

effect by the execution and delivery of a conveyance in ordinary terms, and I do not understand that the defender has any fault to find with the terms of his conveyance. Therefore if the pictures form part of the subjects conveyed, they belong to the defender, and if they do not form part of these subjects, they remain the property of Lord Glasgow's representatives, to whom they belonged before the sale. The question, therefore, would appear to be a question of fact—whether the pictures form part of the lands of Hawkhead and of the houses and buildings thereon, because that is the subject which has been conveyed to the defender, and that depends entirely upon whether they have been so fastened to the houses of Hawkhead as to become an integral part of the houses.

Now, it appears to me that in considering that question we have not to take into account distinctions which may sometimes be of importance in regulating the conflicting interests of landlord and tenant or possibly of successive heirs of entail, because I think we must take the law as it has been laid down in the House of Lords in the case of *Bain v. Brand*, where the Lord Chancellor lays down the doctrine of law in this way. His Lordship says there are two general rules. One of them is the well-known rule that whatever is fixed to the freehold of the land becomes part of the freehold. The other is quite a different and separate one, that whatever has once become part of the freehold cannot be severed by a limited owner whether he be owner for life or owner for years. Then his Lordship goes on to say that to the first of these rules there is no exception whatever—whatever is fixed to the land is part of the land. Then he says that to the second there are various important exceptions, and all the questions as to the difference and distinctions between the rights of landlord and tenant and of successive owners which have been raised in the case appear to me, according to his Lordship's exposition of the law, to depend upon this second rule to which there is that exception—that under certain circumstances things that have been fixed may be removed. But it is very clear that these are considerations with which we have nothing to do, because they do not apply, and cannot apply, to a case between disponent and disponent. Lord Glasgow might, of course, have detached the pictures from the walls of the house before he effected the sale, but after the conclusion of the sale it is quite clear that he could do nothing; and therefore the question appears to me to be, as your Lordships have considered it to be, a mere question of fact—whether the pictures in dispute are so permanently fixed to the buildings and houses of Hawkhead as to make them an integral part of those houses. It is in accordance with all our authorities to say that in considering that question the method of attachment is not the only point to which attention should be directed, because it is common for articles in them-

selves removable to be temporarily attached to the walls of a house for use or ornament, or to the floors of a house, as in the case of things which might be nailed to the floor without being so permanently fixed as to become in consequence of their attachment integral parts of the house itself. But still the real question, as it seems to me, must always be, whether in fact the subject which is said to be moveable has been so permanently fixed as to become a part of the house, or whether the attachment is of such a kind as to make the subject, which in itself was moveable, easily removable or removable without injury to the subject itself or to the building. Now, upon that question of fact I entirely agree with what has been said by your Lordships, and therefore I think it quite unnecessary to dwell upon the grounds upon which it seems to me that these three pictures have not been made permanent parts of the building but are removable and are not carried by the conveyance.

In common with your Lordship it has seemed to me that the question with regard to the picture of King Charles II. is somewhat different from the question with regard to the portraits of Lord and Lady Wharton. I agree with what was said by Lord Adam, that if it had been proved that in order to remove that picture it was necessary to remove also the entire structure of the frame in which it is fixed, the question would have been one of much greater difficulty than it actually is, but I also agree with what his Lordship said, that the evidence shows that that is not necessary, but that the picture may be removed like the others for any purpose for which it is desirable to get it down either temporarily or permanently.

I therefore agree with your Lordships in the result at which you have arrived.

The Court adhered.

Counsel for the Pursuers (Respondents)—
Ure—Pitman. Agents—J. & F. J. Anderson, W.S.

Counsel for the Defender (Reclaimer)—
Guthrie—Burnet. Agent—F. J. Martin, W.S.

Friday, July 10.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

PATERSON AND ANOTHER (WYLLIE'S TRUSTEES).

Marriage-Contract—Assignment of "Property now belonging to" the Husband—Spes successionis—Vesting.

A person died in 1872 leaving a trust-disposition and settlement under which a share of his estate would vest in his eldest son upon his youngest child attaining twenty-four years of age, which happened on 30th April 1890. In 1874 his son by antenuptial contract of

marriage assigned to trustees all his property of every description "now belonging to him," and among the purposes of the trust he mentioned the disposal of his share of his father's trust-estate. The assignation was duly intimated to his father's testamentary trustees. On 15th May 1890 one of his creditors used arrestments in their hands of the share of his father's trust-estate which had now vested.

In an action of multiplepointing at their instance in which the claimants were the marriage-contract trustees and the arresting creditor, it was held that the assignation in the son's marriage-contract included the *spes successionis* to the share of his father's estate, and that the claim of the marriage-contract trustees fell to be preferred to that of the arresting creditor.

The late John Wyllie, innkeeper, Irvine, died on 12th May 1872 leaving a trust-disposition and settlement of his whole estate, heritable and moveable, in favour of John Paterson, banker, Irvine, and others, as trustees by which they were directed, *inter alia*, upon the truster's youngest child alive attaining the age of twenty-four, to sell and dispose of the estate and divide the free proceeds thereof equally among his children one of whom was James Wyllie. The youngest child attained twenty-four years of age on 30th April 1890. By antenuptial contract of marriage entered into with his second wife Agnes Kerr, and dated 20th October 1874, James Wyllie conveyed to James Dickie, solicitor, Irvine, and others, as trustees, "All and sundry lands, houses, goods, gear, sums of money, effects, and property of every description, heritable and moveable, real and personal, now belonging or which shall be belonging to him at the time of his decease, with the whole writs and title-deeds of the heritable property, and the vouchers and instructions of the moveable means and estate, and all that is competent to follow thereon; and without prejudice to the said generality the said James Wyllie hereby assigns, conveys, and makes over to and in favour of the said trustees above named, and to the survivors or survivor of said trustees accepting and acting, and to the heirs of the survivor, all as aforesaid, a certificate or policy of assurance, No. 26,823, dated the 12th day of May 1874, effected by the said James Wyllie on his own life with the Scottish Provident Institution: . . . and the said James Wyllie has herewith delivered up the said certificate or policy of assurance to be kept and used by the said trustees as their own proper writ and evident; and the said James Wyllie hereby binds and obliges himself to execute and deliver all writs and deeds necessary for making the above general and special conveyance effectual, but the same is granted for the ends, uses, and purposes following, viz.—*First*, That the said trustees shall, after the death of the said James Wyllie, hold the properties in Fullarton Street and Bridgend of Irvine

which formerly belonged to his deceased wife Mrs Margaret Gardner or Wyllie, and also the share to which he is entitled of the trust-estate of his late father John Wyllie, innkeeper, Fullarton Arms, Fullarton Place, Irvine, and all sums of money which may at the time be in bank at Irvine in connection with the said properties or estate, for behoof of his only child by his former marriage, Miss Margaret Gardner Wyllie, presently residing in Halfway, Irvine, and shall pay to her, or administer for her behoof, the whole annual income or produce thereof so long as she shall be in minority after his death, and upon her being married or upon her arriving at majority, whichever of these events shall first happen, they are hereby directed and appointed to make over and convey the whole of the said properties and the share of the said James Wyllie's father's estate and sums of money, so far as the same may be then unpaid or not conveyed, to and in favour of the said Miss Margaret Gardner Wyllie absolutely if they shall judge this expedient, or to trustees for her behoof, so that she may enjoy the life-rent thereof only or in such other way as from her circumstances at the time they shall judge most prudent and expedient having regard always to any directions the said James Wyllie may leave thereanent, or as to the manner of settlement thereof on her by any writing under the hand of the said James Wyllie; and in the event of her dying without leaving lawful children, or the issue of such children, before receiving conveyances of the said properties or payment of the shares of the said James Wyllie's father's estate or other sums of money, or before the same shall have been settled upon her as above provided for, the said trustees are hereby directed and appointed to hold the same for behoof of the said Agnes Kerr in life-rent for her life-rent use only, in case she shall happen to survive the said James Wyllie and the child or children who may be procreated of the said intended marriage or of any other marriage which the said James Wyllie may afterwards enter into, equally among them in fee: . . . *Second*, The said trustees shall hold the said policy of assurance and proceeds and produce thereof, with the whole household furniture and other means and effects of whatever description the same may be belonging to the said James Wyllie, after payment of all his debts and the expenses of executing the trust, for the life-rent use alienarily of the said Agnes Kerr in case she shall happen to survive him, and for the child or children who may be procreated of the said intended marriage or of any other marriage which the said James Wyllie may afterwards enter into, equally among them in fee." In consideration of which provisions in her favour, Agnes Kerr disposed and conveyed "all sums of money and property of every description, heritable and moveable, real and personal, now belonging to her or which she may acquire by gift, *mortis causa* deed, or legal succession, to and in favour of the said James Wyllie in case he

shall survive her, but in the event of his predeceasing her the said whole property, heritable and moveable, which may belong to her shall be subject to any disposition or division thereof which may be made by her among the children of the said intended marriage, and in the event of there being no such children, or of their failure by death without leaving lawful issue, then the same shall go to and be divided among her own lawful heirs or assignees whomsoever, but this conveyance by her to the said James Wyllie shall be subject always to the liferent use and enjoyment of the said Agnes Kerr, secluding therefrom the *jus mariti*, right of administration, and any other right of the said James Wyllie."

In 1868 James Wyllie had borrowed £500 from Miss Jane Boyd, Montgomery Street, Irvine, and granted a bond and disposition in security in her favour. This sum he failed to repay, and in virtue of an extract of the registered bond with warrant thereon, Jane Boyd on 15th May 1890 used arrestments in the hands of John Wyllie's trustees, and raised an action of furthcoming against them. In consequence thereof these trustees raised an action of multiple-pounding against James Wyllie, his wife Mrs Agnes Kerr or Wyllie, James Dickie, solicitor, Irvine, as the sole surviving trustee under James Wyllie's marriage-contract, and Miss Jane Boyd, to have it determined who had right to James Wyllie's share of his father's estate.

James Dickie averred that "the said antenuptial contract of marriage was duly intimated to the trustees of the said John Wyllie on 1st March 1875 by the said James Dickie, as agent for the trustees under the said marriage-contract, of whom he was one. On that date the following entry was made in the sederunt book of the said trustees:—'1st March 1875.—Antenuptial contract of marriage betwixt Mr James Wyllie and Miss Agnes Kerr, of date the twentieth day of October Eighteen hundred and seventy-four, produced and intimated to me as agent for the trustees of the late Mr John Wyllie.' (Signed) 'JAS. DICKIE, Solicitor, Irvine.' The said intimation was at the same time communicated to the trustees of Mr John Wyllie, and a copy of the said marriage-contract was deposited with the papers of the trust. Further, at a meeting of the trustees of Mr Wyllie held on 3rd October 1889, at which Mr John Paterson and William Orr were present, Mr Dickie, the agent of the trustees, directed their attention to the said entry, and the minutes of the meeting bear with reference thereto—'This entry had not been referred to since Mr Orr was assumed a trustee, and it was now brought to his knowledge so that the intimation to the trustees may be complete.' The minute was duly signed both by Mr Paterson and Mr Orr. Mr Dickie, who directed the attention of the trustees to the said entry, and by whom the said minute was written, was then the sole surviving trustee under the said marriage-contract and he so acted in order to complete his right as trustee under the said marriage-contract. The said

marriage-contract was also duly intimated by the trustees under the same to the Scottish Provident Institution on 25th February 1875." He claimed to be ranked and preferred to the whole fund *in medio*.

He pleaded—"(1) The share of the estate of the said John Wyllie senior falling to the said James Wyllie under the foresaid trust-disposition and settlement, having been validly and effectually assigned by him to the trustees under the said antenuptial contract, and the said contract having been duly intimated, the right thereto is now vested in the claimant as the surviving and accepting trustee under that deed. (2) The pretended arrestment used by the said Jane Boyd in the hands of the trustees of the said deceased John Wyllie senior being posterior in date to the said antenuptial contract and intimations thereof, the same is inept and ineffectual, and did not attach or affect the foresaid share of the said estate or any part thereof."

Miss Jane Boyd averred that "James Wyllie's antenuptial contract of marriage was not put on any public record, and was in every respect a latent deed. The trustees therein named did not accept office, and did not direct or authorise the alleged intimation thereof to John Wyllie's trustees to be made. No valid intimation of the conveyance contained in said marriage-contract was made to John Wyllie's trustees, and no *de presenti* conveyance of the funds arrested by the present claimant is contained in the said marriage-contract in favour of the trustees therein named. By the said marriage-contract the said James Wyllie only conveyed the estate now belonging or which should be belonging to him at the date of his death. The funds arrested did not belong to him at the date of said marriage-contract, and he was still living. That the share of the estate of John Wyllie falling to James Wyllie had now vested in James Wyllie, and was payable to him by John Wyllie's trustees. In respect of the arrestment used by her, she claimed as much of the fund *in medio* as would pay the sums due and resting-owing to her by James Wyllie under and in respect of said bond and disposition in security."

She pleaded—"(1) The claimant being a creditor of the principal debtor, and having used arrestment in the hands of the arrestees, is entitled to be preferred in terms thereof. (2) The fund *in medio* having vested in, and being due and payable by the arrestees to the principal debtor at the date on which the claimant's arrestment was lodged, she is entitled to be ranked *primo loco* thereon in terms of her claim. (3) On a sound construction of the said antenuptial contract of marriage, the funds arrested are not conveyed thereby, and *separatim*, not so conveyed as to defeat the arrestment of the claimant. (4) Said contract of marriage not having been on record, or duly and validly intimated to the real raisers in the present action, and *separatim*, any intimation thereof having been made by a party or parties not *in*

titulo to intimate it, the present claimant ought to be preferred and ranked in terms of her claim."

The Lord Ordinary (KINCAIRNEY) allowed a proof, the import of which sufficiently appears from his Lordship's opinion, and thereafter on 7th March 1891 pronounced the following interlocutor:—"Finds that the share of the estate of the deceased John Wyllie, destined by his trust-disposition and settlement to his son James Wyllie, was effectually assigned to the trustees under the contract of marriage of the said James Wyllie, dated 20th October 1874, and that the assignation thereof was intimated to the pursuers, John Wyllie's trustees, before the date of the arrestments founded on by the claimant Miss Jane Boyd: Finds that the claimant James Dickie is sole surviving trustee under the said marriage-contract: Therefore ranks and prefers the said James Dickie as trustee foresaid in terms of his claim, and decerns, &c.

"*Opinion.*—By his trust-disposition and settlement the late John Wyllie directed his trustees to convey a share of his estate to his son James Wyllie. John Wyllie died in 1872. Parties in this case are agreed that this provision vested and became payable on 30th April 1890, the vesting being postponed until that date in respect of a survivorship clause in the destination.

"On 20th October 1874 James Wyllie and Agnes Kerr, thereafter his wife, entered into an antenuptial contract of marriage, whereby he conveyed, or purported to convey, to trustees all the effects then belonging to him or which should belong to him at the date of his death.

"On 15th May 1890 Jane Boyd, to whom James Wyllie owed £500, used arrestments in the hands of John Wyllie's trustees, and brought a furthcoming, and John Wyllie's trustees have in consequence raised this action of multiplepointing. The claimants are James Dickie, as sole surviving trustee under James Wyllie's marriage-contract, and Miss Boyd, who claims to be ranked on the fund for £500.

"There is no question about Miss Boyd's claim.

"The questions are (1) whether prior to her arrestment James Wyllie's interest in John Wyllie's estate had been effectually assigned to James Wyllie's marriage-contract trustees; and (2) whether, if so, that assignation was completed by intimation to John Wyllie's trustees before the date of the arrestment? If both these questions are answered in the affirmative, Miss Boyd's claim is excluded. If either were answered in the negative, she would be entitled to be preferred in terms of her claim.

"With regard to the former question, it was contended (1) that James Wyllie's interest in his father's estate was not included in the conveyance to the trustees in the marriage-contract. The deed bears that James Wyllie conveyed all the effects then belonging to him, or which should belong to him at the time of his death. It was contended that this was not a con-

veyance of *acquirenda*, but a conveyance of the estate which belonged or might belong to James Wyllie at two specified dates—the date of the deed, and the date of his death—and in support of that contention the case of *Champion v. Duncan*, November 9, 1867, 6 Macph. 17, was referred to. It was maintained that the share of John Wyllie's estate could not be carried as estate belonging to James Wyllie at the date of the marriage-contract, because his right to it had not then vested, nor as estate belonging to him at his death, because he was and is still alive. I am inclined to regard the conveyance as equivalent to a conveyance of *acquisita et acquirenda*. The same words occurring in the marriage-contract under consideration in the case of *Buchanan's Trustees v. Whyte*, February 25, 1890, 17 R. (H. of L.) 53, appear to have been so regarded. Still, I think it would be difficult to hold that if this right was not carried at the date of the marriage-contract, it could be held to be carried at any later date—for instance, at the date of vesting—and accordingly that was not maintained by the marriage-contract trustee, whose contention was that it was carried at the date of the marriage-contract, and I have come to think that contention well founded.

"At that date it is true that James Wyllie had no vested right to any part of his father's estate. His interest in it was of the nature of a *spes successionis*. But it was not disputed that as such it was assignable—*Kirklands v. Kirkland's Trustee*, March 18, 1886, 13 R. 798. An express assignation of a *spes successionis* would be effectual, and when duly intimated would place the assignee in the place of the cedent, entitled to be paid when the period of payment arrived. But in this case the *spes successionis* is not expressly mentioned. There is nothing but the general conveyance of the whole estate. That, I think, is capable of being construed as including a *spes successionis*, but could not in my opinion be held to do so according to its ordinary and primary import; and accordingly, if the question depended on the words of the conveyance to the trustees alone, I would have held that James Wyllie's share in his father's estate was not included.

"But the marriage-contract trustees referred, and I think legitimately, to the purposes of the trust. It is provided by the first purpose that the trustees are to hold certain heritable property specified, and 'also the share to which he (James Wyllie) is entitled of the trust estate of his late father John Wyllie,' for the purposes specified; and by the second purpose it is provided that they are to hold a policy of insurance effected with the Scottish Provident Institution, which is specially conveyed, and the proceeds of it, with the household furniture, 'and other means and effects, of whatever description the same may be, belonging to the said James Wyllie,' for the said Agnes Kerr in life-rent, and the children of the marriage in fee.

“It was argued, and I think rightly, that these provisions show that James Wyllie intended to convey his share in his father's estate to his marriage-contract trustees, and meant to include that share under the general terms of the conveyance, either in the knowledge that his interest was only a *spes successionis*, or what seems more likely, because he supposed that he had or might have a vested interest in it. In either case, it appears to me that the conveyance of the whole effects belonging to him at that date would carry his interest in his father's estate, whatever it might be, if his intention that it should be so carried sufficiently appears from the deed itself. On the whole, on this point I think that the contention of the marriage-contract trustee, that James Wyllie's share in his father's estate was meant to be included, and was included, in the general conveyance to the marriage-contract trustees in the contract is well founded.

“But it was contended (2) that the conveyance to the trustees was really as yet wholly ineffectual, because it was entirely testamentary and inoperative until the death of James Wyllie, the truster. I think there is difficulty about this point also, but I have come to the conclusion that it was intended to be operative from its date, and that the trust-disposition in the contract is not testamentary only. It has of course, like every marriage-contract, provisions regulating the succession to the estates; but the peculiarity which, as it appears to me, most favours the argument that the trust conveyance is only testamentary is this, that there seem to be no trust purposes at all during James Wyllie's life. It is provided by the first purpose that the trustees shall after his death hold the heritable subjects specified and the share of his father's estate for the purposes specified. They are not directed or empowered to hold for him at all—in liferent, or fee, or otherwise—nor are they expressly directed to hold for anyone during his life. This strikes one as a singular peculiarity in a marriage-contract. But notwithstanding this peculiarity, I think that the deed must be regarded as being what it bears to be, a deed coming into operation, and having effect from its date. It is expressed in words of *de presenti* conveyance. The conveyance of Agnes Kerr's estate is not to trustees, but directly to James Wyllie, and there is no reason to question its immediate effect. The trust conveyance comprehends, besides the general estate, a policy of insurance on James Wyllie's life. This is conveyed to the trustees by the same words which convey the general estate, and in reference to it the deed bears that James Wyllie 'has delivered up the said certificate or policy of assurance to be kept and used by the said trustees, as their own proper writ and evident.' It is difficult to hold that the policy did not pass immediately by the conveyance, and difficult to hold that if it did, the same words of conveyance would not carry James Wyllie's whole estate. Considering the deed as a whole, I am of

opinion that the conveyance to trustees was, according to its sound construction, a conveyance *inter vivos* which included James Wyllie's share in his father's estate. Analogous questions arose in the case of *Buchanan's Trustees v. Whyte*, where provisions in a marriage-contract which were held in this Court to be testamentary were held in the House of Lords to be operative from the date of the deed.

“It was contended that the deed was ineffectual because undelivered. This argument was pressed somewhat anxiously, but I feel some doubt whether I have correctly apprehended it, because the deed is an onerous bipartite contract, effectual according to its true intent without delivery. Besides, I apprehend that intimation would operate as delivery. *M'Lurgs v. Blackwood*, 28th February 1860, M. 845, where an assignation intimated but otherwise undelivered was preferred to an arrestment. This question is therefore involved in the second general question, whether the assignation has been completed by intimation to John Wyllie's trustees.

“(4) It was contended that the trust in the marriage-contract never came into operation or existence at all, and was a mere unreality or pretence. To this point the proof has in part been directed, and the result is easily expressed.

“There were three trustees nominated, of whom two are dead, and James Dickie is the sole survivor. There was no written acceptance or meeting of trustees, no sederunt of the trust, no entry about that trust in Mr Dickie's books as agent of the trust. Nothing whatever was done in it unless it were the intimations after referred to. The reason was, as Mr Dickie explained, that the trustees had no duties and nothing to do during James Wyllie's life.

“Mr Dickie deposes that he prepared the marriage-contract on the instructions of James Wyllie, that one of the trustees—John Wyllie, the truster's brother—had expressed his willingness to act, and that he had reason to believe that the other trustee was communicated with by James Wyllie, who, however, has not been examined as a witness, I hardly know why. This is certainly a singular state of matters, but I do not see that the deed would be inoperative even if no trustees accepted. Whether a difficulty would arise as to intimation is a different question.

“But, seeing that Mr Dickie prepared the marriage-contract as James Wyllie's agent, I am disposed to think that in the circumstances his acceptance of the trust is to be presumed, and that he is entitled to hold himself forth as a trustee, and as now the sole remaining trustee, under the marriage-contract, as he is now doing.

“On these grounds I answer in the affirmative this first question, whether James Wyllie's share in his father's estate was effectually conveyed to his marriage-contract trustees?

“The second question is, whether this conveyance was completed by intimation to John Wyllie's trustees before the date of Miss Boyd's arrestments?

"There is annexed to the marriage-contract a docquet, dated 25th February 1875, signed by the secretary of the Scottish Provident Institution, acknowledging intimation of the contract. The docquet does not state by whom the intimation was made, but Mr Dickie depones that he made it on behalf of the trustees under the marriage-contract. He does not say that he got any instructions from anyone to do so. There is an entry about it in Mr Dickie's ledger under the name of Mr James Wyllie, and I rather think that he considered that his instructions to prepare the marriage-contract included authority to make the assignations in it effectual by the necessary intimations, and if he thought so, I think that in the circumstances of this case he was right.

"It was not expressly maintained by Miss Boyd's counsel that the intimation to the insurance company was ineffectual. It is true that he had no concern with that intimation, but his argument seems to infer that it was inept. But I understand that such an acknowledgment by the debtor of intimation is probably the most ordinary way in which intimation is effected, or to any one in his right, and by which the assignee is effectually put in place of the cedent—*Newton Company v. Collogan & Company*, November 23, 1785, M. 850; *Menzies' Lectures*, 257.

"There are two entries in the sederunt book of John Wyllie's trust which are referred to as proving intimation of the marriage-contract to John Wyllie's trustees. The one is dated 1st March 1875 [see *supra*]. It is averred that the intimation was made by 'James Dickie, as agent for the trustees under the marriage-contract, of whom he was one,' and the acknowledgment bears to be by James Dickie, as agent for the trustees of John Wyllie.

"The sederunt book of John Wyllie's trust seems to have been irregularly kept, and this entry appears to be somewhat out of its proper date. A great part of the evidence is devoted to an attempt to expiscate this irregularity, quite idly, I humbly think, because nothing turns on the exact date of this intimation, or of the entry, and I see nothing whatever suspicious about it. It is said, however, that this intimation was never communicated to John Wyllie's trustees. I do not think it necessary to inquire into this point, because the marriage-contract trustee points to another minute, dated 3rd October 1889, which bears that the agent directed attention to the prior entry, and proceeds—'This entry had not been referred to since Mr Orr was assumed a trustee, and it was now brought to his knowledge, so that the intimation to the trustees may be complete.' This minute is signed by Mr Orr and Mr Paterson, then the surviving trustees of John Wyllie. The minute bears that a copy of the marriage-contract had been deposited with the papers of John Wyllie's trust.

"It thus appears that at all events at 3rd October 1889, which is early enough for the case of the marriage-contract trustee, the

marriage-contract had been formally brought under the notice of John Wyllie's trustees.

"It was contended that there could be no effectual intimation, because there were no trustees of James Wyllie who could make the intimation. But I do not concur in that argument. It is not essential that the intimation shall be by the assignee. Reference was made to the case of *A v. B*, 25th January 1540, M. 843, in which it was expressly decided that intimation by the cedent was sufficient, although there had been no intimation by the assignee; and I may notice that the statutory schedule of a notarial intimation appended to the Transmission of Moveable Property Act 1862, 25 and 26 Vict. cap. 85, does not bear on whose behalf the notary acted. Besides, I do not see any sufficient reason for denying to Mr Dickie the character of a trustee under James Wyllie's marriage-contract, and if he was a trustee he was in 1889 the sole surviving trustee.

"I cannot distinguish between the intimation to the Scottish Provident Institution and the intimation to John Wyllie's trustees.

"If I could hold that at the date of these intimations there was no trustee under the marriage-contract trust, there might be a difficulty of another kind, because it might be said that there was no assignee who could take in the place of the cedent. I think that any such difficulty might be overcome, but it does not arise if I am right in holding that James Dickie was a trustee.

"It appears to me therefore that the effect of the conveyance and the intimation has been to place Mr Dickie, as sole trustee under James Wyllie's marriage-contract, as the creditor of John Wyllie's trustees, to whom they became bound to pay the share of the estate destined to James Wyllie when that share vested and was payable—that is on 20th April 1890.

"It follows that Miss Boyd's claim, which is founded on the assumption that John Wyllie's trustees are debtors of James Wyllie and not of James Wyllie's marriage-contract trustees, falls to be repelled, and that these trustees are entitled to be preferred.

"It does not follow from this judgment that James Wyllie's estate has been placed beyond the reach of his creditors by the marriage-contract. No question of that kind has been argued or could have been raised in this case. I am only anxious to make it clear that I do not indicate any opinion on that point."

Miss Jane Boyd reclaimed, and argued—(1) James Wyllie did not in express terms assign the *spes successionis* to his father's estate. It was not included in the words "property now belonging to him"—*Champion v. Duncan*, November 9, 1867, 6 Macph. 17. The terms used in the assignation by the wife were in marked contrast. His silence as to the income during his lifetime was significant. (2) Such a *spes* would not have been attachable by creditors—*Trappes v. Meredith*, November 3, 1871, 10 Macph. 38, and could not pass

to the marriage-contract trustees. (3) Even if it were held that the *spes* was assignable, and that Wyllie intended to assign it, the assignation had never been duly intimated. The marriage-contract trustees had never accepted, and Mr Dickie had acted without authority. (4) The marriage-contract was of a wholly testamentary nature. The trustees were not to deal with the estate until his death. It contained a substitution of the wife to the daughter of a former marriage, who was not a party to it, and the provisions in whose favour were revocable—*Costine's Trustees v. Costine* March 19, 1878, 5 R. 782, and March 20, 1879, 6 R. (H. of L.) 13. In the case of *Buchanan's Trustees v. White*, February 25, 1890, 17 R. (H. of L.) 53, and L.R., 15 App. Cas. 156, relied on by the Lord Ordinary, there were mutual obligations by the husband of the wife. Besides, that case was peculiar. This was an attempt by Wyllie to put the fee beyond his control, and yet enjoy the income. The deed was invalid against an arresting creditor—*Grant v. Robertson and Others*, June 15, 1872, 10 Macph. 804. The fee had now vested in Wyllie, and the arrestments had been used since that date.

Argued for the marriage-contract trustee—The *spes* being a contingent right was assignable and had been assigned. This was put beyond a doubt by the words used as to the first purpose of the trust—*Forrest v. Robertson's Trustees*, October 27, 1876, 4 R. 22. The assignation had been duly intimated by the sole surviving marriage-contract trustee. The Lord Ordinary's opinion disposed of the objections stated by the claimer, and his judgment ought to be affirmed.

At advising—

LORD KINNEAR—The first question we have to consider in this case is, whether the share of the estate of the deceased John Wyllie was effectually assigned to the trustees under James Wyllie's contract of marriage? and upon that question I agree with the Lord Ordinary.

James Wyllie was entitled to a certain share of his father's estate, but the parties are agreed that the right did not vest until the 30th April 1890. James Wyllie's marriage-contract was executed in 1874, while the right was still *in spe*, but it is settled law that an expectancy of this kind may be effectually assigned so as to give a valid title to the assignee when the right comes to be vested. The only question therefore is, whether upon the construction of this marriage-contract there is an effectual assignation of the expectant right in question? Now, the husband by the terms of the marriage-contract assigns and conveys to the trustees all the real and personal property of every description now belonging or which shall belong to him at the time of his decease. I cannot say that I altogether agree with the Lord Ordinary in thinking that that is a conveyance of *acquisita et acquirenda* in the ordinary technical signification of these words, because that would mean that the husband had given the marriage-contract

trustees not only everything of which he was possessed at the date of the contract, and everything in addition which he might leave behind him at his death, but also anything which he might acquire in any manner of way during the intermediate period between the marriage and his death, so as to deprive himself of all right of property and all power of control over other property that might come to him during that intermediate period. I do not think that is the meaning of the conveyance. It is said that these words, which are of not infrequent occurrence, have a technical meaning in our law, but it appears to me that although their significance is perfectly well fixed, it is simply the natural meaning of the words, as words of ordinary language, and when the marriage-contract settles everything now belonging to him and also everything that shall belong to him at his death—he conveys exactly what he says—the property that belongs to him at the date of the contract and also what shall be found to belong to him at his death, but he does not deprive himself of any right of property or power of control in subjects he may acquire after the date of the marriage-contract during his lifetime, and accordingly the property which belongs to him at his death and which he has acquired after the date of the marriage-contract will be subject to all the debts which he may have contracted during his lifetime. Therefore it is quite indispensable that we should consider in this case whether the *spes successionis* now in question is carried to the marriage-contract trustees under the description of property belonging to the husband at the date of the contract, or only under the description of the property which shall be found to belong to him at the date of his death, because if the latter were the true construction of the words, then it would be impossible to sustain the right of the marriage-contract trustees in the meantime to carry off the fund to the exclusion of the husband's creditors. Now, that appears to me to be a question of construction which must be considered by the ordinary rules for construing a contract. It is said that the words "property now belonging to me" cannot cover any interest which is not vested at the time the granter of the deed is supposed to be speaking. It appears to me that the words are words of ordinary language and are quite effectual to cover any interest of the kind which it appears, upon the construction of the whole contract and of this clause taken with the context, the party intended them to convey. Now, it is clear enough that the husband in this case supposed himself to be dealing with his interest in his father's succession as a right which he was entitled to dispose of, and in that respect he was perfectly right, because although it could not become finally vested in him until his survivance at a particular date, still it was a right which was undoubtedly subject to disposal.

Reading the purposes to which the trustees are to assign the subjects conveyed to

them, it would appear to me that the natural inference from the words employed in that clause is that the husband did intend to convey this particular right, because when he comes to direct the trustees as to what they are to do with the subjects assigned to them, he says, first, that the said trustees shall, after the death of the said James Wyllie, hold certain properties which undoubtedly belonged to him at the time—heritable properties—and also the share to which he was entitled of the trust-estate of his late father, for certain purposes expressed, and therefore he begins by tying up these two properties together—his right of succession to his father's estate, which he assumes he is entitled to convey, and the property which did undoubtedly belong to him. But then it is said—and it is a point that requires consideration—that when he goes on to tell his trustees what they are to do with the property conveyed to them, it is clear enough that he does not contemplate that anything is to be done with it until after his death, and therefore it is said it cannot be supposed that he could make an immediate conveyance of it to his trustees at all. The trust purposes are that they are to hold these two estates together for behoof of his daughter, and to give her the income so long as she shall be in minority after his death, and then upon her majority or marriage to settle the fee upon her under certain conditions; and in the event of her dying without leaving children, or the issue of such children before receiving a conveyance of these properties, then to hold the properties in question for behoof of his second wife, with whom he was making this contract of marriage. The only importance of that consideration is as an indication of intention to postpone the conveyance until the death of the husband. If the intention to make an immediate assignation during his life is clearly expressed, then no practical difficulty arises from the limitation of the trust purposes to a period occurring after his death, because it is a settled doctrine of the law that where funds are put in trust for limited and defined purposes which do not exhaust the fund, the unexhausted portion results to the granter of the trust and his representatives, and therefore if the husband in this case intended to assign his share of his father's succession to the trustees by an immediately effectual conveyance, and yet told them only how they were to dispose of it in favour of his daughter or his wife after his death, there would necessarily arise a resulting trust for him so far as regards the income accruing from the estate during his lifetime. The point which is here made upon this peculiarity of the trust is certainly, as I have said, one that requires consideration, but I think the inference which might otherwise have been drawn from it is entirely displaced when one reads the whole purposes of the trust together, because when the first purpose and the second are read together it is perfectly clear that the trustor intended that the

two estates which he places together under the trust are to be treated as separate and distinct subjects, to be kept free from any debts he may contract during his life, and that the rest of his property which is to come to his trustees at his death under the conveyance of what shall then belong to him is to be the only property which will remain in his own hands subject to debts contracted by him during his life. I think that is clear enough. In the first place, he begins by making a specific direction that the trustees shall hold—that is, of course from the moment of the assignation to their becoming effectual—the two properties which he specially mentions, and then he goes on to say that the trustees are to hold a certain policy of insurance and the proceeds and produce thereof, and the whole other means and effects of whatsoever description which may belong to James Wyllie after payment of his debts and the expenses of the trust; and therefore it seems to me to be clear that he makes a *de presenti* assignation of two estates—the estate which belongs to him at the time of the contract, including his expectant right in his father's estate, to become immediately effectual and free from any power of control or interference of his; and another estate—whatever belongs to him at the date of his death, including the policy of insurance, which will remain in his hands subject to the debts he may contract during his life.

I therefore agree entirely with the Lord Ordinary in the conclusion at which he has arrived as to the meaning and effect of the marriage-contract; but there are a number of other points which have been raised, which his Lordship considers very minutely and carefully in his opinion, upon the effect of this contract, assuming it to bear the interpretation which he puts upon it. It is said, in the first place, that it has never been delivered, and I think the Lord Ordinary's answer to that is quite conclusive, because a mutual contract requires no delivery. But then it appears to have been argued, and it was also argued before us, that upon other grounds it was ineffectual as an assignation. It was said that the trustees had never accepted, and, as the Lord Ordinary puts it, that the trust was really never effectual upon that ground. Now, it does not appear to me necessary to consider at all the various grounds upon which the Lord Ordinary quite satisfactorily, I think, meets that argument, because there is one point which is very conclusive. It is of no consequence that the trustees accepted the trust so committed them, because it is quite certain the surviving trustee has now accepted it, and makes this claim in the performance of his duty for the purpose of making it effectual, and I cannot see how the question of the time at which the trust may have been accepted previously to the institution of this action has any bearing at all upon the question of its validity and effect now that we know that the trustees are seeking to enforce it. But then a third point remains,

because it is contended for the reclaimers that although the trust is effectual the assignation to the trustees cannot prevail against the other claimants' arrestments, because it has never been duly intimated. Upon that question also it appears to me that there are a good many points which have been suggested as points of difficulty, and which the Lord Ordinary deals with, which really create no difficulty at all. It is quite sufficient, as his Lordship points out, that the sederunt-book of the marriage-contract trustees bears that the attention of the trust had been directed by the agent to a certain previous intimation, so that it might now be brought to the knowledge of a new trustee that the assignation in question had been intimated, and in order that that intimation might be complete. I am speaking of course of the trustees of the deceased John Wyllie, who were the debtors in this obligation, which was to be made effectual by intimation to them of James Wyllie's assignation of his right as against them. I entirely agree with the Lord Ordinary in what he has said upon that question, and I am therefore of opinion that the claim of the trustees in respect of an assignation which has been duly intimated has been rightly sustained by his Lordship.

Their claim, or rather the claim of the sole surviving trustee, is of course to hold the money for the purposes of the trust, and that is so expressed. No question was raised before us as to the right of the arresting creditor to any portion of the estate except the entire fee or capital of the right of succession, and therefore no question of that kind appears to arise, but it may be well to observe that nothing that is done by this judgment can affect in any way the right of the husband's creditors to the income coming due to him during his life. Of course the ground upon which we proceed is this—That he has effectually conveyed the fund to trustees for certain purposes, but that one trust purpose is during his own lifetime to make good the income of the estate to himself.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers and Real Raisers—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for the Claimant Miss Boyd (Reclaimer)—M'Kechnie—Craigie. Agent—James Russell, S.S.C.

Counsel for the Claimant James Dickie—Vary Campbell—Lorimer. Agents—Morton, Smart, & M'Donald, W.S.

Saturday, July 11.

SECOND DIVISION.

[Sheriff Court, Glasgow.]

ROBERTSON v. THE LINLITHGOW OIL COMPANY.

Reparation—Personal Injury on Railway—Unfenced Hole—Want of Light—Fellow-Servant's Breach of Duty—Action at Common Law and under Employers Liability Act 1880 (43 and 44 Vict. cap. 42)—Relevancy.

A labourer engaged on a railway sued his employers for damages for personal injuries sustained by him in the course of his employment, and averred that the defenders had cut a pipe-track across the line of rails, and allowed it to remain uncovered and in a dangerous state longer than was necessary; that the defenders had failed to provide any or at least sufficient light for the proper and safe discharge of the pursuer's duties; that while he was at work between two waggons of a train, standing on the rails, the engine-driver, who had previously uncoupled from the train, returned with his engine and one or two waggons in front which had no light, and suddenly and culpably drove against the standing waggons, and that both the engine-driver and the guard of the train had failed to give him any warning; he "was in the act of coming out from between two of said waggons when said collision occurred, and he would, notwithstanding the want of warning, and the danger he was placed in, have probably escaped any injuries but for said hole or trench. One of his feet slipped into it, and he was thereby unable to get the other clear in time, and a waggon went over one of his legs."

Held that as upon the pursuer's statement neither the hole nor the want of light would have caused the accident but for a breach of duty on the part of the defenders' servants, against which the defenders were not bound to provide, the pursuer, although entitled to proceed under the Employers Liability Act, had not stated a relevant case for an issue at common law.

The Employers Liability Act 1880 (43 and 44 Vict. cap. 42) provides—"1. Where, after the commencement of this Act, personal injury is caused to a workman—(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal-points, locomotive-engine, or train upon a railway—the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

John Robertson, a labourer in the em-