"The said trustees may hold the residue of said funds first and second hereby assigned for behoof of my said wife, for her liferent alimentary use allenarly, during all the days of her life, and exclusive of my *jus mariti* and right of administration; and, after her death, for my liferent alimentary use allenarly, during all the days and years of my life thereafter; and I provide and declare that the said liferent in favour of the said Flora M'Lean or Sloane, and of myself, shall be strictly alimentary, not affectable by the debts or deeds of the liferenter, nor attachable by the diligence of creditors; (3) Upon the death of the survivor of my said wife and me, should we be survived by any lawful child or children of me, the said John Sloane, whether procreated of the present or any future marriage, or their issue, I direct the said trustees to hold the residue of said funds for behoof of my said children jointly with the issue of any predeceaser *per stirpes*, and upon their attaining the age of twenty-one years, in the case of males, and, in the case of females, upon their attaining that age or being married, whichever event shall first happen, to pay over to them their respective shares; (4) In the event of there being none of my children or their issue alive at the death of the first deceaser of me and my said wife, or of their all predeceasing the survivor of us, I direct my trustees to hold the said residue and remainder of said funds for behoof of any party or parties I may appoint, by any writing under my hand, whether *mortis causa* or otherwise; and failing such appointment, then for behoof of the survivor of me and the said Flora M'Lean or Sloane in fee." The trust assignation contained an express discharge of the truster's *jus mariti* and right of administration, and appointed the trustees tutors and curators to any of the beneficiaries under the trust who might be in pupilarity or minority. It also declared that the provision in favour of the truster's wife and children should be accepted by them in full of all claims, whether of terce, *jus relictæ*, *legitim*, or otherwise competent to them by, at, or through his decease, in any manner of way. The only consideration for the said trust assignation was the foresaid exclusion, and the truster's natural obligation to provide for his wife and family. The deed contained no reserved power of revocation.

The trustees accepted the trust, and intimated the assignation to Mr Turner's trustees on 29th October 1868. They have received from these trustees £3000, and at the same time they have been informed that Mr Sloane's share in the succession will amount to about £5000, and this special case was presented in order that it might be ascertained whether those sums went to the trustees under the trust assignation to Mr Sloane or his creditors.

The effect of the assignation by Mr Sloane was to make him insolvent, and he has been so ever since.

Mr Sloane now maintained that he executed the trust assignation under essential error as to the amount of his share of Mr Turner's succession, and he claimed that the surplus over and above the £4000 should be paid to himself subject to the claims of his lawful creditors. All the parties to the special case admitted that he did not anticipate that any large surplus would revert to him over and above the £4000. It was also admitted that the error under which Mr Sloane laboured did not arise from neglect on his part to use the information available to him as to the value of his interest in Mr Turner's succession; but from the intricacy of the calculation necessary to ascertain his interest, and the circumstances that there were pending questions involving an increase or diminution of his interest, and that the estate of Mr Turner had not been then realised, and its value could not be correctly ascertained.

The prior creditors of Sloane, on the other hand, maintained that the trust-assignation must be set aside so far as it affected them, until their debts were paid; both under the statute 1621, cap. 18, and at common law.

The following were the questions of law submitted for judgment:—"(1) Was the error under which the party of the first part admittedly laboured, at the time of granting the said voluntary trust-assignation, of such a nature as to entitle him to have that assignation set aside or restricted, in so far as it disposes of the truster's interest in Mr Turner's succession to any greater extent than the sum of £3000, and such further sum as may be required to defray the expenses of the trust; or is the said assignation now restrictable to any extent; and if so, to what extent? (2) Are the parties of the third part entitled to have the said trust-assignation set aside, in whole or in part, to the effect of obtaining payment of their claims, or part thereof, out of the fund thereby assigned, in preference to the claims of the beneficiaries under said trust-assignation; and if so, to what extent and effect.

M'Laren for the party of the first part.

H. J. Moncrieff for the parties of the second part.

Watson and Mackintosh for the parties of the third part.

At advising—

Lord Justice-Clerk—The opinion I have formed is, that there are no relevant allegations of essential error as inducing the contract. The fact is, that at the time of the settlement the granter was aware of all the facts that could be known. He knew that the amount of the fund was uncertain. Even if it should turn out that the result is not what he expected, that constitutes merely an error of judgment. It is now conceded—as it could not but be—that this deed, having had the effect of making the granter insolvent, cannot have any force against prior creditors.

Lords Cowan, Benholme, and Neaves, concurred.

The Court found that there was no relevant statement of essential error, and therefore answered the first question in the negative; but, in regard to the second question, they held that the deed, being gratuitous, and granted with the result of making the granter insolvent, it could not be allowed to prejudice the prior creditors of the granter, and consequently answered the second question in the affirmative.

Agents—William Archibald, S.S.C.; J. & R. D. Ross, W.S.; J. & R. Macandrew, W.S.

Friday, December 2.

FIRST DIVISION.

MACANDREW (FRASER'S TRUSTEE) AND OTHERS *v.* JOHN AND DONALD FRASER.

Process—Interim Order—Ultra petita. Where, upon closing the records in conjoined actions

of reduction and suspension, and while the question of title to sue was still undecided, the Lord Ordinary had issued an interim order for delivery—*Held* that the order was incompetent *in hoc statu;* and that, under the special circumstance of the case, it was *ultra petita*, being neither concluded for in the summons, nor craved in the note of suspension.

This was a reclaiming note against an interim interlocutor, pronounced by Lord Gifford in two conjoined actions of reduction and suspension, at the instance of Colin Lyon Mackenzie of St Martins, residing in Inverness, as trustee under a trust-disposition, dated 8th January 1868, granted by John Fraser, ironmonger, Inverness, for behoof of his creditors, against the said John Fraser, Donald Fraser, residing at Platchaige, in the county of Inverness, his brother, and Lord Lovat, for his interest as landlord of the farm of Platchaige. The action of reduction was signeted on 11th March 1870, and concluded for the reduction of an assignation to the lease of the said farm of Platchaige, granted by the defender John Fraser to his brother the said Donald Fraser; and also for decree of removing from said farm, and cession of said farm and stock thereon to the pursuer. Defences were lodged for the defenders John and Donald Fraser, but no appearance was made by Lord Lovat. The suspension and interdict was raised on 25th March 1870, and prayed that the defenders, or either of them, be interdicted from using or carrying away the stock, crop, farm implements, manure, furniture, and other effects, from the said farm of Platchaige; and also for interdict against the said defenders, or either of them, labouring, sowing, or planting the said farm. The said note also prayed for interim interdict, and, if necessary, that a manager be appointed to labour said farm. Interim interdict was granted on 28th March 1870. On 11th May 1870 the estates of the said John Fraser were sequestrated; and Henry Cockburn Macandrew, solicitor in Inverness, was appointed trustee on the said sequestrated estates. Mr Macandrew was sisted as a party to both actions, and has insisted in them accordingly. The defender Donald Fraser at no time laid claim to the stock, &c., on the said farm of Platchaige: but, when called upon by the pursuer Macandrew to deliver up said stock, &c., refused to do so until he had been paid for taking care of and feeding the stock, maintaining that he had a lien and right of retention for what he had laid out in so doing.

The Lord Ordinary, on 19th July 1870, closed the record in both actions, and conjoined them, and on the same day, on the motion of the pursuers, pronounced the interlocutor now reclaimed against, which was in the following terms:—"The Lord Ordinary having heard parties' procurators on the motion of the pursuers and suspenders for warrant to obtain possession of the stock, implements, manure, and furniture which belonged to the bankrupt John Fraser, in respect it is admitted by the respondent Donald Fraser that (Ans. 17) 'he does not, and never did, claim any right under the said assignation to the stock, crop, furniture, and other effects mentioned,' ordains the defender and respondent Donald Fraser to give up and deliver to the suspenders and pursuers the whole moveable stock, separated crop, implements, manure, and furniture on the farm of Platchaige, which belonged to the said John Fraser, and grants warrant to the suspenders and pursuers to receive and take possession thereof, reserving all questions and claims between the parties."

The defenders John and Donald Fraser had preliminary pleas in both actions of want of title in the pursuers to sue said actions; and at the time when the interlocutor complained of was pronounced the question of title was still undecided.

At the hearing the SOLICITOR-GENERAL and MACKINTOSH, for the reclaimers and defenders, argued, that such an order was not competent, being neither concluded for in the summons, nor prayed for in the note of suspension; and that the order was further incompetent at such a stage of the case when the question of title was still undisposed of.

MARSHALL and WATSON, for the respondents and pursuers, contended, that the interlocutor should be sustained, the defender Donald Fraser having rendered it necessary by his refusal to give up the stock; and that it was moreover competent, being concluded for under a declaratory conclusion in the summons.

At advising—

The LORD PRESIDENT—There are two processes before the Court—the one of reduction, declarator, and count and reckoning, the other of suspension and interdict; and there were two records made up in these actions. On 19th July last the Lord Ordinary closed the records in both actions, and then conjoined the processes, and on the same day pronounced the interlocutor now under review. Now that interlocutor is of a very peculiar nature, and I am not sure that I ever saw anything like it before. It proceeds on the ground that the defender Donald Fraser "does not, and never did, claim any right under the said assignation to the stock, crop, furniture, and other effects mentioned;" and on the strength of that he "ordains the defender and respondent, Donald Fraser, to give up and deliver to the suspenders and pursuers the whole moveable stock, separated crop, implements, manure, and furniture on the farm of Platchaige, which belonged to the said John Fraser, and grants warrant to the suspenders and pursuers to receive and take possession thereof, reserving all questions and claims between the parties." The words used are of great importance—he "ordains" and "grants warrant,"—he does not "decern." This is not a decree; it is only an order, and is not extractable, and, of course, it was not meant to be extractable, but to be put into execution *de plano*, and to allow the pursuers to take away the stock of the farm. Now, whether it was competent at this stage of the action to pronounce such an order, and with such conclusions in the summons, is the question before us. We find that the defenders have preliminary pleas of want of title in the pursuers to insist in either of the actions, and that at the time of pronouncing this interlocutor the Lord Ordinary actually had the question of title at avizandum. There can be no doubt that if he finds that the pursuers have no title, the result will be most singular. Therefore I doubt whether such an interlocutor is competent, on that ground alone. But, upon consideration of the conclusions of the summons and the prayer of the note, its incompetency becomes quite clear. The note in its prayer does not ask for such an order. As regards the conclusions of the summons, they are different and more complicated. The declaratory conclusion certainly concludes—whether the assignation "be reduced or not, it ought and should be found and declared that said Colin Lyon Mackenzie, as trustee

foresaid, has the only good and undoubted title to the whole cattle, sheep, stock, crop, implements of husbandry, household furniture, and other effects of every description, situated on the said farm of Platchaige, and also to the said lease thereof, and to possess and labour the said farm, and reap the crops thereof during the present year 1870, subject always to the rights of the said Right Hon. Thomas Alexander Fraser, Lord Lovat, as landlord of said farm; and the said Donald Fraser ought and should be decerned and ordained by decree foresaid, instantly to remove from the said farm, and to cede to the said pursuer the possession of the cattle, sheep, stock, crops, implements of husbandry, household furniture, and other effects of every description situated thereon, in order that the pursuer, the said Colin Lyon Mackenzie, may have access to the same, for the purposes of the said trust, and to labour, sow, and reap the crops of the said farm, as aforesaid, for the purposes of said trust, subject always to the rights of the landlord, as aforesaid." Now it must be kept in view that there are three defenders in the action of reduction, &c.—First, John Fraser, the bankrupt; second, Donald Fraser, his brother; and third, Lord Lovat, the landlord of the farm, and these three are all called to "hear and see the same and all that has followed or may follow thereon." Lord Lovat does not appear in the action, and does not think it necessary to appear. I can quite understand that he does not choose to say what he will do as regards either party as tenant of his farm. But if there had been a conclusion that, whatever the defender Donald Fraser might be found entitled to, he would be ordered to give over the stock and other furnishings of the farm; in that case, I have no doubt that Lord Lovat would have put in an appearance in this action. I do not think that there is anything like such a conclusion as I have hinted at in this action. I think that under this summons the stock is meant to go along with the farm, and the conclusion which I have quoted fully carries me out in this opinion. In it Donald Fraser is called upon to remove from the farm, and to cede to the pursuer the possession of the stock and other furnishings of the farm. Does that mean that the two are to be separated? No, the pursuer concludes to get into possession of a stocked farm, and that is the clearer on account of the words "in order that the pursuer may have access to the same," &c. I am therefore of opinion that this interlocutor is incompetent as *ultra petita;* and though the question as to whether it was expedient does not accordingly arise, I am also of opinion that it was inexpedient at the stage of the case at which it was pronounced.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—I think it clear that, whatever the terms employed, this is a judgment on the merits—though the wording of the interlocutor is peculiar. I am of opinion that this judgment was pronounced at an improper stage. There is still an objection to the pursuer's title to sue standing undecided—the result of discussing which may be that the action is dismissed. The conclusions of the summons are complicated; and though I do not say that they cannot be unravelled, still it would be a matter of difficulty to do so satisfactorily at present.

Lord Ordinary's interlocutor recalled, and the pursuer's motion refused.

Agents for Reclaimers—Murdoch, Boyd & Co., S.S.C.

Agents for Respondents—Mackenzie, Innes & Logan, W.S.

Friday, December 2.

SECOND DIVISION.

DALGLEISH & FORREST *v.* MILLER.

Sale—Double Distress—Multiplepoinding. A having purchased certain articles of furniture for £156, for which he granted a promissory-note payable one month after date, his mother a few days afterwards sold them to an auctioneer for £50. After delivery, and before payment, the auctioneer discovered the previous transaction, and received notice from the creditor in the promissory-note, which was dishonoured, that he must not pay over the £50. Arrestment was also used in his hand of any sum due by him to A; and, instead of paying, he raised an action of multiplepoinding. *Said action dismissed,* on the ground that there was no double distress; that the arrestment did not attach the sum of £50 due to the mother of A; and that the sale was for ready money.

This was an action at the instance of Mrs Millar to recover the sum of £50, said to be due to her as the price of certain articles of furniture which she had sold to the defenders, who were auctioneers in Edinburgh. The defence to the action was, that the defenders had been interpelled from making payment by other parties in the following circumstances:—They alleged that immediately after they got delivery of the articles in question, they ascertained that they formed the greater portion of furniture bought by the pursuer's son from Messrs Finlay & Son, cabinet makers, a few days before, at the price of £156, 6s. 7d., and for which he had granted a promissory-note payable one month after date.

They alleged further:—"Messrs Finlay & Son claimed the price of the articles sold by the pursuer, on the ground *inter alia* that the price was due to their debtor to whom the articles of furniture belonged. On 8th April 1870 Messrs Finlay & Son protested the said promissory-note, and in virtue of a warrant to arrest contained in the extract registered protest of that date, arrested in the hands of the defenders the sum of £200 sterling, less or more, due and addebted by them to the said William Waddell Millar, or to any other person or persons for his use and behoof. The object and effect of this arrestment was to attach in the defenders' hands the sum now sued for. On 11th April 1870 the estates of the said William Waddell Millar were sequestrated in terms of the 'Bankruptcy (Scotland) Act 1856,' and at the meeting for the election of a trustee Mr James Hogarth Balgarnie, C.A., Edinburgh, was elected trustee, and he has since been confirmed by the Sheriff of Edinburgh. On 27th April current, Mr James Knox Crawford, S.S.C., as agent for Mr Balgarnie, wrote the defenders, intimating that he, Mr Balgarnie, as trustee foresaid, claimed the price of the furniture from the defenders. Messrs Finlay and Mr Balgarnie both maintain that the furniture did not belong to the pursuer, but to her son, and that no change of possession had taken place to the effect of transferring the property from him to the pursuer. The defenders