

the bye-law, and bye-law 26 says that in that case he shall be liable to a particular penalty. I therefore agree that the Stipendiary, who seems to have been very properly anxious that this passenger who had no legal advice should not be prejudiced thereby, has been misled by a supposed difficulty, which, if the bye-laws be properly read, is no difficulty at all. On the matter of the specification I concur.

LORD JUSTICE-CLERK—I am of the same opinion. I think it is impossible to look at these bye-laws without seeing that bye-law 26 is intended to apply to a number of cases which are given in the previous bye-laws, and I am unable to conceive any reason why it should not apply to bye-law 3, in which the duty is imposed upon a passenger of paying his fare and accepting a ticket. It is the obvious duty of every person riding in a public carriage to pay the fare and to accept a ticket, which is necessary for the purpose of inspection. I have not the slightest doubt that bye-law 26 does apply.

The only thing which might lead one to a contrary opinion is that in certain of the bye-laws reference is expressly made to penalties prescribed by the bye-laws. For example, in bye-law 21 it is said the offender "shall be liable to the penalty hereinafter provided." But then that bye-law does not refer to people on a tram-car; it relates only to the orderly conduct of street traffic, the driver of a tram-car being entitled to order everybody out of the way of his car under penalty of punishment. Tramway traffic could not be carried on in any other way. Then in others of the bye-laws it is assumed that a breach of them is punishable under bye-law 26. For example, bye-law 16 provides that a person swearing or using obscene or offensive language "shall, in addition to incurring the penalty hereinafter provided, forfeit his fare, and be summarily removed from the car." And in bye-law 17 it is provided that any person who shall do any damage to a car "shall, in addition to the penalty prescribed by these bye-laws and regulations, be liable to pay the amount of damage done in consequence."

It seems to me very plain that it is a necessary implication from these two bye-laws that in every case where a breach of a bye-law is committed a penalty is exigible in respect of the breach, whereas in these two particular cases you have not only the penalty to be exacted but other penalties as well—in one case the forfeiture of the fare and removal from the car, and in the other liability to pay damage. I agree with your Lordships that the Stipendiary Magistrate has erred in holding, as he does, that there is no offence in bye-law 3 without going to bye-law 4 (c). As regards the other matter, it is unnecessary to say anything further than what your Lordships have said already.

The Court sustained the appeal and answered the first and second questions of law in the affirmative.

Counsel for the Appellant—A. O. M. Mackenzie, K.C. — Crawford. Agents—Campbell & Smith, S.S.C.

COURT OF SESSION.

Thursday, November 28.

FIRST DIVISION.

[Sheriff Court at Glasgow.]

DONALDSON AND OTHERS (MACKINNON'S TRUSTEES) v. DUNLOP (MACKINNON'S TRUSTEE).

Marriage-Contract — Bankruptcy — Jus Crediti—Obligation by Husband to Pay before Death at such Times and in such Sums as Convenient.

In his antenuptial contract of marriage a husband undertook to pay to his trustees before his death, "at such times and in such sums as he finds it convenient," a sum of £4000, and until the said sum was paid over to pay to the trustees or his wife half-yearly interest at 4 per cent. The contract provided that the said sum and the profits and produce thereof were (1) to be held for behoof of the wife in liferent for her liferent alimentary use alternately till her death or second marriage, and on her death, in the event of her predeceasing her husband, then to him in liferent as an alimentary provision for himself and the children of the marriage, and (2) on the death of the survivor of the spouses or the wife's second marriage, were to be held for behoof of, or paid over to, the children of the marriage. The husband's estates were sequestrated and the marriage-contract trustees, to whom the £4000 had never been paid, claimed that sum in the sequestration.

Held that as the husband retained command of the sum of £4000, the interest never going directly to the children, no *jus crediti* was conferred on the trustees entitling them to rank therefor in the sequestration.

Herries, Farquhar, & Company v. Brown, March 9, 1838, 16 S. 948, and *Fair v. Hunter*, November 5, 1861, 24 D. 1, commented on.

Opinion (per the Lord President) that the wife had a good claim to the actuarial value of her liferent.

William Henderson Donaldson and others, the trustees acting under the antenuptial marriage-contract between Thomas Neil Mackinnon and Rachel Catherine Donaldson dated 26th and 27th September 1882, *pursuers*, raised an action in the Sheriff Court at Glasgow against William Dunlop, C.A., Glasgow, trustee on the sequestrated estates of the said Thomas Neil Mackinnon, *defender*.

The antenuptial contract of marriage between Thomas Neil Mackinnon, *first party*, and Rachel Catherine Donaldson, *second party*, provided, *inter alia*—"The first party hereby undertakes within six months from the date hereof . . . (*tertio*) to pay to the said trustees before his death, at such times and in such sums as he finds it convenient, a further sum of £4000, and

until the said sum is paid over to pay to the said trustees or the second party half-yearly at Martinmas and Whitsunday interest thereon at the rate of 4 per cent. per annum, all which subjects and the profits and produce thereof shall be held by the said trustees in trust as follows—(first) for behoof of the second party in liferent for her liferent alimentary use alienably till her death or second marriage, and on her death in the event of her predeceasing the first party, then to him in liferent as an alimentary provision for behoof of himself and the children of the marriage, for the proper upbringing, education, and maintenance of such children, and that in such sums or proportions as the said trustees shall deem proper, and of which they shall be the sole judges; (second) on the death of the survivor of the said spouses or the second marriage of the said Rachel Catherine Donaldson, the said trustees shall hold the said estate for behoof of, or pay and convey the same to, the children of the said marriage and the issue of any child or children who may have predeceased leaving issue, in such proportions and on such conditions and subject to such restrictions as the first party, whom failing the second party, may appoint by any writing, whether testamentary or otherwise, and failing such appointment, then equally among the said children *per stirpes*, the issue of any predeceasing child or children taking equally among them the share which would have fallen to their parent if in life.”

There were eight children of the marriage. The estates of Thomas Neil Mackinnon were sequestrated on 28th February 1911, and on 4th April 1911 the defender was appointed trustee. The bankrupt had not paid the £4000 to the trustees, and they lodged a claim, *inter alia*, for this sum. On 4th March 1912 the defender rejected this claim in respect that “the terms of the obligation for payment of the £4000 to the claimants do not import a *jus crediti* in the trustees entitling them to rank in the sequestration.”

The pursuers appealed to the Sheriff, and on 2nd July 1912 the Sheriff-Substitute (BOYD) recalled the deliverance and found them entitled to be ranked in terms of their claim.

Note.—“... [After stating the claim]. . . The bankrupt has not paid the £4000 to the pursuers, who accordingly lodged on oath an account of debt claiming this sum. The defender rejected this claim on 4th March 1912, in respect that ‘the terms of the obligation for payment of the £4000 to the claimants do not import a *jus crediti* in the trustees entitling them to rank in the sequestration. . . .’

“Is there a *jus crediti* in the trustees in respect of the obligation to pay £4000? I think there is. The authorities are numerous, and after comparing them and the above provisions I conclude that in a competition with creditors the wife in this marriage contract has a *jus crediti*. With regard to the children, I think I may conclude from the authorities that when a

father undertakes obligations in their favour to be performed after his death, but with interest to run on it before his death, then there is a *jus crediti* in the children, and not a mere *spes successionis*. The sum may be retained for the father's convenience, but the right of the children in it is so real that interest is due on it. If interest is due, it seems to follow that the capital sum must be a debt of the father. Here there is an obligation to pay to the trustees before death, and interest is to run. *A fortiori* I think a *jus crediti* is established.

“The principles applicable are to be found in Erskine, b. 3, t. 8, p. 40, to b. 3, t. 9, p. 22; Bell's Commentaries, 682-685; Bell's Principles, s. 1946; Fraser, Husband and Wife, 1355-1358; M'Laren, Wills and Succession, ss. 1209, 1211, 1215, 1217, 1219.

“The earlier cases which start in Morrison, *voce* Provisions to Heirs and Children, with Lyon v. The Creditors of Easter Ogle, 12,909, Douglas 12,910, Ballingall 12,919, Mackenzie 12,904 (where the sum was not due till the father's death, but interest was due from the majority or marriage of the children), seem to have been all considered and given effect to in the leading case of Wilson's Trustees v. Pagan or Wilson, 2nd July 1856, 18 Dunlop 1096.

“The defender's view is that no action was competent against the father during his lifetime to compel performance, and unless the provisions conferred a *jus exigendi* a *jus crediti* did not exist. So far as I am aware the case of Wilson's Trustees has never been overruled, and I think from it and the cases that precede it I may conclude that, although the right of action may never come, yet a *jus crediti* may be conferred. I think it was conferred in the present case. . . .”

The defender appealed, and argued—There was no *jus crediti* conferred on the children in a question with their father's onerous creditors. As regards them the children were by the marriage-contract put in the position of heirs and not of creditors; the children did not get the interest of the £4000. The result of the cases on the subject was that the test to be applied was whether or not the husband had abridged his power of administration. If not, no *jus crediti* was conferred—Ersk. iii, 8, 39; Bell's Comm. (7th edn.), vol. i, pp. 682 and 685, and the cases there cited, viz., Children of Mac-tavish v. His Creditors, 1787, M. 12,922; Creditors of James Lockhart v. Anna Lockhart, 1741, M. 12,914; Creditors of Kenneth Mackenzie v. His Children (Red-castle case), 1792, M. 12,924; Goddard v. Stewart's Children, March 9, 1844, 6 D. 1018, esp. Lord Moncreiff at 1023-4; Wilson's Trustees v. Wilson, July 2, 1856, 18 D. 1096; Creditors of Strachan v. Strachan, 1754, 5 Br. Sup. 814. Herries, Farquhar, & Company v. Brown, March 9, 1838, 16 S. 948, as appeared from the opinions in Wilson's Trustees (*cit. sup.*) was not really against their contention. In Fair v. Hunter, November 5, 1861, 24 D. 1, there

was an antecedent obligation on the father to pay; moreover, it was decided on a different branch of law. They admitted that the succession was here protected but not against onerous creditors.

Argued for the respondents—The marriage-contract trustees were entitled to a ranking for the £4000 *pari passu* with other onerous creditors. "At such times and in such sums as he finds it convenient" was not equivalent to "at his pleasure." It was a suspensive condition similar to "as soon as I have it in my power," and it flew off at death or bankruptcy—*Fair v. Hunter* (*cit. sup.*) esp. Lord Justice-Clerk Inglis at p. 9. "Convenience" meant mercantile convenience—*Crawshaw v. Hornstedt*, 1887, 3 T.L.R. 426. No doubt it lay on the creditor in the obligation to show that the condition was purified—*Shaw v. Kay*, March 24, 1904, 12 S.L.T. 6, *aff.*, 12 S.L.T. 262—but this *onus* the trustees might have been able to discharge in the father's lifetime. The condition was in no different position from one to operate on majority or marriage. Where there was an obligation undertaken by the father upon which the children (or the trustees) might be able to sue in his lifetime with the effect of either transferring the fee to the children or even impairing the father's right of administration, then there was a *jus crediti*—*Herries, Farquhar, & Company v. Brown* (*cit. sup.*); *Creditors of Kenneth Mackenzie v. His Children* (*Redcastle case*) (*cit. sup.*); *Wilson's Trustees v. Wilson* (*cit. sup.*). The obligation to pay interest could not be split up according to the persons at different times entitled to receive it.

At advising—

LORD PRESIDENT—The question in this case arises in the bankruptcy of Mr Thomas Neil Mackinnon, and the point is whether the learned Sheriff-Substitute has been right in recalling the deliverance of the trustee and ranking the marriage-contract trustees of the bankrupt for the sum of £4000.

The bankrupt entered into an antenuptial marriage contract under which he became bound to make good certain provisions in favour of his wife and children. As to some of these provisions no question arises, but the one upon which the whole matter turns is this—He bound himself ("*tertio*") to pay to the said trustees before his death, at such times and in such sums as he finds it convenient, a further sum of £4000, and until the said sum is paid over to pay to the said trustees or the second party" (his wife) "half-yearly at Martinmas and Whitsunday interest thereon at the rate of 4 per cent. per annum, all which subjects and the profits and produce thereof shall be held by the said trustees in trust as follows—(*first*) For behoof of the second party in liferent for her liferent alimentary use allenerly till her death or second marriage, and on her death, in the event of her predeceasing the first party, then to him in liferent as an alimentary provision for behoof of himself and the children of the marriage, for the proper upbringing,

education, and maintenance of such children, and that in such sums or proportions as the said trustees shall deem proper, and of which they shall be the sole judges; (*second*) on the death of the survivor of the said spouses or the second marriage of the said Rachel Catherine Donaldson, the said trustees shall hold the said estate for behoof of, or pay and convey the same to, the children of the said marriage, and the issue of any child or children who may have predeceased leaving issue, in such proportions and on such conditions and subject to such restrictions as the first party, whom failing the second party, may appoint."

The marriage-contract trustees claimed for this £4000, which *de facto* had never been paid to them, and the trustee in the sequestration rejected the claim. The learned Sheriff-Substitute recalled the trustee's deliverance and ranked them in terms of their claim, and he states the question thus—"Is there a *jus crediti* in the trustees in respect of the obligation to pay them £4000?" He thinks there is. He gives a general citation of authorities, but he particularly calls attention to the fact that when a father undertakes obligations in favour of his children to be performed after his death, "but with interest to run on it before his death, then there is a *jus crediti* in the children and not a mere *spes successionis*." He says—"If interest is due, it seems to follow that the capital sum must be a debt of the father. Here there is an obligation to pay to the trustees before death, and interest is to run. *A fortiori* I think a *jus crediti* is established." I think there the learned Sheriff-Substitute made a slip. It may follow from the fact that interest is to run that a *jus crediti* is created, but only if interest is to run in favour of the same people to whom the principal is payable, in this case the children. Now the Sheriff-Substitute has not noticed here that the children directly never get any of this interest at all. The wife gets it so long as she is alive, and after her death the father gets it, or else nobody gets it; and accordingly that ground of judgment fails as soon as that is explained.

We had a very good and very able argument on the general question with which the Sheriff-Substitute does not more particularly deal than by a citation of authorities, and the whole question comes to be whether in this marriage contract there is a *jus crediti* or not.

I am not going through all the cases that have been decided upon this matter, which would indeed be a lengthy proceeding. I could not possibly put the general result so well or with the same authority as was done long ago by Mr Bell in his Commentaries (7th ed. vol. i, p. 682). He puts the point that applies to this case in one single sentence in the middle of p. 684. After stating all the ways in which a husband may be able to provide for a wife and children in case of his own bankruptcy, he says—"(*6*) It is quite incongruous to attempt to give to the husband the com-

mand of his funds, and at the same time secure the wife and children against the effect of his insolvency." Now that would be just the attempt that is made here if the obligation were intended to confer a *jus crediti*, because it is perfectly clear that when the only thing this gentleman binds himself to do is to pay the £4000 at such time and in such sums as he finds convenient, then, in the words of Professor Bell, he retains the "command of his funds." The *locus classicus* on the subject which bears out what Professor Bell says is the judgment of the Court in *Herries, Farquhar, & Company v. Brown* (16 S. 948). The consulted Judges, in their opinion (at p. 963), began with the general proposition, which is undoubtedly law, that "Whether a provision in an antenuptial contract of marriage to children *nascituri* does or does not vest in them when they come into existence, a proper right of credit depends on the terms in which the obligation is conceived and the condition with which it is affected." Reverting to the matter, there is another passage which was quoted by the learned Judges in the subsequent case of *Wilson's Trustees v. Wilson* (18 D. 1096), and may be taken really to be the foundation of the matter. I quote now from the bottom of p. 964 of the opinion in *Herries, Farquhar, & Company*—"As we have already observed, if it be a simple and unconditional provision *liberis nascituris*, the term of payment being suspended till the father's death, the presumption of law has been received and is still enforced that no *jus crediti* is contemplated, although the obligation is conceived in favour of the children directly, so that, *ex figura verborum*, they are creditors. But if words are used which express or plainly imply a restriction on the father's power of disposal, or if any conditions are adjoined incompatible with that power, the presumption ceases, and the children are held not to have a *spes successionis* merely, but a proper right of credit." That is putting exactly the same criterion as Professor Bell—Is there a restriction upon the father's power of disposal during his lifetime? There is, if he has to part with his own funds so far as to pay interest at a time which may arrive before his death. There is not, in a case like this, where he makes it clear that he is going to keep the management of his own fortune in his own hands.

I think that would be enough, and I could now stop, were it not for the case that is mentioned in the opinion of the consulted Judges in *Herries, Farquhar, & Company*, which would certainly, as they put it, seem to go the other way, and although it seems almost sacrilegious to touch this opinion, which has always been looked on as a very great authority, and which I think is a very great authority still, none the less I feel bound to point out what I think is an undoubted slip in the opinion. In that opinion a certain case is discussed, and if that case can be used as it is used there it would go against the doctrine I have laid down and against

its application to the present case. In the opinion of the Consulted Judges it is said (16 S. at p. 965)—"A case still more applicable to that which is now before the Court is noticed in the case of *Gordon v. Sutherland* (1748, M. 12,915)—'In a contract of marriage in which the husband "became bound to join the sum of 3000 merks with 17,000 merks of portion received with his spouse, and to lay out the same upon security to himself and spouse and longest liver in conjunct fee and liferent, and to the children of the marriage in fee; and how often the sum should be uplifted, that he should so often re-employ the same in the above terms;" the man having died bankrupt, action was brought against the cautioner who was bound with him in the contract. His defence was that the obligation barred only gratuitous deeds, and was no impediment to the husband from laying out the money upon trade though it should be sunk thereby. But the Court found the import of the obligation to be that in all events this sum should be secured to the children of the marriage, and therefore sustained action against the cautioner for replacing the same.'" So far quotation from the notice of the case in *Gordon v. Sutherland*. Then the opinion of the Consulted Judges proceeds—"In that case there was not only no stipulation that the father should denude of the fee in his lifetime; but it was necessarily implied that he should not denude, for it is contemplated that he might employ and re-employ—that is, that after having employed the sum, he should have the power of uplifting it at his pleasure. Neither was it stipulated that any part of the sum, nor of the interest accruing upon it, should be payable during the father's lifetime. But the Court held the obligation that the father should employ, and if he uplifted that he should re-employ, to import that he was bound to make the provision effectual to the children after his death, and consequently that they were proper creditors to the father." Now if that case had decided that, I quite agree it would be contrary to what my view of the true meaning of the restriction of the father's power of disposal is, and to the application to this case; but I think it is clear that that was not decided in that case. It is quite evident that the learned Judges in referring to that case did not know what case it was, because when referring to it as "noticed in" *Gordon v. Sutherland* they would have given the name of it if it was known, and it is only referred to in the argument in *Gordon v. Sutherland* (M. at p. 12,917). I notice, to begin with, that the decision in *Gordon v. Sutherland* was to the opposite effect. It is perfectly well brought out by the rubric—"A settlement in a contract of marriage is *in dubio* not understood to give more to the heirs *nascituri* than *spes successionis*;" and the obligation there was as to land instead of as to merks in this other case, but it was an obligation to provide for the spouse in liferent and to the children in fee. But it is not impossible,

although it is not done by the learned Judges, to find the case that was quoted in the case of *Gordon v. Sutherland*, and I have no doubt whatsoever that the case is the case of *Fotheringham v. Fotheringham of Powrie* (1734, M. 12,941), which is reported as follows;—"In a contract of marriage the husband's cautioner being bound to employ a sum for the use of the wife in liferent, and the children of the marriage in fee, and the husband having died bankrupt without implementing, in a process at the instance of the children against the cautioner, the defence was that the pursuers, as heirs of provision, are ultimately liable to relieve the cautioner, and *frustra petit quod mox est restitutus*. Answered, the pursuers have got nothing by their father, and so cannot be liable for any of his debts; nor will the sum they recover from the defender make them liable for their father's debts, because their claim is not *qua* heirs to their father but as the defender's creditors. The Lords found the cautioner bound to implement, and that without relief." I agree that, reading that case as I have read it, there would not be a necessary identity with the case referred to in *Gordon*, but the identity is satisfactorily made out when one goes to another report of the same case which is found in Lord Elchies' Decisions, *voce* Cautioner, No. 2; and if you compare the report of the case in the first volume of Elchies with the report in the second volume, *i.e.*, in Elchies' Notes, there is no longer any doubt about it. In the first volume of Elchies it is thus—"Cautioner in a contract of marriage for the husband's employing and re-employing his stock, and the bride's tocher, to them two in conjunct fee and liferent, and the bairns of the marriage in fee, found liable to the children for the money, without relief against them as heirs of provision of their father; and it was found no good defence that the father had employed and lost the money in trade, being a merchant." Now there you have the expression "employing and re-employing" of the bride's tocher along with the husband's provision; and then when you come to the same case in the second volume, Elchies' Notes, *voce* Cautioner, No. 2, you find there that there is a special mention of this sum of 3000 merks—"The Lords sustained the defence in the discharge *quoad* the liferent of the 3000 merks paid, but repelled it *quoad* the remainder of the liferent, and found Powrie"—that is, Fotheringham's cautioner—"liable to the children of the marriage for the whole sums without relief." That makes the identity, I think, absolutely certain.

Now, having got the case, it is perfectly clear that it was not decided upon the ground stated by the learned Judges in *Herries, Farquhar, & Company*, *viz.*, that the children were proper creditors to the father, but what the case was decided upon is rightly set forth by Mr Erskine in his *Institutes* (iii, viii, 40), where, after having dealt with this question of *jura crediti*, he says—"Though such marriage settlements

when executed in the ordinary form are postponed to every *onerous* debt of the granter"—that is to say, do not create a proper *jus crediti*—"even those contracted after, and so cannot come in competition with his extraneous creditors, they are nevertheless effectual against a cautioner who has engaged himself in the marriage-contract for the father's performance of his obligation. For the plain language of that engagement is that he shall make the provision effectual to the heir in case the father himself shall fail; so that the claim competent to the heir of the marriage in such case is not as heir to his father but as creditor to the cautioner." Then he cites the case of *Dickson* (1717, M. 12,938), and the case of *Fotheringham* (M. 12,941). So that, in other words, the case of *Fotheringham* was decided against the cautioner upon the hypothesis that there was no proper *jus crediti* in favour of the children against their father's estate. That I think ends the matter, and leaves it precisely as Mr Bell put it, namely, Can you find any proper restriction upon the power of the husband? Here I find none, and in point of fact, if the argument upon the other side is right, the husband here would have succeeded in doing what Mr Bell says above all things he cannot do—he would have reared up a claim on behalf of his children which never could incommode him, because he need never pay except when he liked, but which would always incommode his creditors, because it would be a *jus crediti* the moment he became bankrupt.

Counsel for the respondent in a very able argument particularly appealed to the case of *Fair v. Hunter* (24 D. 1), in which it was held that an obligation to pay "as soon as I have it in my power" was a proper debt. Well, all depends on what one means by proper debt. The truth is there are three forms of obligations in such matters. There is the form of an ordinary debt which you are bound to pay the moment that you are sued upon it. It is not suggested that there is such a debt here. Then, on the other hand, there is a form of quasi-obligation which is truly no obligation at all, which simply says, "I promise to pay if I like to pay," and I agree with the learned counsel that the obligation here is not of that kind. But there is the third and intermediate case, of which I think *Fair v. Hunter* was an instance, in which a debtor may be bound in the sense that the obligation is good against him and yet it cannot come into competition with his ordinary and proper creditors, and that is just where the respondents' case fails, because there is no proper *jus crediti* which will destroy the father's power of disposal.

The circumstances in *Fair's* case were that Mr Hunter had a son through whom Fair had lost money, and the father was very anxious to make up to Fair the money which his son had lost. He was not in a condition at the time to do so. He had not any ready money—his money being locked up in Australia—and he was a member of

a firm of Writers to the Signet in Edinburgh under a contract of copartnership by which he had become bound not to enter into any obligation, and he therefore did not wish to transgress the terms of his own copartnership. He entered into negotiations with Fair, and they came to an agreement by which Fair remitted a certain considerable portion of the son's debt, and the father gave an obligation that he would pay the rest when he could. And the father wrote a letter in which he said—"I shall be most happy to pay you, with interest, so soon as I have it in my power by remittances from Australia or otherwise" (24 D. at p. 3). The father died, and an executor was appointed, who proceeded to realise the estate, and the action was brought by Fair for constitution of the debt against the father's executor. The learned Judges held that it was a debt which could be constituted against the executry. But I think they clearly held that it was a debt of what I may call the intermediate kind, because the Lord Ordinary (Lord Kinloch), after giving his views, in which he said that this was not a mere promise which was no promise at all, namely, to pay if he chose, says this (24 D. at p. 5)—"Whether or not the pursuer shall be entitled to rank on the executry funds in competition with other creditors of the deceased is not, as the Lord Ordinary thinks, now the question. Those creditors are not here. No question is or can be raised in this process with them. It will be for the pursuer to consider when he has got his decree what he will do with it, and for other creditors of the deceased and for the defender to consider what effect is due to it as respects any ranking on the estate of the deceased." And Lord Justice-Clerk Inglis says the same thing at the end of his opinion (24 D. at p. 10)—"We are not going one step beyond that in giving judgment in this action. What the executor may have to say as to the condition of the executry estate" (that is to say, whether it can pay or not) "we are not here to inquire. But that there is this legal obligation against Mr Hunter, created by means of these letters, and which we are bound by our decree to constitute against his executry estate, I entertain no doubt, and I do not think it the least necessary to proceed one step further in deciding the present case." Accordingly that judgment merely comes to this, that it was a good obligation as against Hunter, and therefore a good obligation against the free estate which Hunter left in his executry. But then it was not in any way decided that it was a good obligation against the onerous creditors of Hunter if as a matter of fact Hunter died insolvent, which we do not know.

Now here I am not doubting that this would have been a good obligation against the estate of this gentleman supposing he had never paid the sum during his lifetime and had died leaving free executry; and I am not doubting, under the authority of *Fotheringham*, that if a cautioner had been bound along with him, it would have been

a good obligation against the cautioner; but that is a different thing from saying it is a *jus crediti* ranking along with the claims of present creditors in bankruptcy, and upon the doctrines I have examined, that depends on whether the father is or is not maintained in full possession of his funds. I think he is, and I am of opinion that the judgment of the learned Sheriff-Substitute should be recalled and the deliverance of the trustee replaced.

I ought to state, and I think it follows from the judgment, that if the wife chooses to make a claim, which she has not done at present, for the actuarial value of her life interest right to the interest which is due, that would be a perfectly good claim against the sequestration; that indeed was admitted by the learned counsel who appeared for the trustee.

LORD KINNEAR—I agree.

LORD MACKENZIE—The decision in this case turns upon whether the children of the marriage have a *jus crediti* in the sum of £4000 dealt with in the third article of the marriage contract.

This statement of the law applicable to this question I take from the opinion of Lord Moncreiff in the case of *Goddard*, 6 D. 1018, at p. 1023, and from Lord Deas' summary in *Wilson's Trustees*, 18 D. 1096, at p. 1136, which is the law laid down in 1 Bell's Com., 684 (6), and *Herries, Farquhar, & Company*, 16 S. 964. A father cannot secure his children against his other creditors without securing them against himself. He cannot secure them against himself without making such a provision that his own powers of administration or beneficial enjoyment are or may come to be abridged in his own lifetime. It is because the provision in question here fails to satisfy, on any reasonable construction, this condition, that it cannot be regarded as conferring a *jus crediti*. If this fund had been made payable at majority or marriage of the children, even though this should happen in the father's lifetime, or if it had been provided that interest was to run from a term which might happen in his lifetime, the children would then have had a *jus crediti*.

There is, however, no such provision here in favour of the children. We are not concerned in the present case with the interests of the wife, whose provision is of a different character.

So far as regards the rights of the children the father does not appear to me to have tied his hands in any way.

It was argued on the authority of *Fair v. Hunter*, 24 D. 1, that the proper construction to be put upon this clause is that it contains an absolute obligation to pay money, qualified only to this extent that it was only to be paid if and when it should be convenient in a commercial sense to do so. The opinion of the Lord Justice-Clerk in *Fair's* case was founded on to the effect that the death or bankruptcy of the debtor puts an end to all such conditions. The case of *Fair* was however different from the present. As the Lord Justice-Clerk

points out in the concluding portion of this opinion, the question that was there being disposed of was only the constitution of the obligation against the executry estate. Here the obligation is a good one against the father, and will subsist notwithstanding any discharge he may obtain in the sequestration, but it is an obligation that must be construed according to its terms. To construe it as conferring a *jus crediti* on the children in a question with creditors would be to hold that although the father retained full control of the £4000 during his life (except in a question with his wife) the moment he becomes bankrupt his children are entitled to step in and say they are secured. This, in my opinion, they cannot do. The interlocutor appealed against should, in my opinion, be recalled, and the deliverance of the trustee sustained so far as regards the sum of £4000. No argument was submitted to us regarding the sum of £212.

LORD JOHNSTON was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, dated 2nd July 1912, and affirmed the deliverance of the trustee, dated 4th March 1912, in so far as it dealt with the claim for £4000.

Counsel for Mackinnon's Marriage-Contract Trustees, Pursuers and Respondents—Sandeman, K.C.—Normand. Agents—J. & J. Ross, W.S.

Counsel for the Trustee on Mackinnon's Sequestrated Estates, Defender and Appellant—Chree, K.C.—T. G. Robertson. Agents—Carmichael & Miller, W.S.

Tuesday, December 3.

SECOND DIVISION.

TRUSTEES OF ALEXANDER SCOTT'S HOSPITAL, PETITIONERS.

Trust—Administration—Powers of Trustees—Charitable Trust—Nobile Officium—Restriction to Investment in Land—Trust Securities other than Land.

Held that the Court had no power to grant the crave of a petition to its *nobile officium* to invest the prices of certain lands held under a charitable trust in trust investments other than land, in view of the fact that the trust-disposition constituting the trust directed the trustees in the event of a sale to invest the price in other lands.

The trustees and managers of Alexander Scott's Hospital, incorporated under Alexander Scott's Hospital Act 1868 (31 Vict. cap. i), *petitioners*, presented a petition to the Court for authority "to sell and dispose at the price of £17,890, by private sale to the Governors of the North of Scotland College of Agriculture, of All and Whole the town and lands of Crabestone, . . . as the same were possessed by the deceased Mr Thomas Sandielands of Crabestone and his tenants, . . . and to

invest in approved trust investments the balance of the said sum of £17,890."

The petition stated, *inter alia*—"1. That the deceased Alexander Scott of Crabestone, in the county of Aberdeen, by his trust-disposition and deed of settlement, dated 8th June 1824, gave, granted, and disposed to and in favour of certain trustees (all of whom are now deceased, and whose successors in office the petitioners are), for the ends, uses, and purposes mentioned in said trust-disposition and deed of settlement, *inter alia*, his said landed estate of Crabestone. The said Alexander Scott in his said trust-disposition directed that the residue of his estate, including Crabestone, should be applied for the purpose of erecting and endowing a hospital at Huntly, in the county of Aberdeen, for the maintenance, aliment, clothing, and lodging of old men and old women in the said town of Huntly—the said hospital or receptacle to be known, styled, and called by the title of 'Alexander Scott's Hospital.'

"2. That by his said trust-disposition and deed of settlement the said Alexander Scott further provided as follows:—'In case it shall appear to my said trustees above named or those to be assumed as aforesaid, after they have maturely and deliberately considered the matter, and had some experience of the yearly returns and probable increase of value from the wood and otherwise of my said estate of Crabestone, that it is not likely to be such a beneficial investment for the purposes of the mortification as some other landed property, it shall in that event be in the power of my trustees . . . to sell and dispose of the said lands and estate of Crabestone by public roup or private bargain . . . at the best and highest price which can be obtained therefor, and thereupon to grant disposition thereof to the purchaser containing all usual and necessary clauses with obligations of absolute warranty against me and my heirs, and declaring that the purchaser or purchasers shall have no concern with the application of the price, or the conditions, declarations, and appointments contained in these presents; and thereafter my said trustees shall be bound and obliged, as soon as conveniently can be done, to invest and lay out the said residue and remainder of my estate in the purchase of other lands situated in the county of Aberdeen if such can be reasonably had, and failing thereof, in any of the adjoining counties, and shall settle and secure the lands so to be purchased by a deed or deeds for the purposes of the mortification for the said hospital allanery.'

"3. That by 'Alexander Scott's Hospital Act 1868,' the trustees and managers of Alexander Scott's Hospital were incorporated, and further powers were conferred upon them. . . .

"5. That the petitioners have found that the management of the said estate of Crabestone has for some years past been a source of difficulty, and has not been a remunerative investment. . . . In the year 1910 the petitioners were able to