

the expense. To infer a forfeiture of the advance because insurance was not made would be to insert a penalty in the contract which its terms do not contain, and this I consider to be at variance with established principle. This option to the charterers to insure this special advance for their own security did not in the least preclude an insurance by the owners for the full amount of the freight. It would only do so on the assumption of the advance being out and out payment of the freight *pro tanto*, leaving no interest in the owners but for the balance, to make which assumption would be to beg the question at issue. A policy on the whole freight effected by the owners, and a policy, if otherwise competent, on the special advance effected by the charterers for their own security would quite well stand together. This would no doubt be double policies on what in some sense was the same risk, but there is nothing incompetent in this. It is quite consistent that there should be multiplicity of policies, but only one recovery.

I would only in conclusion say one or two words regarding the decision in this Court of the case of *Leitch v. Wilson*, as supposed in some quarters to have adopted the rule of English law, that a prepayment of freight by a charterer is always irrecoverable in the event of the vessel being lost. In deciding that case as Lord Ordinary I did not proceed on any contrast between English and American authorities, or adopt either one or other of these. I proceeded simply on the ground that by the terms of the charter-party, which made the freight of a voyage to Demerara, which usually took six weeks, payable in Glasgow within a month after the vessel sailing, there was a contract created for out and out payment of the freight whether the vessel reached her destination or not, or, in the ordinary maritime phrase, "lost or not lost." I do not find that in affirming my judgment the Court adopted any other ground. I entertain no doubt that parties may so contract as to make payment of the freight by anticipation an absolute and irrecoverable payment whether the vessel be lost or not, and any judgment, whether in England or here, which proceeds on the footing that such a contract has been made proceeds on a sound principle of equity, whatever difference of opinion there may be as to the precise construction of the agreement. The same result may be arrived at as to a partial advance on account of freight—that is to say, parties may contract that such an advance shall not be repayable if the vessel be lost, though I think very clear words would be required to operate such a result. I do not think that a mere partial payment, made for the accommodation of the owners, without any stipulation on the subject, express or implied, is *eo ipso* irrecoverable; on the contrary, I think that this will just stand in the category of an advance for the creditor's accommodation towards a contingent debt to be recovered back if the debt does not become due through the non-emergence of the contingency. The rule which is said to be now settled in the English Courts that every partial payment of freight is *eo ipso* irrecoverable I cannot sanction or adopt; and I would consider it a most unsuitable reason for its adoption when the English Courts are expressing their regret for its now irretrievable establishment. We are here in no such predicament. We are not tied down to any such rule, but may decide the case on the principles which legitimately apply to it. The case is not to be deter-

mined by the application of any arbitrary or artificial principle. The true rule of decision is a sound regard to the terms of the individual contract. What I consider these to be in the present case I have already explained.

The parties having come to an agreement that the pursuers should obtain decree for £20 odds of premium and commission, with interest from the 7th July 1864, the Court, of consent, decreed for that amount, and *quoad ultra* assoilzied the defenders, with expenses.

Agent for the Pursuers—William Mason, S.S.C.  
Agent for the Defenders—William Archibald, S.S.C.

Thursday, November 30.

BIRKETT, SPERLING, & CO. v. ENGHOLM  
& CO.

*Insurance—Sale—Contract—War Risk.* A cargo of oats to be shipped by a German vessel at Archangel was sold at so much per quarter, "cost, freight, and insurance" to this country, "payment to be made by cash in London on handing invoice, and in exchange for shipping documents." After the contract was completed, but before the vessel arrived at Archangel, war was declared between France and Germany, and the vessel became liable to capture. The purchasers maintained that the insurance which the sellers had undertaken to effect must include war risk. The sellers denied this, and when notice had arrived that the cargo had been shipped they in effect tendered to the purchasers a policy in which war risk was excluded. The purchasers declined to accept this, and declared the contract at an end; and although the vessel subsequently arrived safely in this country they refused to take delivery of the cargo.

*Held* that the sellers were bound to effect an insurance covering war risk, and to tender the same along with the shipping documents, and that on their wrongful refusal to implement the contract the purchasers were entitled to rescind the contract.

*Observed* that the proper implement of the contract by the sellers was not delivery of the cargo, but delivery of the shipping documents.

On the 23d June 1870 the pursuers Birkett, Sperling, & Co., merchants in London, and the defenders Engholm & Co., merchants in Leith, entered into a contract, embodied in bought and sold notes, as follows:—

"Leith, 23d June 1870.

"Bought through Birkett, Sperling, & Co., of London, selling by order and for account of their principals—A cargo of about 1100 quarters, or whatever the ship may carry, of Archangel oats, of fair average quality of the season, to be shipped by the 'Ems,' 3/3 1.1. 110 tons register, on her arrival at Archangel, at the price of 23s. (say twenty-three shillings) cost, freight, and insurance to London, or the east coast of Great Britain, according to charter-party, for every 304 lb. weighed out, sound or damaged, at the port of discharge.

"Payment to be made by cash in London on handing invoice, and in exchange for shipping documents, less interest at 5 per cent. per annum

for unexpired portion of three months from date of bills of lading; and any surplus above, or deficiency below, the quantity provisionally invoiced, to be settled after arrival of the oats at port of discharge.

ENGHOLM & Co."

On the 15th July 1870 war was declared between France and Germany, and the "Ems," as a German vessel, became liable to capture.

Some correspondence appears to have taken place between the parties as to an abandonment of the contract. Engholm & Co. offered to cancel the bargain for £100. This proposal was not accepted, but an expression in a letter of Birkett, Sperling, & Co., dated 21st July 1870, showed that they understood, or professed to understand, that the war risk was with the purchaser. Upon receipt of this letter, Engholm & Co. write as follows:—

"22d June 1870.

"Your friends (*i.e.*, Messrs Brandt, for whom Birkett, Sperling, & Co. were acting) will have to insure war risk on the oats per 'Ems,' the cargo being gold c. i. f. (*i.e.*, cost, insurance, freight), and being shipped by a belligerent vessel, is not c. i. f. unless war risk be covered."

To this Birkett, Sperling, & Co. reply—

"London, 23d July 1870.

"Dear Sirs,—Your favour of the 22d inst. duly to hand. As regards the 'Ems,' Messrs Brandt are not at all bound to insure against war risk. They only sell as usual, including sea insurance, and not including risk of capture and seizure, &c."

A good deal of correspondence followed, in which the defenders maintained that they were entitled under the contract to a policy covering war risks among others, and the pursuers the reverse.

On 1st September notice had arrived that the cargo had been shipped on board the "Ems" at Archangel. The pursuers enclose the invoice to the defenders in the following letter:—

"London, 1st Sept. 1870.

"Dear Sirs,—We beg enclosed to hand you invoice of oats shipped per 'Ems,' sold to you as per contract dated 23d June 1870, amounting to £1162, 11s. 2d., due in cash here on Saturday the 3d inst., and will think you to inform us where we shall apply for this amount here against documents."

The invoice is in ordinary form, specifying, as a deduction from the gross price, insurance amounting to £53, 9s. 9d.

The following correspondence followed:—

"Letter, Engholm & Co. to Birkett, Sperling, & Co.  
2d Sept. 1870.

"We are in receipt of your letter of yesterday, enclosing invoice of cargo oats per 'Ems,' regarding which our friends write thus:—We have yours of date, handing invoice of the cargo oats p. 'Ems,' but as the sellers don't say they have covered war risk, we cannot pay till such is done. A sale c. i. f. covers all risk, and several policies we had current when the cargo per 'Ems' was purchased had the war clause in, and completely covered capture, &c. When this is done we are prepared to pay; if not, we must only wait until the vessel arrives at port of destination. We notice bill of lading is dated 19th August, and in this case we do not consider documents have been forwarded in course of post, and we do not consider ourselves bound to accept the cargo now. We have sold the cargo oats upon exactly the same terms that we bought it from you. Please answer us about the insurance."

"Letter, Birkett, Sperling, & Co. to Engholm & Co.

"London, 3d Sept. 1870.

"Dear Sirs,—Yours of the second inst. duly to hand, and, noting contents, we send copy of your letter of that date respecting the 'Ems' to the original sellers, Messrs Brandt & Co., whom we have seen here to-day. As regards insuring the war risk, they maintain that they are not bound to do this; but they are willing to leave this question to be settled by arbitration.

"In the meantime, we beg to give you notice that the cargo is entirely at your risk.

"Messrs Brandt say that, with the present irregularity, letters from Archangel are generally twelve and thirteen days on the way, and the invoice was handed in the usual course.

"In reply to what you state, that you have had policies including war risk before the war broke out, this may be, but we do not think this is anything for you to go upon, as we know for a fact that a good many of the London insurance companies invariably stipulate in their policies 'free of war risk,' even in times of peace.

"As before mentioned, the documents must be taken up and invoice paid for *without delay*; and as we think Messrs Brandt's proposition is a very fair one, we await your telegram on Monday morning *without fail*."

"Letter, Engholm & Co. to Birkett, Sperling, & Co.

"5th Sept. 1870.

"Your letter of 3d inst. to hand, and this morning telegraphed you as follows:—'Are prepared to take up "Ems" documents when sellers insure war risk, being sold c. i. f., or on arrival at destination.' We bought the cargo c. i. f., so it must be insured against all risks, as at that time Lloyd's policies had war risk clause inserted. We agree to take up documents on war risk being covered by sellers."

On the 5th September the pursuers renew their proposal to refer the matter to arbitration; and again intimate that they would hold the defenders responsible should the "Ems" be captured.

"Letter, Engholm & Co. to Birkett, Sperling, & Co.

"Leith, 6th Sept. 1870.

"We have yours of yesterday, and note contents. Had there been any difference, we would most willingly have referred it; but we only ask what we stipulated for—*viz.*, insurance; and if war risk is not covered, we hold the cargo is not insured; all we ask is a Lloyd's policy—same as those we held when the contract was entered into; and unless you give this by return of post we must decline to take the cargo. We regret that you should for a moment withhold war risk, and we decline any responsibility whatever about the cargo till the documents are handed over to us complete."

Ultimately, on the 8th September the pursuers effected an insurance of the cargo against war risk, for a premium of £60, 10s. 6d. Before they did so they made a proposal, "without prejudice," to divide the expense with the defenders, but, as the pursuers themselves stated in the present record, the defenders did not agree to it.

On the 23d September the "Ems" arrived safe at Fraserburgh. The defenders were requested to take delivery, but they declined to do so, on the ground that the contract had been already rescinded. It was then agreed between the parties, under reservation of their legal rights, that the ship should proceed to London, and that the cargo

should be disposed of there to the best advantage. The sum realized was £294, 11s. 5d. less than the invoice price of the oats. On the 2d February 1871 the pursuers raised the present action for payment of £355, 1s. 11d., being the difference between the invoice price of the oats and the price actually obtained, together with the amount of the premium of insurance against war risk effected by the pursuers. The claim for reimbursement of the premium was afterwards restricted by a minute to one-half thereof, viz., £30, 5s. 3d., making the total sum claimed £324, 16s. 8d.

The pursuers pleaded—" (1) The defenders having wrongfully refused to take delivery of said cargo, and pay the price thereof, are liable in the loss thereby occasioned."

The defenders averred—" Ans.3. It is explained and averred that, under the contract libelled, the sellers were bound at their own expense to insure the cargo against all ordinary sea risks, including 'takings at sea,' or losses by hostile capture and belligerent seizure, and to deliver the policy along with their shipping documents against payment of price."

A letter was recovered by the defenders, written by the pursuers to Messrs Brandt, to whom they stood in precisely the same relation as the defenders did to them. It was written on 5th September, on receipt of the defenders' telegram of that date—

"London, 5th September 1870.

"Gentlemen—We beg to acknowledge receipt of your letter of 3d inst., and, noting contents, we are prepared to take up documents per 'Ems' upon your presenting same, with policies covering war risk; and meanwhile we decline to acknowledge any responsibility on our part in case the vessel is captured. We have just received the following telegram from our buyers:—'Are prepared to take up "Ems" documents when sellers insure war risk, being sold c. i. f., or on arrival at destination,'—which please note; and, from inquiries which we have made to-day, we believe our buyers are quite justified in the course which they adopt.—We are, &c.

BIRKETT, SPERLING, & Co."

The defenders pleaded—" (3) The pursuers being themselves in breach of the contract libelled, are not entitled to maintain the present action. (4) The defenders were entitled to hold the said contract as at an end in respect of the failure and refusal of the pursuers to implement the same, in manner alleged by the defenders, to their loss, injury, and damage."

The Lord Ordinary (JERVISWOOD) pronounced the following interlocutor:—"Finds (1st) that the defenders have failed to establish that the pursuers were bound to effect an insurance of the nature and description specified in the answer for the defenders to the third head of the condescendence for the pursuers, of the cargo of oats shipped on board the 'Ems' at Archangel, as set forth on the record; or that the pursuers, by their failure to effect such insurance when the same was first demanded by the defenders, committed any breach of the contract of sale of said cargo between the said parties, as the same is contained in the bought and sold notes referred to in the second head of the said condescendence, and in the answers thereto: Finds (2d) that the defenders were, notwithstanding such failure to insure on the part of the pursuers, bound to take delivery of the said cargo, in terms of the said contract; and that the defenders, having refused so to take delivery, are liable for

the loss arising to the pursuers upon the sale of the said cargo, which was eventually carried through by them in terms of arrangement between the parties; therefore, and with reference to the foregoing findings, and to the terms of the said joint minute, finds (3d) that the defenders are resting-owing to the pursuers in the sums of £294, 11s. 5d. and £30, 5s. 3d., which are set forth in the fourth article of the said minute, amounting together, the said sums, to the sum of £324, 16s. 8d. sterling, together with interest thereon at 5 per centum per annum from the 19th of November last 1870, and decerns against the defenders for the said sum and interest accordingly; finds the defenders liable to the pursuers in expenses."

The defenders reclaimed.

WATSON and TAYLOR INNES, for them, argued—An indemnity against war risks is one of the *naturalia* of a policy of insurance—Bell's Principles, 464, 472; Commentaries, i, 645, 671; Marshall on Marine Insurance, Shee's Edition, p. 394, and 310 (*dictum* of Lord Mansfield); Parsons on Marine Insurance, 575; Levy, 4 Greenleaf's Rep. 180; and anyone who contracts, in general terms, to furnish a policy of insurance must be held to mean a policy including war risks.

SHAND and TRAXNER, for the pursuers, argued that the refusal of the defenders to take delivery of the oats was wrongful on three grounds—(1) They were wrong in the position which they took up from the beginning, that the pursuers were bound to insure against war risk; the parties entered into the contract on the understanding that there was no war risk; the event turning out otherwise, it is not reasonable that the whole loss should fall upon the sellers. (2) The parties came to an agreement, in accordance with which the pursuers insured the cargo against war risk, on the understanding that the defenders were to bear one-half of the expense. (3) The ship did in fact arrive safe, and the pursuers fulfilled their obligation by offering the cargo, which the defenders were not entitled to refuse.

At advising—

LORD PRESIDENT—This, though in form a claim for an ascertained amount, is practically a claim for damages for breach of contract. The contract was one of sale of a cargo of oats to be shipped at Archangel and delivered in Great Britain; and the breach alleged is failure on the part of the defenders to take delivery of the oats on arrival. That this is the ground of action is clear from the first, and what may be called the only plea for the pursuers—" (1) The defenders having wrongfully refused to take delivery of said cargo, and pay the price thereof, are liable in the loss thereby occasioned." The loss has been ascertained by the sale of the cargo, and the damage asked is the difference between the contract price and the sum actually realised. The contract is dated 23d June 1870 (*reads*). The first thing to be observed is that this is not an ordinary contract of sale and delivery. It is the sale of a prospective cargo to be carried by a ship not yet at the port of loading. In such circumstances there is no doubt that it is the duty of the seller, on the cargo being shipped, to send forthwith the bills of lading to the purchaser. The proper implement of the contract is not delivery of the cargo, but delivery of the shipping documents, which entitle the purchaser to get the cargo from the ship-master. This is abundantly clear in the present contract from the mode and time in which payment is to be made, viz., by cash

in London, in exchange for the shipping documents. The cargo was sold at 23s. per quarter, including cost, insurance, and freight. Therefore one of the shipping documents which it was the duty of the sellers to furnish to the purchasers was the policy of insurance. I have made these remarks to dispose of an untenable argument by the pursuers that whatever was done in the interval as to furnishing shipping documents the purchasers were nevertheless bound to take delivery of the cargo on its arrival.

When the contract was made there was no war in Europe. About three weeks after France declared war against Germany. The sellers seemed to have conceived an idea that in consequence of the change of circumstances they were not bound to give the purchasers a policy of insurance in the ordinary form, including, among other risks, the risk of capture. This appeared early in the correspondence. On the 21st July the pursuers disclosed their view about their obligation to insure. On receipt of the letter the defenders immediately wrote—[reads letter of 22d July 1870]. Here arose a dispute, which is carried on through a considerable correspondence. It admits of little doubt that when a party contracts to sell a cargo under burden of insurance he means nothing less than a guarantee of indemnity against all the risks ordinarily covered by insurance to which the ship may be exposed in its voyage from the port of loading to the port of delivery. That every policy of insurance conceived in the usual terms contains a specification of war risks, in the case of a vessel liable to them, is perfectly well known. No doubt policies are sometimes effected with variations in the clause enumerating the risks covered. But no one who undertakes in general terms to insure can be heard to say that he is entitled to except any of the ordinary risks, unless he expressly stipulates to that effect. In a question with the underwriters every insurance which is expressed in the usual terms covers the risk of future wars just as much as the risk of capture in an existing war. In like manner an obligation to provide such a policy must be similarly construed. There was thus a dispute before the cargo was put on board, in which the sellers were entirely wrong, and the purchasers entirely right. What follows? The proposition of the pursuers is again repeated. They were not at all confident of the soundness of their own position. We have a letter by them, dated 5th September, to their own constituents—[reads]. But although they have made inquiries, and believe "that the buyers are quite justified in the course which they adopt," they nevertheless persist in their objection, and decline to fulfil what was their duty, and what apparently they knew to be their duty.

The subsequent correspondence is to a great extent immaterial to the decision of the present question, but I shall refer shortly to some parts of it. The cargo had been shipped, and notice had come by 1st September. Upon that date the pursuers sent the invoice of the cargo to the defenders in a letter, in which they say—[reads letter of 1st September]. The invoice includes the usual items, with a deduction for insurance. It is perfectly correct if the insurance is such as the defenders were bound to accept. The defenders write on 2d September—[reads]. They ask whether the insurance covers war risk. That is in consequence of the dispute already arisen. There is a passage in this letter strongly founded on by the pursuers—

"if not, we must only wait until the vessel arrives at port of destination." The first purpose for which the pursuers refer to this passage is to show that their reading of the contract is the same which the defenders put upon it—that the defenders considered that the proper implement of the contract was delivery of the cargo. But it is impossible to reconcile this construction with the rest of the letter. The defenders construe the contract in the strictest manner against the pursuers, too strictly indeed, but quite inconsistent with the pursuers' view. They aid—"We do not consider documents have been forwarded in course of post, and we do not consider ourselves bound to accept the cargo now." They hold that the contract has been already broken by the pursuers failing to send the shipping documents. The other purpose to which the pursuers refer to the passage mentioned is to show that the defenders thereby agreed, if the matter could not be otherwise settled, to accept delivery of the cargo as fulfilment of the contract by the seller. But what the defenders really say comes to this, "You have broken the contract; it is optional to us to rescind the contract or to insist upon its performance"—a position which they were perfectly entitled to take up. They had not yet declared their option. The same may be said of their telegram of 5th September, in which they again speak of the alternatives open to them.

The 3d September is an important date. It is the day on which the pursuers effected the insurance on the cargo, and it is the day which, according to their letter of 1st September, was the proper day for exchanging the shipping documents for cash. What they did was in fact to tender as one of the documents a policy of insurance excluding war risks. This is declined by the defenders. They stand upon their right to have a policy including war risks. The pursuers write—[reads letter of 3d September]—"In the meantime, we beg to give you notice that the cargo is entirely at your risk." Nothing could better show the unreasonableness of the pursuers' position. They have contracted to give insurance, and now they say that the cargo is entirely at the risk of the other party. The defenders take their ground on 6th September—[reads letter of 6th September]. Up to this time they had left open to themselves the alternatives of either rescinding the contract or of enforcing it. The only point of dispute up to this time was whether the pursuers were bound to effect a policy in the terms required by the defender. As I have said, on this the pursuers were entirely wrong, and the defenders entirely right. There being then a clear breach of contract on the part of the pursuers, the defenders were entitled to rescind the contract as they did. After this nothing material occurred. Some parts of the correspondence have been founded on to the effect that the cost of the additional policy to cover the war risk was agreed to be divided between the parties. There were negotiations to this effect, but they never came to anything. The pursuers state on record that the defenders refused to agree to the proposal. The war risk was ultimately covered by an insurance effected by the pursuers. It would have been very foolish for their own interests if they had not effected the insurance. As it happened, the ship arrived safe; but long before this the contract had been rescinded by the defenders. If they were entitled to do this, as I hold they were, this action cannot be maintained, and the defenders must be assoziated.

**LORD DEAS**—I concur. What appears to me conclusive is that the pursuers were bound to effect insurance in the usual terms.

**LORD ARDMILLAN**—I have no difficulty in this case. The words of the bought and sold notes are clear. I need not again read them. The meaning of them is admitted. The agreement of parties, which we must construe as now explained by the minute of admissions, was that the policy of insurance was to be effected by the sellers, who are the pursuers of the action, and was to be tendered to the buyers, the defenders, along with the shipping documents. It is manifest that there being no special stipulation in regard to the nature of the policy of insurance it was intended to be an insurance of the usual character known in mercantile practice, and of the usual scope and comprehensiveness.

Now, I have no doubt that according to sound principle, and to the settled equity of commercial and maritime law, capture by enemies in war is within the usual scope and comprehensiveness of a British policy of marine insurance. War, with its incidents, is a risk within the policy, and the insurers take the risk of war arising after the date of the contract. This is the law laid down by all the best authorities in this country and in America. But it is unnecessary to quote other authorities, for the authority of Lord Mansfield in the case of *Elder v. Parkinson* is conclusive on such a point. There can be no higher exposition of the equities of commercial and maritime law than the judicial opinion of Lord Mansfield.

Therefore the pursuers, as sellers, were bound to insure, and to insure against the war risk as well as against the storm risk, or the other perils of the sea.

It is scarcely less unreasonable to say that war risk is excepted when the contract is made in time of peace than it would be to say that storm risk is excepted when the contract is made in time of calm.

On the refusal of the pursuers to effect this insurance, including the war risk, which they were bound to do, I think that the defenders were entitled to cancel the contract in respect of the pursuers' failure to fulfil one of the contract obligations, and they did declare the contract at an end.

It has been argued by Mr Shand that the defenders afterwards agreed to an arrangement that an insurance against all perils, including war, should be effected at mutual expense, each party paying half the premium. I think that no such arrangement has been proved. And none such has been alleged. Indeed, in the 4th article of the condescendence the pursuers distinctly allege the contrary; and in the pursuers' letter of 10th September 1870 they make the same averments. That view, taken ingeniously, but without foundation, by Mr Shand, must accordingly be set aside.

The only remaining point to which it is necessary to advert is, that the pursuers plead that they were entitled to withhold the shipping documents till the arrival of the ship at the port of discharge, and they also pleaded that they were not even bound to indorse the documents. This is, in my opinion, a plea which raises a most serious question, on which important results might depend. I have given to it the deliberate attention to which Mr Shand's argument was well entitled. But I have without difficulty arrived at the conclusion that it is not well founded. The

transmission of the shipping documents was the first duty of the sellers. No authority in support of the pursuers' plea, either by institutional writer or in decision, has been quoted; and it is, in my opinion, contrary to the true principles and the settled understanding of commercial law and practice. We have been referred on both sides to the correspondence.

I have read this correspondence carefully. There is nothing in it which creates an exception—nothing which to my mind prevents the application to this case of the principles of law and equity to which I have adverted. At the same time I think that the defenders have also been somewhat too contentious.

Whether the pursuers were bound in a time of peace to insure against the war risk was a fair, though not a doubtful question, which has been well raised and argued. I think that the pursuers were bound so to insure. They failed to do so. But that question being once settled, this case is at an end. It can only be decided in favour of the defenders. There is no other ground stated or urged on which the pursuers can possibly succeed.

I am accordingly of opinion that we should recall the interlocutor of the Lord Ordinary, and assolvie the defenders.

**LORD KINLOCH** absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the third and fourth pleas for the defenders, and assolvied the defenders with expenses.

Agents for the Pursuers—Scarth & Scott, W.S.

Agents for the Defenders—Murdoch, Boyd, & Co., S.S.C.

Thursday, November 30.

#### SPECIAL CASE—M'CALL'S TRUSTEES AND OTHERS.

*Assignment—Trust—Alimentary Liferent—Apportionment.* Competition between two sets of trustees to whom a person had assigned her right in the same legacy.

By a trust-settlement Mr John M'Call, *inter alia*, directed his trustees to pay the sum of £1000 to each of the children of his sister Mrs M'Kerrell who should be alive at the death of the trustor's widow. Mr M'Call died 18th October 1833.

In November 1838 Mary M'Kerrell, one of the children of the trustor's sister Mrs M'Kerrell, was married to the late Donald Smith. By antenuptial contract she assigned to trustees her whole right and interest in the succession of her uncle John M'Call, as also her whole other means and estate to which she might succeed during the subsistence of the marriage, excepting her right and interest in the succession of her father. It was provided that the whole estate thus conveyed, together with £2000 which her father had bound himself to pay to the trustees, should be held by the trustees for her liferent use alienably, and for the children of the marriage in fee. The trustees were directed to pay to her during her life, and to her husband if he should survive her, the free annual proceeds of the estate vested in them, under the declaration that the liferent in her favour should be purely alimentary, and that the same should not be assignable by her nor affectable by her debts and deeds. Upon the death of the