but to show it from the donee *per formam doni;* it came down to the person last seized of the estate tail, and then he was bound to show his title upon the record—upon his count, not as son, or grandson, and heir of the first donee, but as cousin and heir, *secundum formam doni,* to the person last seized of the estate tail. I need hardly refer to the authorities for that, but they are to be found in *Buckmere's* case, in the 8th part of Coke's Reports, 86, and in Fitzherbert's *Natura Brevium,* and in Comyn's Digest, title "Pleader." They are uniform upon it. He took as heir *secundum formam doni,* as we should say in England; in Scotland he takes as heir of provision. When once you have got that, it is precisely the same in both countries; he comes in from the donor, the original settler having had the power to a certain extent (more extensive in Scotland than in England) of saying who shall be the provisional heirs, and who shall be the heirs *per formam doni.* He who takes as heir under such circumstances as those derives his title from the last person possessed, and consequently the amount of duty which he has to pay must be regulated according to his blood relationship to that person; and it seems to me obvious that this must have been the intention and wish of the Legislature, for, taking the ordinary case of a man purchasing an estate either in England or in Scotland, and making no particular settlement about it, but dying leaving two sons, the eldest son of course takes it—the eldest son dies leaving a son, that eldest grandson therefore takes it—then if the eldest grandson dies without issue it goes to the uncle or the uncle's son; it is obvious that the succession duty there would be regulated by that uncle, or that uncle's son succeeding as uncle and heir or cousin and heir to the person last seized; he would succeed as heir to the person last seized because he was the son and heir of the original purchaser, of the grandfather, who, upon the supposition, had bought the land, but he would pay duty because he succeeded to the heir who was last seized; and I cannot myself see any reason in the nature of things, or any reason either technical or substantial, why it should be in the least different when the whole of the inheritance is made by provision in the settlement in Scotland, or in England *per formam doni.* My own private opinion (which I should perhaps hardly state) is that it is excessively harsh, and not very just, to say that a person who succeeds to his nephew should pay a higher rate of duty than a person who succeeds to his father. I do not much like that notion, but I cannot help thinking that it is not a whit more harsh or unjust to say that a man who succeeds to an entailed estate under a provisional order of succession, and succeeds to his nephew, shall pay an extra duty, than it is to say that he shall pay an extra duty when he succeeds by the ordinary rule of law.

Taking the whole matter, therefore, it seems to me that the decision of the Court below was perfectly right, and should be affirmed with costs.

LORD GORDON concurred.

Interlocutors appealed from affirmed, and appeal dismissed, with costs.

Counsel for Appellant—Benjamin, Q.C.—H. J. Moncreiff—Simpson. Agents—Frere & Company.

Counsel for Respondent—Lord Advocate (Watson)—Nicholson. Agent—David Crole, Solicitor of Inland Revenue.

COURT OF SESSION.

Tuesday, February 12. *

SECOND DIVISION.

SPECIAL CASE—REID (M'WALTER'S TRUSTEE) AND M'WALTER.

Husband and Wife—Heritable and Moveable—Conjugal Rights Act 1861 (24 *and* 25 *Vict. c.* 86), *sec.* 16—*Question between a Wife and Trustee on her Husband's Sequestrated Estate as to Right to Annuity.*

A wife was in right of an annuity to which she had succeeded before her marriage, and which continued to be paid to her on her own receipt. On her husband's sequestration she intimated a claim for payment of the fund under the 16th section of the Conjugal Rights Act 1861, before any termly payments, fell due or were attached by the trustee on the estate. In a question with the trustee—*held* (1) that the fund itself was heritable, and did not fall under the *jus mariti,* the termly payments alone being moveable; and (2) that as regarded the termly payments the claim under the Conjugal Rights Act had been timeously intimated, and fell to be given effect to.

Observed (*per* Lord Gifford) that in such a case the wife's claim will subsist for future payments so long as the circumstances of the spouses remain the same.

This case was decided on the same day with that of *Ferguson* v. *Jack, ante* p. 343.

The estates of Robert M'Walter, builder in Glasgow, were sequestrated on 27th April 1877, and on 11th May following Robert Reid, accountant there, the first party to this case, was confirmed trustee on the sequestrated estate. Ann Dougall or M'Walter, the second party, was Robert M'Walter's wife. They were married on 11th July 1873. No antenuptial or postnuptial marriage-contract had been entered into between them. By the trust-disposition and settlement of George Barker, who died on 2d December 1869, his trustees were directed to pay to the second party, then Ann Dougall, a free liferent annuity of £20, by equal portions, at Whitsunday and Martinmas, and interest from each respective term until payment. This annuity was not excluded by the settlement from her husband's *jus mariti* and right of administration, nor protected from the diligence of his creditors. After Mr Barker's death, the trustees, acting under the trust-disposition and settlement, paid the annuity to the second party half-yearly as provided, the first payment being made at Whitsunday 1870, and the last at Whitsunday 1877, always upon her own receipt alone. On 18th May 1877, an intimation was made on behalf of the trustee in the sequestration to the trustees' agents, that the trustee claimed the annuity as part of the bankrupt estate. Upon 30th May 1877 the agent for the second party, as instructed by her, wrote to the agents for the trustees that she claimed the annuity as a reasonable provision for her support and mainten-

* Decided Feb. 5, 1878.

ance, in terms of section 16 of "The Conjugal Rights (Scotland) Amendment Act 1861." The second party had no means of support for herself or her children apart from her husband, except the annuity. On 14th June 1877 the said Robert M'Walter failed to attend a diet fixed for his examination under the Bankruptcy Statutes by the Sheriff of Lanarkshire, and a warrant for his apprehension was accordingly issued, but he had not after that been heard of.

The 16th section of the "Conjugal Rights (Scotland) Amendment Act 1861" was as follows:—"When a married woman succeeds to property, or acquires right to it by donation, bequest, or by any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti:* Provided always, that no claim for such provision shall be competent to the wife if before it be made by her the husband or his assignee or disponee shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband, where he has before such claim is made by the wife attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of furthcoming, or has poinded and carried through and reported a sale thereof."

In these circumstances, the opinion and judgment of the Court was requested upon the following question of law:—"Is the said Ann Dougall or M'Walter entitled to the said annuity or any portion thereof, and, if so, what portion, as a reasonable provision for her support and maintenance, under the 16th section of the Conjugal Rights (Scotland) Amendment Act 1861?"

Authorities—*Hill* v. *Hill*, December 21, 1872, 11 Macph. 247; Fraser on Husband and Wife, vol. i. p. 740 (new edition); Bell's Principles, sec. 1480.

At advising—

Lord Justice-Clerk—In this case, referring to the remarks which I have made in the former case (*Jack* v. *Ferguson*, February 5, *ante* p. 343), I am of opinion that the second party must prevail. Here the wife succeeded to an annuity of £20 before marriage. It was paid on her own receipt down to and including Whitsunday 1877. The husband was sequestrated in April 1877. On the 18th of May 1877 the trustee wrote making a claim for the annuity, and in the same month the second party also intimated a claim.

I am of opinion (1) that the annuity itself is heritable, and does not fall under the *jus mariti*, which attaches only to the termly payments as they arise. (2) That although the right to the annuity was acquired before the marriage, the termly payments fall under the 16th section of the Conjugal Rights Act. This was expressly decided in the case of *Taylor* v. *Taylor*, June 23, 1871, 9 Macph. 893, and cannot now be questioned. The period of time to be regarded is not so much the acquisition of the radical right as the time when the *jus mariti* attached. (3) There was a sufficient claim made by the wife in May 1877 to bring the future termly payments under the 16th section of the Conjugal Rights Act. And (4) I am of opinion that the amount of the annuity does not exceed a reasonable provision, and that the second party is not bound to refund the payment made at Whitsunday 1877, before the amount was claimed by the trustee. Equitable considerations might lead to this result in the case of an alimentary annuity, as this in effect is, even without the necessity of directly deciding on the nature of the trustee's title.

Lord Ormidale—The disputed fund in this case consists of an annuity of £20 left to the second party by Mr Barker, and it has no relation to any particular capital sum, as in *Hill* v. *Hill* (11 Macph. 247), cited in argument at the debate. It is therefore free from doubt, I think, that the right itself—that is, the annuity—bearing as it does *tractum futuri temporis*, is heritable, and so could not pass to the second party's husband *jure mariti*, so as in that way to be of the nature of property to which the Conjugal Rights Act applies. The half-yearly payments, however, of the annuity are differently situated, and each of them, as it becomes due, might fall to the husband *jure mariti*, and so be embraced by the Conjugal Rights Act. But seeing that a claim was made in May 1877 on behalf of the second party, for a provision out of the disputed termly payments, I am of opinion that the first party, as trustee in the husband's sequestration, could have no right to these termly payments except subject to the second party's claim; and I am further of opinion that, in the circumstances, the second party is entitled to the whole of the termly payments as a provision for her maintenance and support.

Lord Gifford—This Special Case raises some questions of nicety and difficulty in connection with the "Conjugal Rights (Scotland) Amendment Act 1861."

I am of opinion that the annuity of £20, not being an accessory to or the mere accruing interest of any specified capital sum, but being a proper liferent annuity dependent only on the life of Mrs M'Walter, is a right having a tract of future time —*tractum futuri temporis*—and therefore as in a question with her husband it is heritable and does not fall under her husband's *jus mariti*.

I speak of course of the right itself—the right to the annuity itself—for I think that each half-year's termly payment of the annuity would, as it becomes due to the wife, fall under the husband's right of *jus mariti*, that right not being excluded by the terms of Mr Barker's will, and the result is, that while Mr Reid, as the trustee on the husband's sequestrated estate, cannot claim the right of annuity itself—that is, the right to draw it in all future time—yet he will be entitled to claim each half-year's annuity as it falls due while

the marriage subsists and so long as the sequestration continues.

In short, I am of opinion that this annuity is, in questions between husband and wife, in precisely the same position as the rents of an heritable estate or subjects belonging to the wife would have been. The husband has no right to claim or to dispose of his wife's heritable estate, but if his *jus mariti* is not excluded therefrom he can claim each half-year's rents of the estate as they become current or due. He can only claim the annual accruing proceeds, which of course are moveable as they accrue.

The next question is, At what time must the wife claim a provision for her maintenance and support out of the annuity or out of each term's payment of the annuity, so as to entitle her to receive such provision in terms of the 16th section of the Conjugal Rights Act of 1861? I am of opinion on this matter that each half-year's payment of the annuity as it falls due (and by the settlement it is payable in advance) is to be regarded as a separate fund out of which the wife may claim a provision at any time before it falls due, or before it is actually paid to her husband or attached by decree of furthcoming by her husband's creditors. I do not mean that a separate claim is necessary by the wife every half-year, as if each half-year's payment were a separate succession. I think she may claim once for all, and that such claim will subsist for future payments so long as the circumstances of the spouses remain the same, but in order to make the claim effectual as to any specified half-year's annuity, the claim must be made before such half-year's annuity has been reduced into possession by the husband, and before any of his creditors have obtained therefor decree of furthcoming. A completed and reported poinding and sale, which is the other alternative of the statute, is not applicable to a money payment like a half-year's annuity.

Applying these principles to the facts of the present case, there is no dispute as to the half-year's annuity payable in advance at Whitsunday 1877 or as to any previous payments. These payments have all been made to the wife herself and I suppose have been spent by her for her maintenance. The first half-year's annuity which the trustee in the sequestration claims is that falling due in advance at Martinmas 1877, but by that time, as I understand it, the present Special Case had been adjusted, and the wife had intimated her statutory claim for a provision, and as I think this claim was in time if it was made before the term's annuity fell due, I think the wife's claim for a provision is effectual under the statute, and this apart altogether from the fact or from the date of the husband's sequestration.

In this way, I think it is unnecessary to decide in this case the precise legal effect of the husband's sequestration—I mean whether the husband's sequestration is, in questions under the Conjugal Rights Act, equivalent to a decree of furthcoming or a completed and reported poinding and sale by a creditor of the husband. But, as I had occasion to say in the previous case which we decided this morning (*Ferguson* v. *Jack, ante,* p. 343), I am inclined to think that a mercantile sequestration has not the effect contended for. The declaration in the Bankrupt Act that the first deliverance in a sequestration, when sequestration is awarded, shall be equivalent to an arrestment and furthcoming, to a poinding and sale, to an intimated assignation, and so on, appears to me to be merely to give the trustee a complete title in the sequestration for the purposes of distribution, and cannot, I think, be held as equivalent to the special completed diligence which the Conjugal Rights Act expressly requires as the only means except actual payment which will exclude the wife's equitable claim for a maintenance out of her own funds.

The only remaining question is, Whether the wife's statutory claim for maintenance exceeds or exhausts the annuity in question? and I am of opinion that it does. The wife has no other means of maintenance for herself and two children, who are delicate and require care and medical attendance. £20 a-year is a very small sum to meet the claims upon it, and therefore I am for answering the question put in this Special Case in the affirmative, and to the effect that the wife, the second party to the case, is entitled to the whole of the annuity in question as a separate provision for her maintenance and support.

The Court accordingly found that Mrs Ann Dougall or M'Walter, the party of the second part, was entitled to draw, term by term, the whole of the annuity of twenty-pounds referred to in the case, as a reasonable provision for her support and maintenance, under the 16th section of the 'Conjugal Rights (Scotland) Amendment Act 1861;' and decerned accordingly

Counsel for First Party — Harper. Agents—Hill & Ferguson, W.S.

Counsel for Second Party—H. J. Moncreiff. Agents—J. & J. Ross, W.S.

Tuesday, February 12. *

FIRST DIVISION.

[Lord Curriehill, Ordinary.

LORD BLANTYRE AND MASTER OF BLANTYRE *v.* LORD ADVOCATE AND CLYDE NAVIGATION TRUSTEES.

Property—Possession—Right to Foreshore of a Public Navigable River—Where a Barony Title is followed by Possession.

Parties holding a barony title to certain lands situated on the banks of the river Clyde, which was a public navigable river, raised an action against the Crown concluding for declarator that the foreshore *ex adverso* of their lands belonged to them in property, subject to such rights of navigation or other rights as the public and the Clyde Navigation Trustees under their statutes might have over it. The Clyde Navigation Trustees got themselves sisted as defenders (Jan. 15, 1876, 13 Scot. Law Rep. 213), and after a proof had been led regarding the state of possession, it was *held* (*aff.* judgment of Lord Curriehill, Ordinary) that the acts of possession proved, which consisted, *inter alia,* in the use by the pursuers and their tenants of all available portions of the foreshore for pasturing their cattle, in the cutting of reeds and sea-weed found there,

* Decided 19th December 1877.