

tially a re-hearing of the case on fresh evidence, and the question now is, whether in the light of the facts proved the creditors were and are entitled to have their debtor's estate made available to them for payment of their claims?

It was no doubt in the view of the Legislature that in such cases the court of first instance must proceed on a *prima facie* view of the case, and to allow the Sheriff's deliverance to be appealed from under the ordinary conditions an appeal would in many cases enable the debtor to defeat the main object of the statute, and to gain that while his creditors were left unpaid. But if the debtor really is solvent, and if the award of sequestration has been improperly obtained, the remedy of a recall of the sequestration is open to him provided he is able to satisfy the Court that he ought not to be deprived of the administration of his estate.

It appears to me that it would be against the policy of the statute if we were to interfere with the sequestration merely on the ground that the debtor was not proved to be insolvent in the application to the Sheriff. We have, then, to consider what is the import of the evidence taken before the Lord Ordinary on this subject. The greater part of the evidence has indeed very little bearing on this question. There are two ways of looking at the question of solvency or insolvency. There is the consideration whether the debtor at the time of being made bankrupt was in a position to meet his current obligations, which I think is the true and only proper test of solvency in an application for recall, and there is also the question whether on a realisation of the debtor's heritable and moveable estate the proceeds will be sufficient to pay all his obligations in full.

Now, as to the first point, if a debtor be able to meet his current obligations, he will in general have no difficulty in proving his ability to do so, because he has only to come with the money in his pocket and to tender payment. But of course it may be that the sequestration has affected the debtor's credit, and that he cannot immediately find the required sum, and yet he may be able to show that up to the time of the presentation of the petition for sequestration he was in good credit and able to pay his way.

In the present case I am of opinion that the debtor has failed to displace the presumption of insolvency arising in the circumstances already referred to. It is true that he was abroad when the decrees went out against him whereon he was made bankrupt. But when a trader goes abroad, carrying with him the chief part of his stock-in-trade, he ought to leave money to pay his debts, or at least enter into arrangements which would make it unnecessary for his creditors to look to their own protection. It is plain that in this case the ability of the debtor to meet his obligations as they matured depended entirely on the sale of his horses in Canada. He has not shown that he had any available credit in this country except his heritable property,

and so far as I can see, even if he had returned from Canada before the expiration of the petitioning creditors' charges, he was not in a position to pay such part of the petitioning creditors' claims as might be found to be justly due.

But it is the less necessary to consider this view of the case very critically, because I am satisfied that the debtor is insolvent in the sense of being unable to pay 20s. in the pound on a winding-up of his estate. We have various views of his affairs in the printed paper, but in none of them do the assets equal the liabilities, and according to the best estimate which the trustee can make the probable dividend will not much exceed 5s. in the pound. This estimate is made without taking account of the expenses of this litigation. I am accordingly of opinion that the Lord Ordinary's interlocutor should be affirmed, and while agreeing with his Lordship that the petitioner has cause to complain of the somewhat hasty and harsh pressure which his creditors originally used towards him, I consider that the best thing that can happen to him is that he should get a discharge of his liabilities, and be as soon as possible put in a position to make a living for himself.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Petitioner—Kennedy.
Agents—Martin & M'Glashan, S.S.C.

Counsel for the Respondent—Chisholm.
Agent—David Milne, S.S.C.

Friday, November 21.

FIRST DIVISION.

SIMONS v. NEILSON AND OTHERS.

Husband and Wife—Married Women's Property Act 1881 (44 and 45 Vict. c. 21), sec. 6—Marriage Prior to the Act—Exclusion of Jus Mariti by Antenuptial Contract of Marriage—Jus Relicti where Wife's Estate Burdened with a Liferent.

By antenuptial contract of marriage a wife had in 1862 conveyed her whole estate to trustees for payment of the yearly income to herself during her life exclusive of the *jus mariti* and right of administration of her husband, and upon her death to her husband as income alimentary—in both cases the income to be unassignable and unattachable by the diligence of creditors, and in the husband's instance to cease upon second marriage. On termination of these liferents the capital was to be conveyed or paid to the issue of the marriage (if any) according to appointment, or equally; but if there were no issue, then in the event of the husband's predecease the said capital was to be paid over or be conveyed to the wife; and in the event of the wife's prede-

cease, it was on cessation of the liferent in the husband's favour to be paid or conveyed to such person or persons as the wife might have appointed by her writ, or failing her writ, then to her heirs whomsoever. The wife in 1888 predeceased the husband without issue, and without leaving directions for the disposal of her estate, except such directions as the marriage-contract contained. The husband entered into a second marriage, and his liferent lapsed.

Held (following *Fotheringham's Trustees*) that the whole trust purposes except payment of the husband's liferent having been either fulfilled or evacuated at the date of the wife's death, she was then undivested owner of her separate estate, upon which the said liferent was a mere burden, and that the husband was entitled, under section 6 of the Married Women's Property Act 1881, to one-half of her moveable estate, there being no issue.

Upon 18th August 1862 William Simons (the first party) entered into an antenuptial contract of marriage with Miss Mary Montgomerie Neilson, who thereafter upon 19th August became his wife. By that deed William Simons made certain provisions in favour of his wife, in consideration of which she, "on the other hand, with consent of the said William Simons, assigned and disposed to and in favour of the said William Simons, and her, the said Mary Montgomerie Neilson, and certain other persons therein named, as trustees for the purposes therein mentioned, the whole estate whatsoever, heritable and moveable, real and personal, wherever situated, then belonging to her, the said Mary Montgomerie Neilson, or which she might acquire or succeed to during the subsistence of the marriage."

The trust purposes were declared to be as follows—(First) For payment of the expenses of carrying this trust into effect. (Second) For payment of the free yearly income of the said trust-estate to the said Mary Montgomerie Neilson during all the days and years of her life, exclusive of the *jus mariti* and right of administration of her said intended husband, and after her death for payment thereof to the said William Simons, in case he shall survive her, during all the days and years of his life, which income shall be purely alimentary, and shall not be assignable by her or him, or be affectable by her or his debts or deeds, or attachable by the diligence of her or his creditors: But providing always, and declaring, as it is hereby expressly provided and declared, that in the event of the said William Simons surviving the said Mary Montgomerie Neilson, and entering into a second marriage, the said liferent above conceived in his favour shall thereupon cease and determine. (Third) On the termination of the liferent above conceived in favour of the said spouses, and in the event of there being issue of the said intended marriage, the said trustees shall pay or convey to the child or children then alive, and to the issue of any child or chil-

dren who may have predeceased, reckoning such issue *per stirpes*, the capital of the said trust-estate so established by the said Mary Montgomerie Neilson, and that in such manner and in such proportions as the said Mary Montgomerie Neilson may have appointed by any writing under her hand, whether the said writing be probative or improbativ; and failing such appointment, the said trustees shall divide and pay or convey the said capital amongst such children and issue, share and share alike: But reserving always, nevertheless, to the said Mary Montgomerie Neilson, in the event of her entering into a subsequent marriage, full power to provide for the husband and child or children of such subsequent marriage out of the estate hereby conveyed, to an extent not exceeding the just and equal half thereof. (Fourth) In the event of the said intended marriage being dissolved by the predecease of the said William Simons, and there being no child or children or their issue then alive, the said trustees shall pay over or reconvey to the said Mary Montgomerie Neilson the whole estate above conveyed. (Fifth) In the event of the said intended marriage being dissolved by the predecease of the said Mary Montgomerie Neilson, the said trustees shall, on the cessation of the liferent above conceived in favour of the said William Simons, in case of there being no child or children or their issue then alive, pay or convey the capital of the said estate to any person or persons whom the said Mary Montgomerie Neilson may have appointed to receive the same by any writing under her hand, and failing such writing, to her own heirs whomsoever."

The said Mary Montgomerie Neilson by said deed accepted of the provisions in her favour in full satisfaction of all terce of land, legal share of moveables, and every other thing which she, *jure relicte* or otherwise, could ask, claim, or demand from the said William Simons or his heirs, executors, or representatives by and through his death if she should survive him. The deed contained no acceptance by the first party of the provisions in his favour as in full of his legal rights, and his *jus mariti* was not excluded except as regards the income.

Mrs Simons died domiciled in Scotland on 30th December 1888. There were no children of the marriage, and Mrs Simons did not leave any writing except the said contract of marriage providing for the disposal of her estate. That estate consisted of property held by the trustees under the marriage-contract, and in addition certain property consisting of personal effects and investments which represented her savings from the income of the trust-estate, or sums given to her by her husband. The said income had been regularly paid to Mrs Simons during the subsistence of the marriage in terms of the second trust purpose, and the amount of said savings at the date of her death was £2004, 17s. 7d., to which her husband obtained confirmation as executor upon 29th April 1889.

The income of the trust-estate was after the death of Mrs Simons collected by the

first party as sole surviving trustee, and remained in his hands as such when the special case was before the Court.

In August 1889 the first party entered into a second marriage, and thus the provision of a liferent of the trust-estate in his favour in substitution to Mrs Simons lapsed.

By the Married Women's Property (Scotland) Act 1881, which came into force on 18th July 1881, being subsequent to the date of the said marriage, it is provided as follows:—"Section 6. After the passing of this Act, the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

The said Mrs Mary Montgomerie Neilson or Simons was predeceased by her father and mother, and the parties of the second part were her brothers and sisters, and descendants of brothers and sisters, and the marriage-contract and testamentary trustees of certain of them.

The first party, as an individual, claimed that he was entitled to payment as an individual of one-half of the moveable estate of his said wife, including therein both the estate settled under the contract of marriage, and the other estate of which she died possessed, on the alternative grounds either that he was a creditor on his wife's estate for that amount under the said Act, or that he was one of her own heirs whomsoever within the meaning of the destination of the said antenuptial contract.

The second parties maintained that the provisions of the statute referred to did not apply in the circumstances of the case, and that Mr Simons had no rights in or to his deceased wife's estate except under the contract of marriage, and that the brothers and sisters of the late Mrs M. M. Neilson or Simons and the descendants of her deceased brothers were entitled to the whole of her estate.

The following question of law was submitted to the Court—"Is the first party, as husband of the late Mrs Mary Montgomerie Neilson or Simons, or otherwise, entitled to one-half of her free moveable means and estate, inclusive of that portion thereof falling under her contract of marriage?"

Argued for first party—The sole purpose of the deed was to protect the estate against her husband or his creditors. The property remained the wife's, and the case was ruled by *Fotheringham's Trustees*, 16 R. 873. The only difference was that the husband here got a liferent of the trust-estate on his survivorship, and conditionally upon his remaining unmarried thereafter, but he had now married. The trust did not effect a divestiture of the wife, and the liferent was a mere burden on the ownership which was in the

wife at her death. The trust purposes were all either evacuated or fulfilled—*Ramsay v. Ramsay's Trustees*, 10 Macph. 120. Further, the sum of £2000 did not fall under the trust as *acquirenda*—*Young*, 12 R. 968.

Argued for second parties—The estate did not remain at the wife's disposal at her death. She had conveyed to trustees, who were to reconvey to her only in an event which did not happen, viz., the predecease of the husband. She was not the absolute owner in the sense explained in *Fotheringham*, for the estate was burdened with a liferent, and therefore the husband's *jus relictii* was excluded, the estate not being "separate estate." The liferent, further, was alimentary, and so could not have been discharged by the husband if he had remained unmarried. This showed the property was not *in bonis* of the wife when she died, and the scope of the deed showed the fee was in her heirs, who would take as disponees—*Inglis v. Inglis*, 7 Macph. 435.

At advising—

LORD PRESIDENT—In this case the estate of the late Mrs Simons was conveyed to trustees for the purposes set forth in the marriage-contract, and I think it is well settled in the case of *Ramsay v. Ramsay's Trustees*, 10 Macph. 120, that if the purposes under a marriage-contract either fail or are fulfilled, then the estate conveyed for the purpose of securing the provisions remains the absolute property of the person who conveyed it. It is not possible to doubt that doctrine, and therefore the question comes to be, What is the operation and effect of this particular marriage-contract?

Upon a consideration of it, we find it contains a provision in favour of issue, an alimentary liferent to the husband conditional upon his survivorship, and no other provision at all except such as are conceived in favour of the lady herself. There is no issue of the marriage, and therefore the provision in favour of issue fails, while the liferent to the husband is not inconsistent with the fee remaining still vested in the wife. The liferent is alimentary, and is a mere burden upon the fee; it does not affect the property of the fee in any way whatever, and therefore the fee continued vested in the wife at the date of her death. The liferent is preserved for the husband by the interposition of a trust, and even if he had claimed and enjoyed that liferent subsequently to his wife's death he would in my opinion have been entitled to make the present claim. But that is not the state of affairs before us, for he has not claimed the liferent, but has received the income of the marriage-contract trust solely in his capacity as trustee. That removes all possible doubt or question, and as the liferent provided has now failed owing to the second marriage of Mr Simons the case is so reduced in point of fact that the same principle can be applied as was affirmed in *Fotheringham's Trustees*.

Now, there is no mystery about section 6 of the Married Women's Property Act 1881. It is there provided that the "husband of any woman who may die domiciled in Scot-

land shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest." Nothing can be clearer than these words to show that the *ius relictii* is to be of the same nature as the right of a widow in her deceased husband's moveable estate, and also that the deceased wife's moveable estate is to be subject to bipartite or tripartite division according as she dies without leaving issue or not, and the only other words in the section have reference to the "exclusion, discharge, or satisfaction" of this right of the husband in his wife's moveable estate. But we have here no suggestion, either in the marriage-contract or otherwise, that the husband's right has been excluded, discharged, or satisfied, and therefore as there are no issue of the marriage the amount to which the surviving husband is entitled extends to one-half of the moveable estate in which his wife was vested at the time of her death. It appears to me that the first party here has to make out "two propositions," if I may adopt the language I am reported to have used in *Fotheringham's* case: "first, that the estate was the absolute property of the wife; and second, that there was nothing done by him to discharge the right which would otherwise have belonged to him"—and I think that the first party in this case has made out these two propositions successfully.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court answered the question in the affirmative.

Counsel for the First Party—D. F. Balfour—Jameson. Agents—J. & J. Ross, W.S.

Counsel for the Second Party—Murray—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, November 21.

FIRST DIVISION.

BARR & SONS v. THE CALEDONIAN RAILWAY COMPANY.

Railway Company—Common Carriers—Innominate Contract—Haulage.

A railway company by a schedule issued to traders offered to convey coals upon their railway system at certain specified rates in their own waggons, and at certain lower rates in the private waggons of the traders. Without further or special agreement the company conveyed a consignment of coals in a trader's private waggons, loaded by the owner, but thereafter under the exclusive charge and control of the

company, from a colliery adjoining their system to a seaport for shipment. The coals were duly delivered, but upon the return journey, for which no charge was made, the waggons were injured without fault upon the part of the company, owing to a latent defect in the waggon of another trader, which made part of the same train. Held that the company were not liable as common carriers for the safety of the waggons.

Question—Whether they would have been liable as common carriers for safe delivery of the coals?

This action was brought by William Barr & Sons, coalmasters, Glasgow, against the Caledonian Railway Company, to obtain payment of the sum of £141, 3s. 3d., and interest thereon from 10th August 1888. This sum represented the value of three waggons belonging to the pursuers which were destroyed, and the cost of repairing two others which were injured, while being conveyed upon the defenders' railway from the general terminus at Glasgow, where the coals which the waggons contained had been delivered, to the Allanton Collieries belonging to the pursuers. The said waggons were at the time empty, and formed part of a composite train the vehicles in which belonged in part to the defenders and in part to the pursuers and other traders; and the accident which occasioned the injury to the rolling stock of the pursuers was the direct consequence of a latent defect in the spring of a waggon belonging to another trader. It was matter of admission that there was no fault imputable to the railway company, and the question raised for decision in the case was, whether the railway company were under the obligation of a common carrier with respect to the private waggons in which the pursuers had their goods conveyed. The pursuers maintained the affirmative of the proposition, while the defenders averred and pleaded that their contract with the pursuers was merely one of haulage of the waggons, and consequently that they were not liable for injury to the waggons, unless such injury resulted from the defenders' negligence.

The contract was concluded by correspondence upon 21st May 1888, and under it the railway company undertook to deliver coal into the steamship "James Groves," then lying ready to receive cargo at the general terminus in Glasgow, at certain rates which were specified in a schedule issued by the railway company to the pursuers and other colliery owners. The correspondence did not embody any special agreement, but consisted merely of a request for facilities of transport by the pursuers, and an intimation by the defenders that the request was acceded to. The schedule, which offered to the pursuers alternative rates according as the coal was conveyed in the waggons of the company or of the trader, was in these terms—

"Caledonian Railway.—Rates for the conveyance of coal and dross in waggon loads