

latter gave birth to a still-born child, and during her confinement the defender showed the greatest solicitude—went himself for a doctor, and paid his fees. He concealed the fact of the birth from the girl's parents, who lived in the same town, and retained her in his service. *Held* that the wife was entitled to decree of judicial separation.

This was an action of separation and aliment, at the instance of Mrs Waldie or Nisbet against her husband, on the ground of his adultery with his maid-servant Maria Court. A proof was led before the Lord Ordinary (ORMIDALE). It appeared from the evidence that the pursuer and defender had been living apart under a voluntary agreement of separation for some years past. The defender had only one servant, Maria Court, who lived in the house along with him and his two sons. The only witness who saw any improper familiarity between the defender and Court was Mrs Williams, who came once a week to assist in cleaning the house. The other evidence was to the effect (1) that Court was delivered of a still-born child in the defender's house on 15th October 1869; (2) that the defender showed great solicitude during the illness—went himself for the doctor, and paid his fee; (3) that although Court's mother and stepfather lived in Edinburgh no communication was made to them by the defender, who still retained her in his service.

The Lord Ordinary pronounced decree of judicial separation, reserving the amount of aliment for which the defender should be found liable.

The defender reclaimed.

The SOLICITOR-GENERAL and MANSFIELD for him.

WATSON and HENDERSON in answer.

The Court unanimously adhered.

Agent for Pursuer—William Mitchell, S.S.C.

Agent for Defender—Robert Mure, S.S.C.

Thursday, June 30.

SIR LEOPOLD ARTHUR, PETITIONER.

*Antenuptial Settlement—Alienation—Reasonable Provision—Vesting.* By an antenuptial marriage contract “the said Charles Montolieu Burges binds and obliges himself, and his heirs, executors, and successors whatsoever, to settle and secure, and for that purpose to take the rights and securities of the just and equal half of all lands and heritages, and moveable goods and effects, debts and sums of money, and in general of all real and personal estate, whether in Scotland, England, or elsewhere, already belonging to him, or which he shall conquest and acquire or succeed to in fee-simple during the subsistence of the said intended marriage, to or in favour of himself in liferent, and to the children of the said intended marriage in fee.” *Held*—on a construction of the deed—(1) that Burges remained absolute owner of his estate during his life, with every privilege of proprietorship, except that he could not prejudice the rights of his children's succession by gratuitous alienation, whether by deed *inter vivos* or disposition *mortis causa*; (2) that he had a right to settle a portion of his estate on his wife and children by a second marriage, provided that the provision was reasonable, and that he had no

other fund available for the purpose; (3) that the right of the only child of the marriage, under the marriage-contract, had not vested at his death (which took place before that of his father), and consequently was not carried by his *mortis causa* disposition.

This was an Amended Case, remitted by the High Court of Chancery for the opinion of the Court of Session, in petition of Sir Leopold Arthur and another.

In 1815 Sir Charles Lamb, a domiciled Englishman, now deceased, intermarried with Lady Montgomerie, widow of the eldest son of Hugh Earl of Eglinton, and in contemplation of this marriage a marriage-contract was entered into between the parties, containing the following clause:—“In contemplation of which marriage, the said Charles Montolieu Burges binds and obliges himself, and his heirs, executors, and successors whatsoever, to settle and secure, and for that purpose to take the rights and securities of the just and equal half of all lands and heritages, and moveable goods and effects, debts and sums of money, and in general of all real and personal estate, whether in Scotland, England, or elsewhere, already belonging to him, or which he shall conquest and acquire or succeed to in fee-simple during the subsistence of the said intended marriage, to or in favour of himself in liferent, and to the children of the said intended marriage in fee; but declaring that it shall be in the power of the said Charles Montolieu Burges to divide and apportion the said half of his means and estate hereby provided among the said children of the said marriage in such shares and proportions as he may think proper; or failing such division by him, then it shall be competent to and in the power of the said Mary Lady Montgomerie, in case of her surviving him, to divide the same as aforesaid; and failing any of these divisions, then the said means and estate shall fall and belong to the said children equally, share and share alike.”

The only issue of the marriage was Charles Montgomerie Lamb, who survived his mother. He married in 1842, and died in 1856, leaving issue. By his last will he appointed Archibald Lord Eglinton and others his trustees, and to them he left all his means. In the year 1859 the said Archibald William Earl of Eglinton and Winton (since deceased), and the plaintiffs Sir Frederick Leopold Arthur and Henry Danby Seymour, as the surviving executors and trustees of the will of Charles James Savile Montgomerie Lamb, in accordance with the leave for that purpose given to them by the said order of the 7th day of July 1859, filed their bill in Chancery as plaintiffs against the said Sir Charles Montolieu Lamb, praying, amongst other things, that the defendant thereto, the said Sir Charles Montolieu Lamb, might be decreed specifically to perform the said obligation or stipulation on his part, contained in the said antenuptial contract of the 30th day of January 1815; and that to such extent as the said obligation or stipulation might be then incapable of specific performance or execution, the plaintiffs in such suit might be declared to be entitled to compensation, or a full equivalent in the way of damages, and that the said defendant Sir Charles Montolieu Lamb might be decreed to pay or make good the same accordingly. Pending this suit, Sir Charles died, leaving his widow Dame Frances Lamb his executrix, and she became a defendant in the suit. In 1867 Vice-Chancellor Malins re-

mitted to the Court of Session for the purpose of ascertaining the construction and effect of the stipulation contained in the marriage-contract of 1815.

The case was remitted back to Chancery for amendment, and now came again before the Court in the present shape.

It was contended by the plaintiffs and defendants in the Chancery suit, other than Dame Frances Lamb—

"1. That the obligation undertaken by Sir Charles Montolieu Lamb was one which, by the law of Scotland, he was bound to perform specifically, and that he could have been compelled during his life to perform it at the suit of the child of the marriage, to wit, the said Charles James Savile Montgomerie Lamb, whatever might be his rights over the property when settled in terms of the contract of marriage.

"2. That having regard to the terms of the obligation to take the rights and securities of the property in question to himself in life, and the child or children of the marriage in fee, to the extent of one-half, and to the specific power of distribution conferred upon him, the father's right was restricted to that extent to a life interest only, and that he held the fee on a fiduciary title for the child or children of the said marriage.

"3. That after the dissolution of the said marriage by the death of Mary Lady Montgomerie, the only child by the said marriage would have been entitled to insist on implement of the obligation in his own name as heir, it being then clear that there could be no other children entitled to share with him.

"4. That in any view Sir Charles Montolieu Lamb could not defeat the obligation in the marriage-contract otherwise than by an onerous deed; or at least he could not grant provisions to his second wife beyond a reasonable amount.

"5. That according to the law of Scotland these questions are not affected by the matrimonial domicile.

"6. That the rights provided by the said contract of marriage vested in the said Charles James Savile Montgomerie Lamb from the moment of his birth, and on his death were transmissible by any *mortis causa* deed executed by him, so expressed as effectually to include them, and failing such deed, would descend to his representatives *ab intestato*.

"7. That if the rights provided by the said contract did not during the lifetime of Sir Charles Montolieu Lamb vest in the said Charles James Savile Montgomerie Lamb, they did, upon the death of the said Sir Charles Montolieu Lamb, vest as to the real estate in the heirs, and as to the personal estate in the next of kin, of the said Sir Charles Montolieu Lamb.

"8. That so far as the moiety of the real and personal property aforesaid affected by the said antenuptial contract neither is nor was subject to the trusts of the said will, such moiety is inheritable or descendible property belonging to the widow and children respectively of the said Charles James Savile Montgomerie Lamb, according to the laws of England which govern the devolution of real and personal estate; and to such extent as the said obligation or stipulation may be now incapable of specific performance or execution, that the plaintiffs and the defendants, other than the defendant Dame Frances Lamb, are entitled to compensation, or a full equivalent in the way of damages, for the default or neglect of the said Sir

Charles Montolieu Lamb in not complying with the terms of his said obligation during the lifetime of his son, the said Charles James Savile Montgomerie Lamb, or during his own life.

"9. That the following amongst other transactions of Sir Charles Montolieu Lamb were, according to the law of Scotland, gratuitous acts, *in fraudem* of the said antenuptial contract, to wit— (1) The arrangement entered into by the said Sir Charles Montolieu Lamb, by which he affected to render his estate, or some portion thereof, liable for Lord Montgomerie's debts. (2) The arrangement entered into by the said Sir Charles Montolieu Lamb with Lord Eglington, by the agreement dated the 8th of August 1848, either wholly or to such extent as the consideration therein failed in affecting to bestow upon Sir Charles Montolieu Lamb property which already belonged to him. (3) The devise and bequest by Sir Charles Montolieu Lamb to the said Lady Lamb of the whole of his real and personal estate, at least in so far as the same was in excess of reasonable provisions, without regard to the rights provided by the said antenuptial contract. (4) The mortgage to Lord Dacre, in the year 1857, for the sum of £5000, of Baldslo and Bigberries, mentioned in the second part of the statement in the appendix to this case, as to lands purchased by Sir Charles Montolieu Lamb.

"10. That, according to the proper interpretation of the terms of the said marriage-contract of the 30th day of January 1815, the said Sir Charles Montolieu Lamb was under obligation, by virtue of the said marriage-contract, to settle and secure the just and equal half of all lands and heritages, and moveable goods and effects, debts and sums of money, and in general all real and personal estate, of what nature or kind soever, whether in Scotland, England, or elsewhere, belonging to him at the time of the said marriage, or which he should acquire during the subsistence of the said marriage, whether by conquest, succession, donation, or otherwise, or the value thereof, for the benefit of the children of the said marriage, and was bound to take the titles or rights of such property to that extent to himself in life, and the child or children of the marriage in fee.

"11. That a moiety of the proceeds of sales of such timber trees growing on the said entailed estates—and the late Sir Charles Montolieu Lamb was entitled to cut down and sell, and did cut down and sell, in virtue of the clauses in the said will of the said John Lamb, and in the said disentailing deeds respectively, declaring him to be unimpeachable for waste—ought to be brought into settlement under the provision of the said antenuptial contract.

"12. That the said Charles James Savile Montgomerie Lamb was, upon the death of his mother, the said Mary Lady Montgomerie, in the year 1848, entitled to demand and have from his father, the said Sir Charles Montolieu Lamb, and consequently the plaintiffs and the defendants, other than the defendant Dame Frances Lamb, now are entitled to demand and have from the defendant Dame Frances Lamb, as executrix and universal devisee and legatee of the said Sir Charles Montolieu Lamb, deceased, a full, true, and particular account of all the estate of the said Sir Charles Montolieu Lamb, of what nature or kind soever, which belonged to him, or of or to which he was possessed or entitled at the time of his said marriage with the said Mary Lady Montgomerie; and also of all the estate, of what nature or kind soever,

acquired by him, either by conquest, succession, donation, or otherwise, during the subsistence of the said marriage."

It was contended on the part of the defendant Dame Frances Lamb, who is the executrix and general devisee of Sir Charles Montolieu Lamb—

"1. That the obligation on the part of Sir Charles Montolieu Lamb contained in the said marriage-contract of the 30th January 1815, to secure to himself in liferent, and to the children of the marriage in fee, the half, not only of all property belonging to him at the date of the marriage, but of all his *acquirenda* by 'conquest or succession during the subsistence of the marriage,' is expressed in a form which is known and usual under the law of Scotland in marriage-contracts.

"2. That such obligations undertaken by a husband in an antenuptial marriage-contract according to the law of Scotland may either be confined to what is technically, in the language of that law, termed 'a provision of conquest,' *id est*, a provision of the whole or a certain proportion of what the husband may 'conquest and acquire during the subsistence of the marriage' (which terms, according to their proper and technical use in the law of Scotland, apply solely to property acquired during the continuance of the marriage under titles other than inheritance, bequest, or succession, and extant and free at the dissolution of the marriage, so as to render the husband then *locupletior*), or they may (as in this case) be extended to the whole or a certain proportion of the property which may belong to the husband at the time of the marriage, and of that which may come to him during the marriage by way of inheritance, bequest, and succession, as well as by 'conquest;' but that in all cases an obligation on the part of the husband, expressed in such terms as are contained in the said marriage-contract of the 30th January 1815, according to its proper and true interpretation in Scottish law, has the meaning and effect hereinafter mentioned, and does not specifically charge the property to which it extends, or bind the husband in respect thereof, any further or otherwise than as hereinafter stated.

"3. That by the law of Scotland the rights of a husband who has made a provision in an antenuptial contract to and in favour of himself in liferent and to the children of the intended marriage in fee, expressed in terms such as those of the said contract of the 30th January 1815, are not restricted to a mere life interest in the property so provided; but that under such a contract so expressed the husband remains during his life absolute proprietor in fee (or *fiar*, in the language of Scottish law), of all such property, whether the same be real or personal, with full power of burdening and alienating the same, the only restriction of his rights being that he is not entitled by any gratuitous deed, *in fraudem* of the contract, to revoke or alter the destination to the children, or to defeat their rights.

"4. That according to the true effect of the said marriage-contract of the 30th January 1815, the issue of the marriage do not by the law of Scotland acquire as they come into existence a vested interest in the property so provided, or a proper '*jus crediti*' in relation thereto during the lifetime of their father; that, on the one hand, they have, during their father's lifetime, a mere *spes successions*, which cannot be gratuitously defeated by their father, but that, on the other hand, no action lies at the instance of the children, or of any one on their behalf, for enforcing performance

of the obligation during their father's life, or for damages for non-performance; and that it was and is, by the law of Scotland, competent for the father, as well during the subsistence of the marriage as after its dissolution by the death of the wife, to expend, sell, alienate, mortgage, and charge, by any contracts or contract, for valuable or onerous considerations (and even by some kinds of gratuitous contracts, if rational in their nature), all or any part of the property to which the obligation relates.

"5. That according to the law of Scotland the free or clear surplus or residue only (if any) of the moiety of real or personal property to which the obligation extends, as the same may stand at the time of the dissolution of the marriage, constitutes the provision made by a marriage-contract, in the terms of the instrument now in question, for the children of the marriage; and that for the purpose of determining whether there is any such free or clear surplus or residue, and of computing its amount (if any), all sums expended by or on behalf of the husband during the subsistence of the marriage, and all debts and liabilities remaining due from the husband at the date of the dissolution of the marriage (whether secured specifically upon any part of the real or personal property to which the obligation extends, or wholly unsecured), are to be deducted; and that unless there would be a clear residue or surplus of such real and personal property extant and forthcoming at the time of the dissolution of the marriage, after deduction and payment of all such expenditure, debts, and liabilities, the provision fails, and no further obligation then attaches to the husband under such contract, so as to bind any estate which he may have at the time of his death.

"6. That the measure of the liability of the husband under such contract is at the utmost only to account for the value of such clear surplus or residue (if any), as the same may be ascertained and computed with reference to the time of the dissolution of the marriage; and moreover, that such value so computed remains after that time subject to further deduction in respect to such part (if any) of the real and personal property to which the obligation extends as may have been charged or alienated for onerous or rational consideration by the father in his lifetime after the dissolution of the marriage—suitable provisions to the wife and children of a second marriage, whether made by an act *inter vivos*, or by any testamentary disposition, being in such a case regarded as rational considerations.

"7. That in the present case the obligation conferred no invested interest or '*jus crediti*,' according to the law of Scotland, upon Charles James Savile Montgomerie Lamb during his father's life, and that according to such law he had no right or interest by virtue thereof which was capable of being transmitted by him to his trustees or executors under his will, and that by reason of his death during his father's life the obligation was, according to such law, wholly discharged.

"8. That neither the income arising from the estate for life in the entailed family property to which Sir Charles Montolieu Lamb succeeded on the death of his father, nor the income received during the marriage from the real estates of Lady Montgomerie, according to the proper interpretation of the terms of the said marriage-contract of the 30th day of January 1815, constituted any part of the lands, heritages, or real estate, or of the

sums of money or personal estate which at the date of the said contract were already belonging to him, or which he should conquest and acquire or succeed to in fee-simple during the subsistence of the said intended marriage-contract; and that Sir Charles Montolieu Lamb was not at any time, in respect of such income, under any obligation whatever by virtue of the said contract.

"9. That the jewels and other personal chattels which belonged to Lady Montgomerie at the time of the said marriage, or were acquired by her during the subsistence of the said marriage out of her own funds or otherwise, with Sir Charles Montolieu Lamb's consent, for her own personal use, and which were possessed or retained by Sir Charles Montolieu Lamb after her death, by virtue of the said arrangement between him and Lord Eglinton, did not constitute any part of the moveable goods and effects, debts and sums of money, or personal estate already belonging to Sir Charles Montolieu Lamb at the date of the marriage, or which he should conquest and acquire or succeed to during the subsistence of the marriage within the meaning of the said marriage; and that Sir Charles Montolieu Lamb was not at any time, in respect of jewels and other personal chattels of Lady Montgomerie, under any obligation by virtue of the said marriage-contract.

"10. That, in like manner, the annuity of £5304 agreed to be paid by Lord Eglinton to Sir Charles Montolieu Lamb, after Lady Montgomerie's death, under the said deed of the 8th day of August 1848, was not within the provisions of the marriage-contract; and that Sir Charles Montolieu Lamb was not at any time, in respect thereof, under any obligation by virtue of the said marriage-contract."

The opinion of Her Majesty's Court of Session in Scotland was requested with reference to Scottish law as administered by that Court, and so far as the same is applicable to the facts set forth in the above case, in the terms of the statute 22d and 23d Victoria, chapter 63, upon the following questions:—

- "1. Whether and how far the respective contentions of the plaintiffs and the defendants, other than the defendant Dame Frances Lamb, on the one hand, and of the defendant Dame Frances Lamb on the other, as above set forth, are well founded, and in conformity with the true interpretation and legal effect and operation (according to the law of Scotland) of the said contract, executed upon the marriage of the said Sir Charles Montolieu Lamb, bearing date the 30th day of January 1815; and what are the correct legal effect and operation of the said contract?"
- "2. In the event of all or any of the said contentions being erroneous, what, according to the said law, and having regard to the said contentions, is the true interpretation and would be the legal effect of the said contract?"
- "3. In what form or on what basis, and of what property, ought an account (if any) to be directed, in fulfilment of the obligation contained in the said marriage-contract, according to the law of Scotland?"

The SOLICITOR-GENERAL and Mr BLAIR appeared for the parties other than Dame Frances Lamb.

The DEAN OF FACULTY and Mr MARSHALL appeared for Dame Frances Lamb.

The Court pronounced the following interlocutor:—"Edinburgh, 30th June 1870.—The Lords of

Council and Session (First Division) having considered the petition of Sir Frederick Leopold Arthur, Baronet, and another, with the Amended Case remitted by the Court of Chancery for the opinion of this Court, by order of Vice-Chancellor Malins, dated the 24th February 1870, and heard counsel for the parties named in the said amended case, make answer as follows to the several questions of law raised by the contentions of the parties as stated in the said amended case, viz.:—

"1. By the marriage-contract executed in contemplation of the marriage of Sir Charles Lamb and Lady Montgomerie on the 30th January 1815, Sir Charles provided to himself in life-tenant, and the children of the marriage in fee, one-half of his whole estate, including not only what then belonged to him, but all that he might acquire during the subsistence of the marriage by his own industry or economy, by succession, or otherwise. This settlement is expressed in the form of an obligation to settle and secure. But the obligation did not require or admit of specific performance during the lifetime of Sir Charles, and no one was entitled to demand such specific performance. In legal construction and effect, Sir Charles remained during his life, and that whether he survived the dissolution of the marriage or not, absolute owner of the whole of his estate, subject only to an obligation to leave one-half of it to the children of the marriage. He had the same absolute power of use, administration, disposal, dilapidation, and spending, that any owner of property has, subject only to the condition that he could not defeat or prejudice the children's right of succession by any merely gratuitous alienation, whether by deed *inter vivos*, by disposition *mortis causa*, or by testament.

"2. The right of the children under the provision is not a proper *jus crediti* on the one hand, nor a bare hope of succession on the other. It does not make the children creditors of their father during his lifetime, or creditors at all at any time, in competition with his creditors in onerous debts and obligations, but makes them creditors against the estate of their father after his decease, for performance of the obligation contained in the marriage-contract.

"3. Whether the arrangement entered into by Sir Charles Lamb, by which he affected to render his estate, or some portion thereof, liable for Lord Montgomerie's debts, was a gratuitous alienation *in fraudem* of the marriage-contract, the Court are unable to determine, not being informed of the nature of the said arrangement.

"4. The arrangement entered into by Sir Charles Lamb with Lord Eglinton (by agreement dated 8th August 1848) was not a gratuitous alienation *in fraudem* of the marriage-contract.

"5. Notwithstanding the said marriage-contract provision in favour of children, Sir Charles Lamb was at liberty to settle a portion of his estate on the wife and children of a second marriage, and for this purpose to encroach on the provision in favour of the children of his first marriage, but on two conditions,—1st, That the provision settled on the wife and children of the second marriage should not be in excess of a reasonable provision having reference to the amount of his entire estate; and 2d, that he should have no other fund or estate out of which to make such reasonable provision for the wife and children of the second marriage, other than the funds or estate settled on the children of the first marriage.

"6. In an accounting between the children of the first marriage and Lady Lamb as her husband's executrix, and also in right of her own provision as his second wife, the amount of Sir Charles' estate must be ascertained as at the dissolution of the first marriage by the death of Lady Montgomerie, and in this must be included every available asset of Sir Charles, however acquired, whether by savings of income, sale of timber, or the like, provided it be an existing and available asset, but not Lady Montgomerie's jewels, or other paraphernal property, which were not acquired by Sir Charles, except by his wife's will, after the dissolution of the marriage. Of his free estate at that time, *deductis debitis*, one-half must, in the first instance, be placed to the credit of the children of the first marriage. Sir Charles, however, continued absolute fief of the whole estate during his own survival, subject only to the condition that he should not gratuitously alienate to the prejudice of the children. But no acquisitions by Sir Charles, whether by conquest or succession after the dissolution of the marriage, could, in terms of the marriage-contract, go to increase the amount of the entire estate, to one-half of which the children of the first marriage were entitled; and the debts contracted by Sir Charles between the dissolution of the first marriage and his own death, and also the provisions to the wife of the second marriage, must be charged primarily against the half belonging to Sir Charles of the free estate ascertained at the dissolution of the first marriage, and against his subsequent acquisitions, both of which must be exhausted before any part of such debts or provisions can be charged against the children's half of the free estate ascertained as aforesaid. If the entire estate left by Sir Charles, after paying his other debts, be insufficient to pay both the children of the first marriage and the reasonable provision to the widow of the second marriage in full, these claims must be ranked according to their nature and legal effect, as above explained.

"7. Charles James Lamb, the only child of the marriage between Sir Charles Lamb and Lady Montgomerie, having predeceased his father (though he survived his mother), the right to one-half of Sir Charles' estate, provided by the marriage-contract to the children of the marriage, did not vest in him, and was not transmissible by his will. But the obligation of Sir Charles was not by reason of his only child's death discharged, but subsisted in favour of the issue left by the said Charles James. The said issue are now entitled to claim the succession which would have belonged to their father if he had survived Sir Charles, and the property of which it consists will descend according to its legal character, the heritage to the heir in heritage, and the moveable property to the other children as heirs *in mobilibus*."

Agents for the Parties—Hunter, Blair & Cowan, W.S., and Mackenzie, Innes & Logan, W.S.

Thursday, June 30.

UNION BANK v. M'MURRAY.

*Agreement—Bankruptcy.* M. & Co. being involved in the affairs of a bankrupt firm, purchased for £45,000 certain subjects from the trustee of the firm. To enable them to do so, they borrowed this sum from the Union Bank, and, by an agreement with the Bank, £7500

of the price was to be paid into the trustee's account for behoof of the personal creditors, and the balance of £37,500, less £2500, into a separate account for behoof of the heritable creditors. Thereafter, D. & Co. agreed to purchase the property from M. & Co. for £47,000, the Bank agreeing to advance this sum to D. & Co., and to credit the sum to M. & Co. in part payment of a large debt due by them to the Bank. *Held* that the second agreement had not superseded the first, and that M. & Co. were still indebted to the Bank in the sum of £45,000.

*Bill—Principal Debtor—Cautioner—Giving Time.* Circumstances in which *held* that a party to a bill was principal debtor in the obligation and not cautioner, and consequently had not been liberated by the fact that time had been given to the other debtor.

The following narrative of this case is taken from the opinion of LORD KINLOCH:—

"There are two separate questions which we are now called on to determine. The one is that presented to us by the defender Mr M'Murray under the reclaiming-note at his instance, and is in substance whether the pursuers, the Union Bank, are entitled to maintain at his debit a sum of £45,000, advanced to him under the minute of 11th November 1856; or whether the arrangement of this minute was superseded, and this charge wiped away, by the effect of the two other minutes of the same date, but of posterior operation.

"The case on this point, when accurately analysed, comes to present itself in a very simple aspect.

"The defender Mr M'Murray had, in the year 1856, become much involved in the affairs of Messrs Cameron & Co., paper-makers. That firm having had their estates sequestrated, the trustee in the sequestration set up to public sale the paper-mill at Springfield, belonging to the company, with the moveable machinery.

"The defender became purchaser at the cost of £45,000. To enable him to pay for this purchase, the pursuers, the Union Bank, agreed to advance to him this sum of £45,000, of which £7500 were to be paid into the trustee's account, as the value of the moveable machinery, for division among the personal creditors; and the balance of £37,500, less a sum of £2500, the value of certain annuities proposed to be continued on the property, into a separate account for behoof of the heritable creditors.

"All this was duly carried out; and there cannot be a moment's doubt that in this transaction, considered by itself, the defender became debtor to the Bank, and bound to reimburse it, for the advance of £45,000 thus made.

"A new transaction then supervened. Messrs Durham & Sons agreed to purchase the mills from the defender at the advanced price of £47,500, besides agreeing to take on themselves the annuities, estimated at £2500 more,—making in whole a profit to the defender of £5000. The Bank agreed to advance this sum of £47,500 as a loan to Messrs Durham, who were to make repayment by instalments. The sum to be so advanced was to be credited by the Bank to the defender in part payment of a large debt owing by him in connection with the affairs of Cameron & Co., being a debt wholly separate from that incurred by him in connection with his purchase of the property. This was accordingly done. The defender had this sum of