legal proceedings for the rent, and Donaghy was pressed with other claims. He therefore resolved to apply for sequestration, which he did in January 1866. The respondent was the concurring creditor in applying for the sequestration, his claim as creditor being founded on the £200 bill above mentioned, and he was appointed trustee on Donaghy's sequestrated estate, with Donaghy's approval. As trustee on the sequestrated estate, the respondent has not interfered with the Glenarm Mill, and materials, and machinery, &c., or with the equity of redemption of the lease which was in Donaghy, and was conveyed by him to the trustees above named." And state-

ment 12:—"The respondent and the trustees, his constituents, have been all along willing, and are still willing, to convey the reversion of the lease of the mill, &c., to Mr Donaghy, or any one in his right, upon his paying them the said sum of £600. But Donaghy has not only failed to pay the first instalment of £200, but is utterly unable to pay any of the remaining instalments, and the equity of redemption of the lease of the mill, &c., is not worth more than £300, and would not sell for more. The landlord has distrained some of the effects on the premises for past due rent, and the property is deteriorating." How can any statement more clearly and convincingly show that the agreement in the letter has become abortive, and that it is impossible to carry out the contract of sale on either part. But yet the promissory-note is confessedly granted on the sole consideration of a sale to Donaghy, one of the conditions being a conveyance of the subjects to Donaghy. The next sentence shows the mistake on which the respondent has been proceeding throughout. "Even upon payment of the two promissory-notes, upon which the suspender and Murty are obligants, the debt due to the trustees, and the respondent as their factor, will remain unsatisfied." No doubt of that. But did M'Allister ever become bound to pay any part of that debt? Certainly not. The trustees intended no doubt that they should be reimbursed by obtaining the price of £600 for a reconveyance of the mill, but M'Allister had nothing to do with that. He became co-obligant, not for any debt due to the trustees, but for the price of a subject sold, and it is impossible to allow the respondent to charge on this bill. I am therefore very clearly of opinion that this threatened charge must be suspended, and that the consigned money must be had up by the suspender.

The other Judges concurred.

Agent for Complainer—John Ross, S.S.C.

Agent for Respondent—R. P. Stevenson, S.S.C.

Saturday, February 8.

## SECOND DIVISION.

ALLAN V. HIGGINS AND BURTON.

*Poor—Residential settlement—Birth settlement—Continuity of Residence—Common Begging—Onus—Expenses.* Circumstances in which held (LORD BENHOLME diss.) (1) that an absence of six months destroyed continuity of residence, and thereby prevented the acquiring of a residential settlement; (2) that while the *onus* of proving the character of residence lay on the parish of birth, that had not been discharged by showing that there had been that absence of common begging without which a settlement by residence could not be acquired. Pursuer held not entitled to expenses in the Inner-House, his appearance there being unnecessary.

This was an action of relief, brought by the Inspector of the parish of Cambusnethan, against the Inspectors of the parishes of Shotts and Dalmeny, concluding for repayment to the pursuer of the sum of £135, 8s. 7d., advanced for the support of John Linn or Lind, a lunatic pauper, and for relief of all future advances for the same purpose. The parish of Dalmeny was the parish of birth, and the parish of Shotts was alleged to be the one in which the pauper had acquired a residential settlement. The question came to lie between these two