

I have one word to say upon the *second* of these appeals. I regret very much that it has been brought here. I think it would have been much better if the two gentlemen who are the appellants in the second appeal had been content to allow the proceedings to go on in the way in which the Court of Session proposed that it should go on against them. I am afraid it must go on against them. It appears to me, that their position is this : they clearly are not judicial officers, and if they justify themselves for the act of arresting and putting into confinement Mr. Watt, they must do it upon the ground that they acted under a proper and regular order. As long as the order stands it is a perfect justification for what they did, but if the order is quashed, then they will no longer be able to appeal to it as their justification. Now this is a proceeding for the purpose of quashing the order, and for the purpose of obtaining damages supposing it should be quashed.

Now I think at this stage all that your Lordships have to ask yourselves, upon this part of the case, is—Is there a question to be tried? If the allegations are so perfectly idle and absurd that you can say, that there is no question whatever to be tried as to the irregularity of this order, then I should not be at all unwilling to say, that even at this stage of the case we might interpose and say, that it was an idle thing to reduce an order upon which no proceedings for reduction could really be founded. But I am not prepared to say that there is no case to be tried. I think it better to abstain from expressing any view as to which of the two arguments upon the question of notice (which really is the only question to be tried) is the right one, whether there ought or ought not to be notice in this case. The case must go further, and therefore I think it is better to abstain from expressing an opinion, though I have an opinion upon this point. It is sufficient now to say, that it appears to me, that the question is not altogether so vain and so idle as that we should say, that there is nothing whatever to be tried upon that point. I am the more led to that by this reason, that if we were to decide now one way or the other, either that there ought, or that there ought not, to have been notice before the process caption was issued, we should be virtually settling the law, not only for this case, but for the practice of Sheriff Courts in the future. Now I think that it would be a very inexpedient and a very improper thing to do that at this stage of the case without any closed record, and without any power of making any declaration in the order which we should pronounce. We have not now at this stage any power to assoilzie the defenders from the conclusions of the summons. I think, therefore, however one may regret that further litigation should ensue, there is sufficient allegation here to prevent our saying, that there is not a case to be tried, and that the Court of Session are right in saying, that the action must go on against the appellants in the second appeal.

My Lords, I regret that that appeal has been brought here, but as it has been brought here I think your Lordships can do nothing in it but dismiss it also with costs.

Watt, junior, v. Thomson, et al.—*Interlocutor appealed from, so far as complained of, affirmed, and appeal dismissed with costs.*

Ligertwood and Another v. Watt, junior —*Interlocutor appealed from, so far as complained of, affirmed, and appeal dismissed with costs.*

Appellant's (Watt's) Agents, A. K. Morrison, S.S.C. ; W. M. Hacon, Fenchurch Street, London.—Respondent's (Thomson's) Agents, Millar, Allardyce, and Robson, W.S. ; Simson and Wakeford, Westminster.—Appellant's (Ligertwood's) Agents, Tods, Murray, and Jamieson, W.S. ; Burchells, Westminster.

JUNE 20, 1870.

HANS GEORGE LESLIE, Esq. of Dunlugas, *Appellant*, v. GORDON M'LEOD, Esq. of Lochbay, *Respondent*.

Et è contra.

Obligation—Marriage Contract—Provision for younger children—Liability of heir male—*L., the proprietor of an estate, by marriage contract bound himself to convey the estate to himself in liferent, and the heir male of the marriage in fee, also to secure to the younger children of the marriage a sum of £16,000. At L.'s death there was no free executry to pay the £16,000, and the estate was worth only £28,000.*

HELD (affirming judgment), *That the heir male was bound, as representing L., to pay the £16,000 in full to the younger children.*

Obligation—Relief—Mistake of fact—Family arrangement—*L.*, by trust disposition, left £5000 to *M.*, his daughter, and her children, which deed was reduced by *H.*, the heir of the marriage, on the head of deathbed, but *H.* paid to *M.* the same amount on *M.* granting a discharge of all claims on *L.*'s estate. Afterwards it was discovered that *L.* had executed a marriage contract, under which *H.* was bound to pay to *M.* £16,000.

HELD (affirming judgment), That the £16,000 was not exigible until the £5000 was imputed towards payment *pro tanto*, the maxim being, that he who seeks equity must do equity.

This was an appeal from interlocutors of the First Division as to the construction of a marriage contract. The late Mr. Leslie of Dunlugas in 1820 married Mrs. Mary Ramsay or Brebner. There were antenuptial marriage articles, which were afterwards carried out by a postnuptial contract. By this contract Mr. Leslie bound himself to convey the estate of Dunlugas to himself in liferent and the heir male of the marriage in fee, and also to secure to the younger children of the marriage £16,000. Mr. Leslie died in 1856, leaving one son, the appellant, and one daughter, who had married the respondent. The estate of Dunlugas was valued at £28,000, and there was only about £1500 of moveable estate. At the time of the death it was not known that the marriage contract had been entered into, and the deceased Mr. Leslie had left a trust disposition, whereby, among other things, he left £5000 to Mrs. M'Leod and her children. That sum was paid accordingly, but afterwards it was discovered, that there had been a marriage contract, and the heir at law reduced the trust disposition on the ground of deathbed. Thereupon the question came to be, what was the construction of the marriage contract. Mr. M'Leod, as representing his deceased wife, claimed from the appellant payment of the sum of £16,000 in full, on the ground that she was a creditor of the father to that extent, and that the appellant was bound, as representing his father, to pay it. The appellant on the other hand, contended, that he was not liable, or at all events, if he was liable, he was a creditor of his father's estate in the same sense that his sister was, and therefore the proceeds of the estate must be divided in the proportion of £16,000 to £28,000. The respondent having raised an action against the appellant, the Lord Ordinary held, that the true construction was, that Mrs. M'Leod, the sister of the appellant, did not take a preferable right to the appellant, but both were entitled to prove against the father's estate for their respective provisions. On reclaiming note, the First Division reversed this finding, and held, that the appellant was bound to pay the whole of the £16,000 to the respondents. Thereafter the further point was raised, whether, in payment of the £16,000, the appellant was entitled to deduct the £5000 which had already been paid to the respondents under the trust disposition. The First Division held, that the £5000 must be deducted from the £16,000. There was an appeal and also a cross appeal from these judgments.

Sir R. Palmer Q.C., and *Lancaster*, for the appellant.—(1.) As to the appeal *Leslie v. M'Leod*, the interlocutor was wrong. The construction of the marriage contract is, that the appellant was to get the estate and the younger children a sum of money. The word "secure" to the younger children means nothing more than to "pay"—*Goddard v. Stewart's Children*, 6 D. 1018. As both obligations occur in the same deed, one was as binding as the other, and both the heir of the marriage and the younger children were equally creditors of the father. There is nothing to shew, that the one obligation was paramount to the other. While the widow's provisions were made a burden on the estate, there is no similar clause as to the children's provisions. There is no authority expressly in point. In *Dundas v. Dundas*, 1 D. 731, the heritable estate was not conveyed to any third party, but was free, and in *Russell v. Russell*, 13 S. 551, the estate was settled on the heir under the special burden of the sums to the younger children. In *Duff's Convey.* 417, the case of its being the same deed, which gives the provision to the younger children, conveying the estate to the heir is not noticed, which makes all the difference. There being no authority, the principle of decision must be sought for by examining the position of the heir. If the father is bound by contract to convey the estate to the heir of the marriage, this shews that the latter is a creditor of the father, and not an ordinary heir at law. He has a *jus crediti*, and might challenge gratuitous deeds of the father—*Ersk.* iii. 8, 38; *Moncreiff v. Moncreiff*, M. 12,871; *Ogilvy v. Ogilvy*, 16th Dec. 1817, F. C.; or if the estate were sold by the father, the heir might claim the value—*Earl of Wemyss v. Lord Haddington*, 28th Feb. 1815, F. C. All the authorities say, that the younger children, in a question with creditors, have nothing more than a *spes successionis*—*Ersk.* iii. 8, 39; *Bell's Pr.* § 1987; *Goddard v. Stewart*, 6 D. 1023. And the same rule applies as between them and the heir of the marriage who is by contract entitled to the estate. (2.) As to the appeal of *M'Leod v. Leslie*, the interlocutor was right. The parties having transacted as to the £5000 in ignorance of the marriage contract, that sum should be treated as part payment of the £16,000 or other sum which may be due under the latter contract. It would be inequitable to allow the appellant to recover both sums from the respondent, seeing that the

¹ See previous report 6 Macph. 445; 40 Sc. Jur. 229. S. C. L., R. 2 Sc. Ap. 44; 8 Macph. H. L. 99; 42 Sc. Jur. 489.

£5000 was paid under the mutual mistake, that no contract of marriage had existed providing for the same substantial object.

Anderson Q.C., and *Nevay*, for the respondent.—(1.) As to the appeal *Leslie v. M'Leod*, the interlocutor of the Inner House was right. The respondent had no *jus crediti* against his father under the marriage contract, but had merely a right to succeed to the estate as heir under the destination. He was only a creditor of the father to the extent of being entitled to challenge all gratuitous or fraudulent deeds which would frustrate his succession to the estate. When the respondent succeeded to the estate the provision in the marriage contract was fulfilled, and in all other respects he, as heir of his father, was bound to pay his father's debts, including the debt contracted to the younger children. The legal liabilities of heir attached to him—*Ersk.* iii. 8, 50; *Bell's Pr.* § 1916. In *Cunningham v. Hathorn*, 20th Dec. 1810, F. C., and *Earl of Wemyss v. Haddington*, 28th Feb. 1815, F. C., the above doctrine is assumed, for according to those cases the father may, notwithstanding the settlement of the estate on the heir of a marriage, still burden the estate with onerous debts, and also with provisions to younger children by the same or a subsequent marriage, except only where these are excessive. Where the provisions to younger children are contained in the same deed or contract, they must stand on a still better footing as against the heir of the marriage, for they are onerous, and the question of excess cannot arise. The various kinds of heirs are liable only in a certain order for the debts of the ancestor—*Ersk.* iii. 8, 52; *Bell's Pr.* § 1935. And though in this marriage contract there is a difference made in the heir's liability for the wife's provisions and the younger children's provision, yet all that the difference amounts to is only this, that as regards the wife's provisions the respondent was made the primary debtor without relief against other heirs or estate, whereas, as regards the younger children's provisions, he is liable only where there is no other heir or estate heritable or moveable to satisfy these provisions. According to the events which have happened, there is now no practical difference between the two sets of provisions as regards the heir's liability. It is a fallacy to assume, that the heir and younger children are competitors, and stand in the same relative position towards the heir. The essential characteristic of the heir's position is, that he alone is entitled to the estate, but he cannot protect it against the claims of the younger children except by paying their debt. He takes the estate just as a residuary legatee takes what is left after paying all claims against the *universitas* of the deceased's assets. It is well settled, that the younger children in a marriage contract are creditors of the father, whereas the heir takes his succession as heir with the legal incidents of an heir—*Ersk.* iii. 9, 22; *Bell's Pr.* § 1987; *Wylie v. Black*, 16 D. 180; *Dundas v. Dundas*, 1 D. 731; *Advocate General v. Trotter*, 10 D. 56; *Maxwell v. Inland Revenue*, 4 Macph. 1121; *Russell v. Russell*, 13 S. 551. If the appellant is not liable as heir of the marriage, he is liable as heir of line, which was the real character in which he took and was infeft in the estate—*Bell's Pr.* § 1920; *Ayton v. Ayton*, M. 9732; *Earl of Fife v. Duff*, 6 S. 698. By his service he took the risk of the debts upon him, and his ignorance of the extent of the risk is no defence. (2.) As to the appeal, (*M'Leod v. Leslie*,) the interlocutor was wrong. The appellant, at the time he granted the discharge, knew of the existence of the marriage contract, and he did not execute it under any mistake. The trustees are bound to keep the bond until it be set aside in a competent action. A proper action should be brought for that purpose. The £5000 provision could only be reduced under the head of essential error, and it might be satisfactorily proved in a competent action, that there had been no essential error; the provision was a voluntary act of a competent testator, and the creditors in the two provisions are essentially different, so that one cannot be set off against the other.

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, the facts of this case are a little complicated, and the point of law here raised has been argued before us with great ability and in great detail; but I confess it appears to me, that the whole determination of the case rests (as regards the original appeal) upon the construction of a single sentence of the settlement which was executed by the settler in the present instance, and that the construction of that sentence may be arrived at in a very few words.

Now the facts are simply these: Mr. Leslie, who appears to have been a wealthy gentleman, on his marriage in March 1820, executed an antenuptial contract, which was implemented soon afterwards by a fuller and more complete instrument following the terms of the contract. That contract is the contract we have to consider. His wife died before him. Under the contract his wife would have taken a liferent, and also a certain sum of money was charged on her behalf. I need not any more deal with her interest in the matter. She died before him. He died on the 4th March 1856. Then, upon his death, the present appellant in the original appeal, Mr. Leslie, served himself as heir general. It so happened that at the time of the death of Mr. Leslie the settlement was not forthcoming. It is not necessary for us, I think, to enter into any detail as to whether or not it was kept back by Mr. Leslie, the father, or under what circumstances it was not forthcoming, because, although in the proceedings in this case some question was at one time raised as to that matter, and an attempt was made to suggest fraud on the part

of the present appellant, Mr. Leslie, that part of the case seems to have been distinctly waived, and all probation of it renounced. I therefore simply state, that the settlement was not forthcoming. The father made a testamentary disposition by which the son would take the estate of Dungulas, his family only consisting of a son and a daughter; and by the testamentary disposition he provided that a sum of £5000 should be paid to the daughter, and subject to that the estate was to go to the son. This disposition, however, was invalid according to the law of Scotland, as being subject to the infirmity of a deathbed disposition. It could not therefore be carried into effect. The son was entitled to reduce it, and he did reduce it; but at this time, the settlement not having come to his knowledge, as he said, and as I think we are bound at the present time to hold, he entered into an engagement with Mr. M'Leod, who had married his sister, the only other child of Mr. Leslie, in which, expressing his desire to fulfil the intention of his father as indicated by his deathbed disposition, with reference to the interest of his sister, he executed a bond for securing £5000 to certain trustees, who were to hold it for the benefit of Mrs. M'Leod for her life, and afterwards for the benefit of her children, in the same manner as had been provided by the deathbed disposition. After that had happened the settlement itself was discovered. Mrs. M'Leod died before the original proceedings were taken by Mr. M'Leod. Mr. M'Leod took proceedings upon the settlement itself to have handed over to him in right of his wife that which by the original settlement of 1820 was provided for the younger children of the marriage. Now, having shortly stated the facts of the case, I will proceed to state what the settlement of 1820 was. There is provision made in this manner. It is immaterial whether I take from the original articles or from the ultimate disposition itself, because in effect the one conforms sufficiently to the other to make it quite immaterial which instrument one cites. The complete instrument was in this form: It was matrimonially contracted and agreed between the spouses, that first Mrs. Leslie's property having been made over to her husband, he gives her the liferent which I spoke of, and he secures to her a sum of money also, and the provision there made is distinctly expressed to be a charge upon the whole property of the testator. The charge there is specifically made, and that point has been relied upon in some respects as being a circumstance that ought to lead us to a construction with reference to the £16,000, which was afterwards provided for the younger children. Then what does he proceed to do afterwards? He binds himself to convey Dunlugas to himself, and the heir male of the marriage in fee; then also to secure to the younger children of the marriage the sum of £16,000; and in the event of there being no heir male, that sum was to be increased to £20,000; then having recited the marriage articles, which were to that effect, he disposes and conveys I may say accordingly. I need not go into more detail as to that settlement. The whole of this case turns upon the part I have read.

Now the circumstances which happened were these; At the time of this settlement being executed, Mr. Leslie had considerable property. He had considerable personal estate, as we should call it in this country, besides this estate of Dunlugas which he possessed; and in having made this instrument in the form in which it is made, the question that has arisen is, whether or not, it having happened at his death that there was no property out of which the £16,000, which he had engaged should be paid to the younger children of the marriage, could be paid other than the Dunlugas property itself—whether, under the true and proper construction of this settlement, Mr. Leslie, the son, the present appellant, was entitled either to retain Dunlugas free of all claim in respect of the £16,000, or if not, whether he was entitled to retain it in such a manner that an apportionment should be made between the value of his estate and the sum of £16,000 to be paid to the younger children, in order that the intention, as it was alleged, of the instrument might be completely effected, the alleged intention being, that the son was to have the estate as much as the younger children were to have the £16,000.

Now really the whole question turns upon what the effect of the law of Scotland is upon an instrument, by which, on the one hand, the person executing it engages to make over to himself and the heir male of the marriage in fee, and does afterwards effectually make over to himself and the heir male of the marriage in fee, the real estate, and, on the other hand, by the same instrument, simply creates a debt of £16,000 not specifically charged upon any property whatsoever.

It appears to me, that, looking to the authorities which are cited, and looking to the absence of authorities in any way contravening that view, one must necessarily come to the conclusion which was arrived at by the majority of the Judges in Scotland, namely, what was engaged and agreed to be made over to the son is simply the inheritance of the estate, the father remaining heir of the estate, and having the estate in him, and the son coming into possession of it, simply as heir male of the marriage, and by virtue of his quality of heir. If that be so, then it would appear beyond all doubt, that the heir of provision is liable to the burdens that may be incident to the circumstance of his becoming interested in the estate simply *qua* heir, that is to say, he must bear the burdens which have been created by his father, and then, amongst other things, he would have to bear this burden or debt of £16,000.

The whole gist of the argument which has been raised in this case is this—that the son, on

the one hand, and the younger children, on the other, must be taken as equally under this instrument,—a disposition made as we should say for consideration—an onerous disposition,—and that both of them stood in an equal character in that respect, and that, therefore, it was impossible to predicate of the son, although he took this property as heir, that he was intended, by the true intent and effect of the instrument, to take it subject to the payment of £16,000, which might exhaust the whole value of the estate, and deprive him of any benefit ; that, as the eldest son of the marriage, it was at least intended, that he should not have an inferior benefit to any of the younger children, and that it could not have been intended, that the younger children should deprive him of the whole benefit of the instrument.

It seems to me, that the fallacy of that reasoning is simply this: We were appealed to in argument and in the reasoning of the case upon this ground: It is said—It is impossible to conceive, that Mr. Leslie intended his son to have nothing, or next to nothing, in an event which might happen, and that he intended his other child, the daughter, to have the whole benefit of the estate. That is reasoning from the circumstances which have afterwards happened. I do not suppose, that either the one thing or the other was present to the father's mind at the time of the instrument being executed. All that he did was this: He said, My son is to take not as the immediate disponee of the estate, not even by the mode of my reserving to myself simply a liferent ; but he is to take as my heir, and having made that provision he says—My younger children are to take £16,000. As to what might actually come to one child or other, that of course was a matter entirely incapable of being foreseen. It might have been, if there had been eight younger children, that each would have taken £2000, but as there was only one younger child, the whole £16,000 devolved upon her. As regards the position that this gentleman would be in, taking as heir, it appears very probable, that it was in Mr. Leslie's contemplation, that he himself should remain a man of wealth, as he appears to have been at the time when the instrument was executed, not foreseeing then, that the estate which he destined for his son would necessarily be subject to the burden of his debts, however they might be occasioned ; and of course if it were subject to the burden of his debts which is created by this very instrument, because there is no indication of intention whatever upon the face of the instrument, that that debt of £16,000 was to be subject to any other condition than his other debts—although, of course, as regarded other creditors upon the estate, this instrument might not prevail, yet as between the younger children and the future heir of the marriage, there is no indication whatever of any intention that the heir of the marriage is to take the property on any other condition than as heir, and he taking as heir, there is nothing whatever in the instrument saying, that he is to be exempted from the ordinary conditions attached to heirship.

The whole position is this: The argument is, that there is an equal *jus crediti* between the son and the younger children. Be it so, *jus crediti* as to what? A *jus crediti* of the son to have the estate as heir subject to all the conditions of the estate which the heir takes, and a *jus crediti* of the younger children to take the £16,000. Each is to have the property assigned to them. And it is only the circumstances which have since occurred which render it unfortunate, that the provision assigned to the son, subject to this condition, should be diminished in the manner in which it has been diminished by the payments necessary to be made of the debts. There is no apparent inconsistency, as it seems to me, in the provisions.

For that reason I cannot arrive at the conclusion at which Lord Deas arrived, that you are to make an apportionment between the son and the daughter, looking at the value of the estate on the one hand as £28,000, and the value of the provisions for the daughter as £16,000, and then saying, that as in consequence of the failure of other means of the testator the son is incapable of taking the whole property free from debts, there should be a just apportionment made between them. I am at a loss to find anything upon the face of the instrument leading to that conclusion.

The whole case seems to me to be fairly and reasonably concluded by a single remark made by Lord Neaves (and the other learned Judges make remarks of a similar character), in which he says—“I think this is a great point in the case to be considered, for in reference to all the views that may be taken of it, the question seems to be, whether these parties are *in pari casu*, having the same claims, and the same character in this supposed competition, or whether their characters are essentially different, and whether the result of that difference is to lead to the conclusion that we are now come to. The defender, the heir male of the marriage, had a *jus crediti* under this antenuptial deed ; but what was that right? He had a right to be substituted to his father in the succession to the landed estate. He had a right as disponee ; he had not a right to an *inter vivos* conveyance of it, so as at once to enter into possession, but he had this right, that his father should take the titles to that estate to himself in the first instance, and to the heir male of the marriage as his heir substituted to him. That was the right of the eldest son. He had a right to be his father's heir, and a right to be liable for his father's debts” (we should call that rather a duty or a burden than a right). “That was the nature of his right, for every man that has a right to be another man's heir has a right or a burden to be liable for his debts. He must take the passive elements and characteristics of the character just as he takes the active

ones. The right of the other party was not a right of that kind, it was a *jus crediti* in so far like the eldest son. I do not say they had equally a *jus crediti*; they had both a *jus crediti*, each of its own character, but the children's *jus crediti* was that of pecuniary creditors—pecuniary creditors for a sum of money to be paid to them at a postponed date, viz. the death of the father. They were pecuniary creditors; these two obligations were essentially different in this way, that the obligation or *jus crediti* of the eldest son was an obligation *ad factum præstandum*. It was an obligation affecting the titles of this estate, so that the succession should go down to him as heir; that the estate should be so left, that he would take it up by service by that solemnity in law which we know as the *aditio hereditatis*, and by so doing become liable in all his father's onerous obligations *ad valorem* of the estate."

These observations seem to me to conclude the whole case, and if one were to put the analogy, as one is perhaps too much tempted to do, to English cases, in order to bring it home to the minds of such of us as are more conversant with English than with Scotch law, it is really simply a case of a marriage settlement by a man who is very wealthy, and had a large personal estate at the time of the settlement, and who engaged, that he will at the time of his death, having then, I will suppose, two or three hundred thousand pounds at his disposal, leave to each of the younger children of the marriage a legacy of £10,000, or as the case may be, and that he will leave to the eldest son the residue of his estate at the time of his death. The eldest son would have that which, at the time when the settlement was made, appeared likely to be a far greater share than was secured to the younger children, but he might, in consequence of events which happened afterwards, find it reduced to something very considerably below what was provided for the younger children, or perhaps absolutely to nothing.

As regards the authorities, I do not enter upon them, because there is no authority which justifies the appellant's conclusion when he says, that he, coming in as heir, is entitled to be liberated from the consequences of being heir. On the other hand, there are text writers supported by authorities so far as they go, upon the points to which I have adverted, though this very precise point does not appear to have occurred according to the authorities. Yet Erskine, I think, says, if a person wished to secure the children against his own acts, or if those who advised a lady wished to secure the children against the acts of the father, I think a possible way of doing that is to make the father a liferenter, or to engage to infest the eldest son of the marriage in such a way as to make over to him the benefit of the estate, which he shall not take as leaving the father heir, but shall take himself by way of succession. If that is done, then of course the eldest son becomes absolutely entitled to the interest, not subject to any of those conditions of succession which affect him here. Here the whole question before us is whether or not one, who is, for example, declared to be entitled by an instrument for onerous causes is to be entitled to come into succession to his father, and to say, I will come into that succession in a different character from that in which the others come in, because the charges which are sought to be made payable out of my property are charges created by the same instrument, and therefore are not of a higher character or position than my own, which made over to me the succession. I think it would all depend upon what it is that is made over to him, and when you once arrive at a conclusion as to what it is that is made over to him, I think the case is fairly concluded, and that the result is absolutely necessary, viz. that this debt falls to be paid necessarily out of the provisions thus made for the son by way of succession.

I have carefully looked at the authorities referred to, both in the case and in the judgment, but I do not find anything to justify the view which Lord Deas seems to have taken of the case, viz. that this engagement to place the son as heir was nothing more than an indication of the person who was to take, and that it in no degree indicated the liability. It appears to me, that the describing him as the heir of the marriage sufficiently described him in a different manner from the younger children.

Then the rest of the case is this: There is a *cross appeal* which I must refer to. Upon the settlement being discovered, or rather upon a copy of it being discovered, (for the original to this day is lost or mislaid,) Mr. M'Leod, the respondent in the first appeal and the appellant in the cross appeal, instituted a proceeding, in which he, in the first place, wished to have a declaration of the existence of this settlement, a declaration proving the tenor of this settlement. That accordingly was regularly done, and the instrument now exists before us by virtue of that decree. It is established as an instrument, according to that tenor to which I referred in dealing with the instrument itself. Well, that having been done, he also insisted on having the £16,000 paid. But then, that being the case, on the other hand, the appellant in the original appeal asserted, that there was nothing payable by him, and that he was entitled to hold Dunlugas, which controversy I have already adverted to, and, so far as my opinion is concerned, disposed of. He said further—If you insist upon that payment of £16,000, you cannot retain the £5000 which I made over to you in consequence of my father having, by a disposition which was invalid according to the law of deathbed, indicated a desire, that that sum should be secured to my sister, and which sum of £5000 I also made over to you in entire ignorance on my part, as well as on your part, of the existence of the settlement. That £5000 must be deducted as so much money

paid from the £16,000. The learned Judges in the Court below were unanimous, (as every person who hears the case must be,) that that is the true justice to be administered between the parties. I should add, that the £5000 being made over, a release was executed by Mr. M'Leod of all other rights whatsoever, which release would discharge the whole £16,000. It is impossible to allow Mr. M'Leod to get rid of the effect of that release, which is part of the proceeding which he desires to achieve in his action, without at the same time giving up the £5000, which was the consideration for the execution of the release. The learned Judges below appear to have some little difficulty as to the best mode of effecting this manifest and clear justice, but I think they have effectually achieved it by holding, that although Mr. M'Leod may have an interlocutor decreeing payment of the £16,000, he shall not be paid the whole sum, but that he shall be paid only the difference between the £16,000 and the £5000 which has already been received by the trustees of the settlement of his wife; that he shall not receive the remainder until and unless he procure a release by the trustees of that £5000. He says—That it is hard upon me. I have not power or authority over the trustees of the settlement to make them grant a release. But then the answer to him is this: We cannot assist in relieving you from the release which you have given to Mr. Leslie except upon the terms of procuring a release to him, on the other hand, in respect of the £5000. It appears to me, therefore, that in both cases the decisions complained of are just and right, and ought to be affirmed; and that in both cases the appeal ought to be dismissed with costs.

LORD WESTBURY.—My Lords, this is a case of an interesting nature, as illustrating the difference between the jurisprudence of Scotland and of England with reference to real estate. It tends to shew, what is otherwise abundantly clear, that property in land is not to be determined or regulated by any abstract rules of justice, but that it depends only on the positive institutions of the country, and that by those institutions the title to property in land, its ownership and enjoyment, must be regulated.

Now here we have an antenuptial contract expressing in a very few words an engagement by the intended husband, that he will settle the estate to himself, and the heir male of the marriage in fee. That antenuptial contract being an agreement, if it had come to be construed by English law, it is probable, that a Court of Equity would have expounded the words "the heir male of the marriage," into "the first and other sons of the marriage." And the sons of the marriage under the proper limitation for the purpose would have taken as purchasers absolutely in remainder expectant on the death of the father, and expectant on the death of the elder sons in succession, without having barred the entail. They would have taken, therefore, purely as singular successors, and each son would have been wholly exempt from the obligation of the father, the settler. The reason for that is plain, because marriage is the highest consideration known to the law, both in Scotland and in England. The sons, therefore, would have become entitled precisely as if they themselves had been purchasers, or singular successors to the father, who would have been reduced to the character of tenant for life only. The same form of words is followed in a postnuptial contract, and supposing it had occurred in an English conveyance passing the fee simple, probably the effect would have been, that the words "heir male of the marriage" would have been held to be equivalent to the words "heir male of the body of the father, begotten of his intended wife," which would have been a limitation in special tail. That probably would have united with the father's life estate, and would have given the father an estate tail corresponding to that limitation. But in Scotland it is entirely different. It is said, that the heir male of the marriage has a *jus crediti*, that is, a right by contract to the thing to be given to him. But when you come to examine the meaning of the words, it seems to be clear, that, according to the law of Scotland his father cannot by any gratuitous gift, much less by any fraudulent gift, deprive him of his right to receive the estate in the capacity of heir male of the marriage. And it appears to be clear, that the words "heir male of the marriage" are nothing in the world more than the description of the heir who takes *ex provisione*. The heir has a right to have the estate preserved from any gratuitous alienation; but taking it as heir, he takes it as an inheritance, and there is involved in the character of heir this consequence also, that he must take subject to the onerous debts and obligations of the ancestor. He takes, therefore, in a very peculiar manner. His *jus crediti* does not amount to an absolute obligation for value; but it does amount to a title that deprives the father of the right of defeating it otherwise than by onerous obligation. Probably, though it is unnecessary to consider that, it leaves the father at liberty to defeat it by any obligation contracted in pursuance of such natural and moral duty as the obligation of providing for a child, or of granting a jointure to a widow. That being the right of the heir, there could have been no dispute that the heir would have been liable to pay this sum of £16,000 if it had been the result of an ordinary transaction or contract between the father and a stranger for valuable consideration.

That being the state of the law, about which there can be, I think, no doubt whatever, it appears to have occurred to the mind of these parties and also to the mind of the Lord Ordinary, that possibly the case of the children might be taken out of the character of onerous obligation, seeing that the engagement in favour of the children is contained in the same instrument that contains

the engagement in favour of the heir, and, therefore, it was said, that the *jus crediti* of the one must be in every respect equal to the *jus crediti* of the other. If you consider the heir as entitled to the estate by that species of contract, I consider the children as entitled to the money by the same description of contract. They necessarily compete with one another. There is a co-equal right, and it would therefore lead to the notion, that the subject should be parted rather than that the subject should be liable to be altogether swallowed up by the one to the entire detriment and loss of the other.

That view of the case appears to have struck the mind of the Lord Ordinary, and to have been received and embodied by him in his interlocutor. But in reality it involves a fallacy, because, when you are speaking of the *jus crediti* of the heir, you substitute, for his inheritance and right of heirship to which that *jus crediti* leads, the estate itself, and by that fallacious substitution of one subject of right for another subject of right, you come then to the conclusion, that the heir is entitled, under the contract, to the estate, and that the other children are entitled, under the contract, not to a charge upon the estate, but to a provision by the father. Now that is not so. It is a technical distinction, but in reality it is a distinction which is essential to be preserved in order to preserve the distinctive view of the law of Scotland. The *jus crediti* of the heir is in the character of heir, and it is a right to receive the estate *eo nomine et eo titulo*. He takes the estate in it, it is true, but he takes it as an inheritance. He takes the inheritance, it is true, by virtue of the engagement, but when he takes the inheritance by virtue of the engagement, he takes it *ex provisione patris*, and he becomes, therefore, in the eye of the law, what is properly denominated *hæres ex provisione*. That is a more favoured class of heir, but it is still as heir. And what he takes he takes *nomine et titulo hæredis*, and whatever obligation the law casts upon that inheritance must be fulfilled by him. For the obligation contained in the settlement is exhausted, and the settlement is *functus officio* as soon as the estate is secured to devolve on the heir of the marriage *nomine et titulo hæredis*. Then the law attaches all the consequences, and it is a mistake to suppose that they come from the contract. They come from the law. The *hæres ex provisione* is liable to onerous obligations; he is liable in the last resort, and all the estates taken by the heir of line of the father are to be discussed, and applied, in the first place, before you have resort to that estate which vests in the heir *ex provisione*. But that is a consequence of the law, and you cannot exonerate the person who fulfils the character of *hæres ex provisione* from these liabilities of the inheritance. It was therefore (with great respect I say it) a mistake on the part of the Lord Ordinary to say, that the heir of the marriage was entitled to the estate as an inheritance. He was entitled to be clothed with the estate as heir; he then becomes a mark for the liabilities of the law, and the law fastens on him those liabilities which, for the want of other assets to answer the onerous obligations of the father, it calls upon him to answer.

Then it is said the eldest son of the marriage will be in a less favourable situation than the daughter, because the daughter no doubt may take by virtue of the onerous obligation of the father. But, as I have already said, the daughter takes under the antenuptial contract, and takes therefore under the provisions to the children of the marriage, and the provision made to them is in every respect of the term an onerous obligation.

The state of the law of Scotland, therefore, is this, that as the heir takes in the quality of heir, he takes subject to the legal responsibility, inasmuch as, his father having no other property than his estate of Dunlugas, there is a liability to pay the portion provided; and although that consequence is one that we may regret when you look at it from a natural and moral point of view, yet it is the result of the conclusions of the law as established, and it must therefore be submitted to without any attempt to evade it, or to escape from it.

It is plain, therefore, to my mind, that the appellant in the original appeal must pay the £16,000 so far as the estate will extend. I should have thought, that the children would be satisfied with that without attempting to enforce a claim which is contrary to every principle of moral equity. It is quite clear, that when this settlement was undiscovered, there was an arrangement made by which the heir of the marriage advanced £5000, which, by the assent and request of the husband of the daughter who would have been entitled to her portion, was settled upon the children of their marriage. That was in every sense of the words, therefore, a payment of the husband, and now, contrary to everything that a proper sense of duty would dictate, there is a desire on the part of these parties not only to get hold of the £16,000, but to get that £5000 *plus* the £16,000 without including that in the payment. Fortunately they cannot get that without coming to the Court of Session to have a release given by the father, who was entitled to the £16,000, set aside, and then the universal principle of justice and duty intervenes, and says that you shall not have equity unless you will do equity; you shall not have the release that stands in the way of your recovering the £16,000 set aside, unless you are willing to do that which plain justice dictates, and to have the £5000 imputed to the £16,000 as part payment. I have no doubt, therefore, that the Judges in the Court below arrived at a correct conclusion, and I must therefore submit to your Lordships that it be affirmed.

It will be for you to determine how we are to deal with the costs of that cross appeal, which contradicts every proper feeling, and in which the appellant comes here with the hope of

claiming £5000 in addition to the £16,000. I therefore think the appeal ought to be dismissed.

LORD COLONSAY.—My Lords, I think it quite unnecessary to go again over the points which have been so fully and clearly stated by my two noble and learned friends. They have stated precisely the views which I entertain on this case. Therefore I merely say I concur in the judgment proposed to be pronounced.

LORD WESTBURY.—My Lords, of course we affirm the interlocutor so far as it relates to the first appeal. In that respect, therefore, the appellant fails. We also affirm the interlocutor in regard to the cross appeal; and in that respect the respondent in the first appeal will fail. Now, the costs are so blended and intermingled, that although your Lordships' general rule is, that costs always follow the event, yet in this particular case perhaps it may be best, in order to avoid that complication, if your Lordships come to the conclusion to dismiss both appeals without costs.

Interlocutors complained of in original appeal affirmed, and appeal dismissed without costs; interlocutors complained of in cross appeal affirmed, and cross appeal dismissed without costs.

Appellant's Agents, J. Knox Crawford, S.S.C.; Crosley and Burn, London.—Respondent's Agents, H. and A. Inglis, W.S.; Martin and Leslie, Westminster.

JUNE 28, 1870.

THE CALEDONIAN RAILWAY COMPANY, *Appellants, v.* SIR WILLIAM H. G. CARMICHAEL of Skirling, Bart., and Others, *Respondents.*

Lands Clauses Act, 8 and 9 Vict. c. 19—Compensation for Minerals—Verdict of Jury—Successive Claims—Interest—Action—*In a Special Railway Act it was provided, that whereas the railway passed over lands of C., under which minerals were found beyond the value of the surface land, the company should pay the value of the stone, of which the company should prevent the working, and the extent and quality of the stone so to be purchased should be ascertained in the usual way when and so often as a certain length of rock had been worked up to the railway boundary.*

HELD (reversing judgment), *That C. was entitled from time to time, when the requisite amount of stone was worked, to make his claim, and that he had no right, in the first instance, after the Act was passed to claim for the whole stone.*

HELD FURTHER, *That where delay occurred in assessing the sum due from time to time, the jury or the Sheriff could not give interest on the sum fixed as the value at an antecedent time.*

HELD FURTHER, *That the Court of Session had no jurisdiction to entertain an action for the value of the stone from time to time to be paid for, or for interest alleged to be due on such value when ascertained.—(LORD COLONSAY dissentiente.)*

This was an appeal from the judgment of the First Division of the Court of Session. The appellants were incorporated by Act of Parliament in 1845, and their Act of Parliament provided, that whereas the railway passed over the quarry field of Hailes, belonging to the respondent, the company would, besides paying for the surface of the land, pay also the value of the whole stone under the surface of the land to be taken, which the company should prevent the respondent from working; provided, that the value of the stone should be payable by the company from time to time, when and as often as a face of rock at least 130 feet in length should be worked up to the north or south boundary of the railway, such payment to be only to the extent of the value of the stone opposite to such face. When the railway was constructed, the company paid the price of the surface of the land, but not the value of the stone. Soon afterwards, the quarry being worked up close to the railway, a correspondence took place, and the company intimated, that they did not wish the quarry to be worked beyond a red line, drawn on a map shewing the site, and that as soon as 130 feet of rock was worked up to the red line, they would be ready to arrange for payment of compensation. In 1852 a face of rock 250 feet in length had been worked, and Sir Thomas Carmichael, the respondent's father, commenced proceedings to get the value of the stone ascertained. Some of those proceedings proved abortive, but ultimately a claim of £33,013 being made, the company made a tender of £7005 in full of all claims. This offer was not

¹ See previous reports 6 Macph. 671; 40 Sc. Jur. 347. S. C. L. R. 2 Sc. Ap. 56; 8 Macph. H. L. 119; 42 Sc. Jur. 494.