tration the liferent interest in Mr Finlay as regards the legitim fund has been adjudicated to the creditors, and become vested in the pursuer for their behoof, while the obligation in respect of which retention is pleaded is to recover payment of a sum of money which the bankrupt had undertaken to pay over to the trustees for behoof of himself, his wife, and children at the distance of ten years after the date of the contract, and which did not elapse till two years after the sequestration. In such circumstances I think there is no room for that *concursus* which is essential for the plea of retention. For secondly, the obligation alleged to have been thus constituted against the bankrupt in favour of himself and his family through the trustees is not such as can be pleaded against the bankrupt's onerous creditors to any effect. This would have been plain had there not been the intervention of trustees; but their appointment cannot legally validate an obligation which would have been inept against creditors if granted to the parties directly, and this more especially as it is not granted in consideration of any counter assignation or obligation, but is simply an additional fund which the debtor desired to place beyond the reach of his creditors in the event of his insolvency. And thirdly, were the obligation to be held to partake of a different character and viewed in a different light, it is not one which can be sustained even in a question with the wife and children, on the principle held applicable to the legitim fund as a reasonable provision, seeing that it did not provide any part of the bankrupt's existing funds when solvent, but was an obligation to pay money *de futuro*, and was not exigible till after his bankruptcy. On these grounds I cannot doubt that the defence of retention cannot be sustained.

But the defenders have further endeavoured to support this contract on the ground of its being a remunerative deed inasmuch as her share of certain estates which belonged to her father was conveyed by the postnuptial deed for the same purposes with the other trust-funds. Whether the estate to a share of which Mrs Finlay was entitled be heritable or moveable under the declaration of trust of 1830–31 may be doubtful, but whether viewed in the one light or in the other it cannot affect the present question. If moveable, then it fell under the husband's *jus mariti*, and the right thereto belonged to him, and its settlement by this postnuptial deed cannot be held to change the character of the deed from being a truly voluntary alienation of property by the husband to one of a remunerative settlement. Again, if the wife's right be viewed as heritable, there being no exclusion of the *jus mariti*, the accruing annual proceeds become the husband's as much as the interest of the legitim fund as well before the execution of this postnuptial deed as after its date, in virtue of his rights at common law. This part of the deed therefore cannot be held to support the plea of the defenders on the ground of the deed being remunerative. It is impossible to hold this in a question which relates entirely to the husband's right to the annual proceeds of the trust-estate.

On the whole this defence seems to me no better founded than the others to which I have referred.

The other Judges concurred.

The case was then argued as to the rights of the wife under the 16th section of the Conjugal Rights Act.

Lord Justice-Clerk—It seems to me that the last point is sufficient to dispose of the plea on the 16th section of the Conjugal Rights Act, viz., that the whole fund belongs absolutely to the husband. The statute requires either that the husband should obtain complete possession of the fund, or that some specific diligence should be done by a creditor in order to exclude the claim of a wife. Now, a question may arise whether sequestration has any further effect than to put the trustee in the position of the husband. But in this case the claim does not fall under the section of the statute, as the fund belonged absolutely to the husband.

Lord Neaves—I am of the same opinion. There is no doubt that if the postnuptial trust-deed had not been granted this fund might have been held in a sense to be *in medio*, and so have been liable as it were to stoppage *in transitu* in order that the wife might get something out of it for her support. But I think the view that the deed operated as a novation of the rights of parties is correct. The trustees were to get the whole fee. The wife got no present provision, but a prospective right—a *jus crediti*, which has been found to be irrevocable, and of which she cannot be deprived by her husband or his creditors.

The question might arise whether there is a difference between a voluntary and a compulsory conveyance—whether a judicial adjudger is not in a better position than an assignee. It would be a nice question whether sequestration was equivalent to an adjudication to any creditor.

Lord Cowan—I concur. By the arrangement which was made in 1852 a liferent was conferred upon the husband. The only question is, Whether the creditors are entitled to attach the liferent? We are not now to go back to the history of the different transactions when the rights of the parties were arranged by the deed of 1852 The annuity was to belong to the husband absolutely, and this prevents the application of the 16th section of the Conjugal Rights Act. It is needless to conjecture what our judgment would have been if the fund had not been the absolute property of the husband.

Lord Benholme concurred.

Agent for Finlay's Trustees—W. Officer, S.S.C.
Agents for the Pursuer—Gibson & Ferguson, W.S.

Wednesday, November 22.

FIRST DIVISION.

COUPER *v.* GUNN & CO.

Process—Mandatory. Held that where a party to a cause, even though he be a native of this country, leaves the country *pendente lite* for an indefinite or permanent absence, his adversary may insist upon his sisting a mandatory, and upon the mandatory producing a valid and probative mandate, the object of the practice being not only to give security for the expenses of process, and for the proper conduct of the case, but also that the party may be bound by the procedure taken in his name, and by the decision come to.

The defender in this action, raised in the Sheriff Court at Wick, left the country some time after the record had been closed and proof allowed, but before

the proof had been concluded. He was, however, represented in Court by his procurator, and the case proceeded. The Sheriff-Substitute (RUSSEL) gave judgment in the case, decerning against him in terms of the summons.

Against this judgment of the Sheriff-Substitute the defender's procurator appealed on 11th January 1871. Before the reclaiming petition came before the Sheriff (THOMS), a minute in the following terms was put in for the pursuers:—"Miller, for the pursuers, stated that the defender had left Scotland upwards of three months ago for New Zealand or Australia, with the intention of remaining abroad, and therefore craved that the defender be appointed to sist a mandatory who would be liable in expenses." The Sheriff accordingly reserved consideration of the appeal, and allowed the minute to be received, and appointed it to be answered by the defender within eight days. The defender's procurator thereafter lodged the following answer to the minute for the pursuers:—"Gray, for the said Alexander Couper, stated that he denied the statements made in the minute under answer. The said Alexander Couper recently went south for a temporary purpose, but he never informed his agent that he intended going to New Zealand or Australia, or beyond the limits of Scotland, but simply to Greenock or Glasgow on business, and he expected to return early in March. Moreover, the said Alexander Couper has a house and farm, on lease current for several years yet, where his wife and ten of a family reside, at Latheronwheel, where the pursuers' agent a few weeks ago, long after Couper went south as stated, sued him in an action at the instance of James Henderson & Company, which was at once settled and paid. He is not obliged to sist a mandatory, his absence being purely temporary and of a very limited nature—his only home being at Latheronwheel, in Caithness,—and the pursuers' object in moving for a mandatory during the defender's absence, "who would be liable in expenses," being that, as he would not likely get such, they might improperly obtain decree in their ill-founded action. On the whole, it is respectfully suggested, in the circumstances stated, that no mandatory should be sisted on any understanding whatever."

A proof of the averments in this minute and answers was led, and the Sheriff, on 2d March 1871, on consideration of the said proof, appointed the defender "to sist a mandatory on or before 20th May next." On May 24 the defender's procurator intimated by minute that he had ascertained that the defender was then in New Zealand, though it was believed that his intention was to return, and that he might be expected back in the course of the following August. Of this there was no evidence. "As it might, however, be urged that he was in the meantime bound to sist a mandatory," his agent craved that Mr John Cormack, gardener, Reiss, near Wick, a proper party and a person in the defender's own position in life, might be sisted as his mandatory accordingly. A letter was produced from Mr Cormack, intimating his willingness to undertake the duties and liabilities of the office. An amended minute, much to the same effect, was lodged for the defender on June 2d, craving that the case might be continued till the defender's return, which was confidently expected in August, or that Mr Cormack might be sisted as mandatory. The pursuers opposed this, and moved the Sheriff to pronounce decree, in respect of the defender's failure to sist a mandatory in terms of the interlocutor of 2d March. The Sheriff accordingly, on 5th June 1871, pronounced the following interlocutor:—

"*Edinburgh, 5th June* 1871.—The Sheriff having resumed consideration of this case, with the minute for the pursuers, No. 22 of process, and the minute tendered on behalf of the defender on 3d instant, and also letter produced on behalf of the defender from John Cormack, dated 2d instant, allows said last mentioned minute and said letter to be received into process; and in respect that no consent by the pursuers to any person sisting himself in the cause, and acting therein as if he were mandatory for the defender, has been instructed; that the pursuer moves for decree because the defender has not sisted a mandatory in terms of the interlocutor of 2d March last; that the defender did not on or before 20th May last sist a mandatory; that the defender has not since tendered a mandate by him in favour of any person; that no power or authority by the defender to any person to sist himself as mandatory, or to appoint any person as his mandatory, or to obtain any person sisted as mandatory for the defender, is instructed; that in none of the minutes for the defender is a prorogation of time to obtain and lodge a mandate by the defender craved; that no offer of caution has been made on behalf of the defender, and of the other circumstances of this case, dismisses the defender's appeal, and decerns in terms of the conclusions of the summons, with expenses.

"*Note.*—The Sheriff is aware of the *dicta* of Lord Justice-Clerk Hope (which are erroneously reported in the rubric of the case *Elder* v. *Thomas Young & Co.*, June 27, 1854, 16 D. 1003, as a decision upon the point) that a person may be sisted as mandatory for a litigant abroad without a mandate being produced signed by the litigant. As opposed to these *dicta*, there is an equally strong statement that the law and practice is in an opposite direction by Lord Cowan. The only motion in that case then before the Court, and dealt with, was for delay to enable the reclaimer to be communicated with, and to get a mandate from him. The Sheriff is of opinion that the law and practice are as stated by Lord Cowan." The Sheriff then proceeded to discuss the following authorities in support of his judgment, viz.:—*O'Haggen* v. *Alexander*, July 31, 1761, M. 4644; *Hope* v. *Mutter*, June 10, 1797, M. 4646; *Neilson* v. *Wilson*, Feb. 13, 1822, 1 S. 314 (N.E. 290); and *Ross* v. *Shaw*, March 8, 1849, 11 D. 984.

Against this and the previous interlocutors the defender's procurator appealed to the Court of Session.

M'KECHNIE for the appellant.

MACKINTOSH, for the respondents, referred to the cases of *Dempster* v. *Potts*, Feb. 18, 1836, 14 S. 521; and *Bonny* v. *Lord Gillies and Others*, Nov. 13, 1829, 8 S. 13.

At advising—

LORD DEAS—I confess I have no doubt that when a mandate is insisted upon by the opposite party it must be produced. According to my own recollection, both on the bench and at the bar, such has been the constant practice. In point of principle there is the plainest possible reason. It is only one object of appointing a party to sist a mandatory in a cause to provide adequate security for the expenses of the case. Another, and very important object, is to give the Court security for the proper conduct of the cause and the regularity

of the proceedings. But, besides these, there is a third reason, sufficient in itself to support the practice, and that is, that if there was not a mandate produced, something which would validly bind the party himself, we might have the party coming back and repudiating what had been done for him and in his name. Even though his agent may be properly authorised and instructed, there may arise in any case circumstances in which something requires to be done, some step taken, which the agent could not take of his own hand, and without authority from his principal. If we had no formal binding mandate, we might have a case carried through all its stages here, and even taken to the House of Lords, and yet the party might come back and disclaim in the end all that had been done for him. Even supposing, therefore, the case were entirely open, I should have had no difficulty in deciding it upon principle. It is quite true that some little doubt has been thrown upon the practice by the remarks made in the case of *Elder*. But I think they arose from mere recollection of a certain laxity of practice which had crept in, and were made without much consideration, and without any discussion on the subject, or reference to authority.

Lords Ardmillan and Kinloch concurred.

Lord President—I come to the same conclusion, in accordance with the decision in the cases of *Dempster* and *Bonny*, which I hold to be binding on me in this question.

The Court accordingly refused the appeal.

Agent for Appellant and Defender—John A. Gillespie, S.S.C.

Agents for Respondents and Pursuers—Horne, Horne, & Lyell, W.S.

Wednesday, November 22.

SECOND DIVISION.

FRIER *v.* EARL OF HADDINGTON.

Landlord and Tenant—Lease. A landlord agreed that if his tenant should put up certain water pipes he would pay him "their value at the end of the lease." *Held* that this did not mean the cost of the pipes, but their value to the landlord or an incoming tenant at the end of the lease.

This was an action by R. S. Frier against the Earl of Haddington, concluding for certain sums, amounting in all to £186, 4s. 8d., as due under a lease of a farm entered into between the father of the pursuer and the late George Baillie of Jerviswoode, the father of the defender. This lease was entered into by a holograph letter by the landlord, which contained the following provision:—"If you" (the late Thomas Frier) "lay pipes for bringing water to the house and steam-mill, you are to be paid their value at the end of the lease." The 5th article of the condescendence, referred to in the Lord Ordinary's note, was as follows—"Various communications took place between the pursuer's father and the late Earl as to the mode of getting water. In or about the year 1854, the late Earl of Haddington, with the view of saving, if possible, the expense of bringing water from Fans Hill, a portion of the farm which had been fixed on by his Lordship and the late Mr Frier as the place from which it would require to be brought, instructed the late Mr Frier, before going on with the work, to endeavour to get water by digging and boring at the steading at East Fans. A considerable amount of work was done and paid for by the pursuer's father under these instructions. His Lordship specially undertook liability for the whole expense connected with the digging and boring. He repeatedly visited the steading while the digging and boring were going on, and ultimately, on finding that these operations were not likely to be successful, instructed the late Mr Frier to abandon the operations and get water from Fans Hill. The sum of £19, 4s. was expended in men's wages alone (exclusive of cartages and horse labour) in connection with the attempt to procure water at the steading."

The Lord Ordinary (Mure) pronounced the following interlocutor—"Finds that the allegations relative to the late Earl of Haddington having undertaken to pay the expense connected with the digging and boring for water, referred to in the fifth article of the condescendence, can only be proved by writ or oath; *quoad ultra*, and before answer, allows both parties a proof of their averments, and to each a conjunct probation, and appoints the proof to be taken before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—Having regard to the nature of the demand made in the fifth article of the condescendence, and to the time which had elapsed since the obligation is alleged to have been undertaken, and to the fact that the parties to it are both now deceased, the Lord Ordinary does not think it would be proper to allow it to be proved otherwise than by writ or oath.

"The abstract plea to title was not insisted on at the debate. And as regards the sums sued for, other than that claimed in the fifth article of the condescendence, the Lord Ordinary does not consider that he would be warranted, at this stage of the cause, in laying down any restriction either as to the mode or extent of the proof; because as regards the pipes parties are at issue, not only as to whether their value is to be taken as at the date when they were laid, or at the expiry of the lease, but also as to what their value was at the latter period; and as a proof will, in any view, require to be gone into on that point, the Lord Ordinary thinks it better to abstain at present from pronouncing any judgment as to the precise period at which the value is to be taken; while as regards the damage alleged to have been done by rabbits during the last year of the lease, the Lord Ordinary, as at present advised, can see no actual irrelevancy in that claim as laid, more especially in a case where the fact that some damage might have been done, of a description for which the landlord might be liable, is scarcely disputed in the letter founded on in the 12th article of the condescendence."

The defender reclaimed.

Watson and Balfour, for him, argued that the Lord Ordinary should have construed the deed before sending the case to proof.

Solicitor-General (Clark) and Campbell Smith for the respondent.

At advising—

Lord Justice-Clerk—We should now decide whether the lease settles the claim of the tenant to the value of the pipes at the end of the lease. The word "value" means value to the landlord at the end of the lease. The other construction would imply that the landlord was to pay the price of new pipes after they had been used for