

LORD PRESIDENT—I concur that there was no completed contract of sale in the missives founded on by the pursuer, the condition in the acceptance never being acquiesced in by the purchaser. With regard to the other ground of judgment, I am inclined to confine myself to the circumstances of the present case. I give no opinion on the general question, whether under any circumstances the concurrence of the husband can be proved by reference to the oath of husband and wife, where they are the sole contracting parties on one side. The reference in this case is clearly inadmissible, Miss Cowan cannot be bound by the oath of Mr and Mrs Dickson. I propose we should recall the interlocutors of the Lord Ordinary, and express in an interlocutor the grounds upon which we are all agreed.

The following interlocutor was pronounced—

“Recall the interlocutor of the Lord Ordinary of date 28th February 1871; also the interlocutor of 17th March 1871; also the interlocutor of 25th May 1871: Find that the missives founded on by the defender do not constitute a completed and effectual contract of sale, in respect the condition in the alleged acceptance by the sellers, that the title must be taken by the purchaser on the footing that it was not to be accompanied by any search of incumbrances, was not assented to by the purchaser: Find that the concurrence of the husband of one of the sellers (Mrs Dickson) not being expressed in the alleged written acceptance by the sellers, cannot be competently proved by the reference to the oath of the pursuers Mr and Mrs Dickson, as proposed in the minute No. 55 of process; Refuse to sustain the said reference: Find it unnecessary to decern in terms of the reductive conclusions. *Quoad ultra* repel the defences; and find, declare, and decern, in terms of the remaining conclusions: Find the pursuers entitled to expenses.

Agent for Pursuers—J. B. W. Lee, S.S.C.

Agent for Defender—D. Curror, S.S.C.

Tuesday, November 7.

KINNEAR (FERGUSON'S TRUSTEE) v. MRS JANET TAINSH OR FERGUSON AND OTHERS.

Husband and Wife—Conjugal Rights (Scotland) Amendment Act, 1861 (24 and 25 Vict. c. 84).

A married woman succeeded to a legacy of £500, the *jus mariti* not being excluded. To the extent of £405 it was invested in the purchase of heritable subjects, the disposition being taken to the husband in liferent and the wife in fee. It was not proved that the husband was insolvent at the date of the purchase, but six months thereafter he was sequestrated. *Held*, in an action of reduction at the instance of the trustee in the sequestration, that the settlement was not more than a reasonable provision for the wife.

In 1869 the defender Mrs Ferguson succeeded to a legacy of £500 from an uncle. The *jus mariti* was not excluded. The legacy, to the extent of £405, was invested by Mr and Mrs Ferguson in the purchase of certain heritable subjects in Portobello. The price of the subjects was £705, the remaining £300 being raised by a loan from the Standard Investment Company, secured over the premises. A feu-charter was obtained from the superior, by which the subjects were disposed “to and in favour of the

said Janet Tainsh or Ferguson, and the said George Ferguson, her husband, in conjunct fee and liferent, and to Helen Ferguson, only child procreated of the marriage betwixt the said George Ferguson and Janet Tainsh or Ferguson, and to any other child or children which may yet be procreated of said marriage, jointly, in fee.” The charter contained a declaration that, notwithstanding the destination therein, it should be competent to the said Janet Tainsh or Ferguson “to sell or burden the said subjects, and exercise every other right of ownership.” The charter was dated 7th August, and recorded 30th August, 1869.

On the 26th February 1870 George Ferguson was sequestrated, and on 9th March the pursuer was elected trustee. On the 12th July 1870 he raised the present action against Mrs Ferguson and George Ferguson, for himself, and as taking burden on him for his wife, and also as administrator-in-law for Helen Ferguson, only child of the marriage, to have it declared that the subjects in question were purchased by George Ferguson, to the extent of £405, with funds which belonged to him *jure mariti*, and are his property notwithstanding the feu-charter: and that the subjects are now vested in the pursuer, as trustee on the sequestrated estate of George Ferguson; or otherwise that the conveyance in favour of the said Janet Tainsh or Ferguson was a donation by George Ferguson in her favour, made *stante matrimonio*, and while he was in insolvent circumstances, and is now revocable by the pursuer, in the bankrupt's right; or otherwise that the conveyance is null, under the Act 1621, c. 18. The summons also concluded for reduction of the feu-charter, so far as it imported a conveyance in favour of the wife or children.

Defences were lodged for Mrs Ferguson and her husband. They pleaded—“(1) The investment of the legacy left by the female defender's uncle being made, not in contemplation of bankruptcy or in the knowledge of insolvency, and not as a donation by a husband to his wife, but as a moderate and suitable provision for her out of funds to which she had in equity the primary right, the deed in question, in so far as favourable to her, ought to be maintained. (2) The legacy in question being money to which the female defender has a primary equitable right, the pursuer ought not to be allowed to obtain possession of the property paid for by it, without making a provision for her adequate to secure her against absolute want.”

A proof was taken, chiefly on the point whether George Ferguson was or was not insolvent at the date of the purchase of the property.

The Lord Ordinary (MURE) found that it was not proved that George Ferguson was insolvent at the date of the purchase: “Finds that previous to that date no provision had been made, by antenuptial contract of marriage or otherwise, by the defender George Ferguson in favour of the other defender; finds, in these circumstances, in point of law, that the defender George Ferguson was entitled to apply a portion of the said legacy in making a reasonable provision for the other defender; and that the application of the sum of £405, in the purchase of the said property to the extent of £250, and the destination thereof in favour of the defender Mrs Ferguson, to the same extent, was, in the circumstances, a reasonable provision, and was not revocable by the said George Ferguson, and is not revoked by his sequestration; and that the defenders are, to that extent, entitled to be assailed from the conclusions of the action; but

finds, on the other hand, and in point of law (1) that the sum advanced in purchase of the said property, in so far as it exceeded £250, constitutes a donation *inter virum et uxorem*, and was revocable by the said George Ferguson, and is revoked by the sequestration; and (2) that the declaration in the feu-charter, to the effect that, notwithstanding the destination, it should be competent to the defender Mrs Ferguson to sell or burden the property, and exercise every other right of ownership therein, in so far as it conferred on Mrs Ferguson right so to deal with the property during her husband's life, was also a donation, revocable by the said George Ferguson, and revoked by his sequestration; and appoints the case to be enrolled, that parties may be heard as to the terms in which decree should be pronounced, in order to carry out these findings; and reserves in the meantime all questions of expenses."

After a review of the evidence of Ferguson's solvency or insolvency at the date of the purchase, his Lordship's note proceeds—

"2d, Holding the defender therefore to have been solvent in August 1869, the Lord Ordinary—having regard to the sums which were held to be reasonable provisions in the cases of *Craig and Galloway*, 17th July 1861, 4 Macph. p. 267, and of *Rust*, 14th Jan. 1865—has come to the conclusion that £250, or one-half the value of the legacy, was not an unreasonable sum to set apart as a provision for the other defender. Had this money not belonged originally to Mrs Ferguson, the Lord Ordinary would have been disposed to hold that about a third of the amount would, in the circumstances, have been a proper sum to apply by way of a provision. But as the money came through the wife, her provision may, it is thought, be fairly fixed at a larger sum; and he has taken it at the one-half, being the amount which, with the apparent approbation of the Court, was fixed in the case of *Small*, 24th February 1870, as a reasonable provision for a wife, in dealing with a question of this description under the 16th section of the Conjugal Rights Act, 24 and 25 Vict. cap. 86.

"3d, Upon this assumption, the Lord Ordinary has found that the application of the legacy, to the extent of £250, in the purchase of the property in question, is not challengeable as a donation, and was not revoked by the defender's sequestration, but that the conveyance is revocable, and may be cut down as regards the excess, which seems to have been recognised as a competent course in disposing of the case of *Craig and Galloway* in the House of Lords, and to be sanctioned by the principle of the decisions in the case of *Kemp and Napier*, 1 Feb. 1842; and of *Dunlop Trs.*, 24 March 1865, both in this Court and in the House of Lords.

"It was contended, on the part of the pursuer, that the effect of the declaration in the feu-charter, empowering the defender Mrs Ferguson to dispose of the subjects during her life, might have enabled her to deprive her husband of his liferent, and may prevent the creditors from now taking any benefit from the bankrupt's liferent interest in the property. The Lord Ordinary is disposed to doubt, as at present advised, whether the declaration would necessarily have that effect, inasmuch as the right of fee appears to be expressly burdened with the liferent interest of the bankrupt. But assuming that this would have been its effect, and that the husband, by consenting to its insertion, had thereby put it in his wife's power to defeat his

liferent, and to dispose of the property for her own benefit during her husband's life, this was, it is thought, challengeable by the husband as a donation; and the Lord Ordinary has therefore found it to be revoked by the sequestration. The effect of this will be to make the liferent interest of the bankrupt available for the creditors, after payment of the interest due upon the bond."

The pursuer now put in a minute, proposing to secure a provision to Mrs Ferguson of £250, payable to her in the event of her surviving her husband, and upon his death; to be effected by a policy of insurance with the North British and Mercantile Insurance Company; and moved the Lord Ordinary to approve of the proposal, and in respect thereof decern in terms of the conclusions of the summons, superseding extract till the policy has been effected.

The Lord Ordinary, on 16th June 1871, approved of the proposal contained in the minute, and found, that upon the policy being effected, the pursuer would be entitled to decree in terms of the reductive conclusions; found no expenses due to either party.

The defender reclaimed.

CAMPBELL SMITH, and MACKINTOSH, for them, argued—(1) That if the Conjugal Rights Act applied, Mrs Ferguson was entitled to a present provision out of the money to which she had succeeded; that in any view the contingent reversion of £250, the provision made by the Lord Ordinary, was much too small; *Somner*, March 2, 1871, 9 Macph. 594; *Taylor*, October 28, 1871, 9 Scot. Law Rep. 22; (2) That at common law, the provision being reasonable, and the husband solvent at the date, the deed should stand, and the defender be assolizied.

MILLAR, Q.C., and MAIR, for the pursuer.

During the debate the Court asked the counsel for the defenders whether they argued on the footing that the liferent given to the husband was defeasible by the wife or not.

MACKINTOSH—We ask for absolvitor in either view.

The Court—Unless we have some argument, from either party, for holding it defeasible, we shall hold it to be indefeasible.

At advising—

LORD PRESIDENT—The object of the present action is to claim for the trustee and creditors the whole property embraced in the feu-charter. The defence stated for the wife is that it makes no more than a reasonable provision for her, as the wife of the bankrupt. That I am prepared to sustain. The case comes within the operation of section 16 of the Conjugal Rights Act. Mrs Ferguson succeeded to money, and that money was not reduced into the possession of the husband, and so the proviso at the end of the section does not apply. The effect of the deed taken by the husband and wife from the superior is to make this arrangement. The money succeeded to by Mrs Ferguson, to the extent of £405, was paid *pro tanto* as the price of the subjects. The remainder of the price was advanced by the Standard Investment Company. The deed settles the fee on the wife. There is a destination over in favour of the child; but as far as the fee is concerned, she has an absolute power of disposal, notwithstanding the destination over. The husband gets a liferent. The only question before us is, whether that provision of the fee of £405 to the wife exceeds a reasonable provision?—not whether it comes up to a reasonable provision. I am of opinion that it does not exceed a

reasonable provision, and that she is accordingly entitled to absolvitor. There may be other questions behind. All that we should fix is, that this settlement of the liferent on the husband, and fee on the wife, is not an unreasonable settlement; and therefore assoilzie.

LORD DEAS—It is impossible to discern in terms of the conclusions of the summons; for (1) The husband was not insolvent at the date of the purchase; and (2) The settlement was a reasonable provision to the wife, for whom no previous provision had been made out of funds which came by her. The summons is limited to the property so far as purchased with the £405. We have nothing to do with the bond in favour of the Standard Investment Company. On the footing that the wife has no power to evacuate the husband's liferent, I am of opinion that the deed must stand.

LORD ARDMILLAN—I concur. We must not be deterred from pronouncing absolvitor by the difficulties that may lie behind. Parties should come to some agreement about them.

LORD KINLOCK—We are not called upon to make a provision for this lady. The parties have made a provision themselves. The point to be decided is, whether the provision is reasonable or not. That depends on the construction of the deed. I do not think there can be any difference of opinion on its construction. By the deed the wife obtains a fee, and the husband an indefeasible liferent. So construed, I am of opinion that it was a reasonable provision.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders, with expenses.

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

Agents for Defenders—J. B. Douglas & Smith, W.S.

Tuesday, November 7.

SECOND DIVISION.

SHIELL v. MOSSMAN.

Jurisdiction—Appeal—Small Debt Act, 1 Vict. cap. 41, §§ 13, 30–31. A small debt decree had been granted against a defender who was not personally present, and the clerk granted a warrant for imprisonment without a charge. *Held* that this was an irregular proceeding, and that the Court of Session have jurisdiction to suspend such a charge.

This was a suspension of a warrant of imprisonment obtained in the Sheriff-court of Berwickshire by William Mossman against John Shiell.

The Lord Ordinary (**MACKENZIE**) pronounced an interlocutor in the following terms, which explain the facts of the case and the conclusion of the parties:—“Finds the complainer liable in expenses; of which allows an account to be given in, and remits,” &c.

“*Note.*—The complainer admits that a decree *in foro* was pronounced against him on the 4th August 1871, in the Sheriff Small Debt Court at Dunse, for the sum of £11, 10s. 9d., with £3, 4s. 7d. of expenses. He avers that, although this decree was *in foro*, he was not personally present at the time that it was pronounced; and he maintains that the decree which was annexed to the sum-

mons, in conformity with the provisions of section 13 of the Small Debt Act, 1 Vict. cap. 41, improperly contains a warrant authorising poinding and sale and imprisonment, after the elapse of ten free days from the date of the decree, which is only competent, according to the provisions of the section, if he had been personally present, and does not contain a warrant authorising poinding, and sale and imprisonment after a charge of ten free days, as it ought to do, seeing that he was not personally present. Having been imprisoned on 29th August 1871, without any previous charge, the complainer, who offers neither caution nor consignation, craves in his note that what he calls the warrant of imprisonment contained in the decree be suspended, and that he be liberated.

“The Lord Ordinary is of opinion that the note of suspension and liberation is incompetent, in respect of the provisions contained in the 30th and 31st sections of the Small Debt Act. By these sections it is enacted that ‘no decree given by any Sheriff in any cause or prosecution decided under the authority of this Act,’ shall be subject to any form of review or stay of execution on any ground or reason whatever, otherwise than by appeal to the Court of Justiciary, and such appeal is declared to be competent only upon the grounds therein specially set forth, one of these being, ‘such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done.’ The Lord Ordinary considers what the complainer seeks to suspend, under the name of the warrant of imprisonment, is truly the decree given by the Sheriff against him under the authority of the Act, which, in conformity with the provisions of the 13th section of the Act, is annexed to the summons. That section provides, that when the parties shall appear, the Sheriff, after hearing them and taking proof when necessary, ‘may pronounce judgment, and the decree, stating the amount of expenses, if any, and containing warrant for arrestment, and for poinding and imprisonment, when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in schedule (A) annexed to this Act, or to the like effect.’ The form No. 7 of schedule A, being that referred to in this section, is entitled—‘Decree for pursuer in a civil cause,’ and it bears that ‘the sheriff of the shire of _____ finds the within designed _____ defender liable to the pursuer in the sum of _____, with _____ of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent after _____ free days.’

“The decree pronounced against the complainer, and annexed to the respondent's summons, is in exact conformity with this schedule, and it is not disputed that it is *ex facie* regular. The Lord Ordinary cannot doubt that this is, according to the true intent and meaning of the Small Debt Act, a decree given by the Sheriff under the authority of that Act. It is called a decree in the 13th section of the statute, and it is thereby directed to contain, as part of it, a warrant for arrestment and for poinding and imprisonment. It is entitled a decree in the statutory schedule, and it bears that the Sheriff decerns and ordains execution by poinding and sale and imprisonment. It is also called a decree in the 19th section of the Act, which provides that such decree, or an extract thereof, may