benefit from the capital sum, I think any excess over and above the amount necessary to meet the annuity may be divided.

LORD BENHOLME—I can scarcely accede to distribution of the surplus, as it makes a great complication in the trust. I think the reasonable view is that the testator, by stipulating that there was to be no second division until both annuitants died, indicated his intention that no division of surplus should take place whatever the amount of funds in hand. I am for answering all the questions in the negative.

LORD NEAVES—I have no doubt on the leading question. On the other, I agree with your Lordship in the chair.

In 1870 there was to be a partial division of the fund, retaining sufficient funds to meet the annuity. I think that then there was a vesting in everything not absolutely necessary to meet the annuity. I do not see, on the one hand, that we can force the factor to make the very cheapest investment, but I do not see, on the other, why any sum unnecessary for that purpose, from year to year left in his hands, should not be divided among the parties in right in 1870.

LORD ORMIDALE—I agree that the first question should be answered in the negative. On the second and third there is a difficulty in fixing the precise sum to be divided. On the one hand, the factor may only divide such a sum as will leave sufficient always to secure the annuity; but I think the parties of the second part are entitled legally to everything not absolutely necessary to secure the annuity. There is no specific sum specified as to be set apart and invested for their annuity, but it is "a portion."

The Court pronounced the following interlocutor:—

"Having heard counsel on the special case, the Court are of opinion and find that the residue of John Henderson's trust-estate, now under the management of the first party as judicial factor, is not, in consequence of the renunciation and discharge of the annuities chargeable thereon, now divisible among the principal parties of the second part.

"That the principal parties of the second part are entitled to receive from the judicial factor, and that he is entitled to pay over to them, any surplus revenue which may arise, year by year, from the funds invested for the purpose of securing the two annuities in question, over and above the amount required in each year to meet such annuities; but that they are not entitled to any part of the capital sum so invested, and that such payment shall be made to the said second parties *per capita*, as it would have been if the said sums had been divided at the first period of division; and decern accordingly."

Counsel for Judicial Factor—Marshall. Agent—E. Mill, S.S.C.

Counsel for Second Parties—John M'Laren and Macdonald. Agent—H. W. Cornillon, S.S.C.

Tnursday, May 14.

SECOND DIVISION.

[Lord Mure, Ordinary.

WATSON *v.* GRANT'S TRUSTEES.

Husband and Wife—Marriage Contract—Act 1621, *c.* 18.

A reasonable antenuptial contract, by which A conveyed to trustees her whole estate, *held* not reducible under the Act 1621, c. 18, at the instance of a creditor in debts contracted by the lady before marriage, in respect that the alienation had not been granted without a just, true, and necessary cause, or between conjunct and confident persons, and it was not stated that A was insolvent at the time of the execution of the deed.

The summons in this suit, at the instance of Alexander Watson, residing in Pittenweem, against the Trustees under the ante-nuptial contract between John Grant and Margaret Taylor, concluded for reduction of the contract. The pursuer stated that the defender, Mrs Grant, was his sister uterine, that he had advanced to her between 1853 and 1858, or thereby, various sums; that in 1866 she granted a personal bond for £468; that the marriage took place in 1871; that in 1873 the pursuer raised an adjudication and inhibition on the dependence against the defender; that the marriage contract trustees appeared as defenders and produced the contract, which was recorded on 4th July 1873, and pleaded that the property was vested in them for the purposes of the contract. These purposes were, *inter alia*, the providing an alimentary liferent to the spouses and the survivor of them, and at the death of the longest liver of them the division of the property among the lawful issue of the said John Grant by this or any other marriage, along with the lawful issue of the said Margaret Taylor by this or any subsequent marriage. At the date of the marriage Dr Grant was fifty years of age, and had three children, and Mrs Taylor or Grant was about forty-seven years old.

The pleas in law for pursuer were—"(1) The said conveyance and alienation of her whole heritable means and estate by the said Mrs Margaret Taylor or Grant to and in favour of the Trustees named in the said contract of marriage, for the uses and purposes therein specified, being to the hurt and prejudice of the pursuer, his just and lawful claims the pursuer is entitled to decree of reduction as concluded for. (2) The said conveyance and alienation being to conjunct and confident persons, without true, just, and necessary causes, and without a just price really paid, and granted after the contracting of lawful debts from true creditors (and in particular the pursuer), it is void and null under the Act 1621, cap. 18, and at common law, and should be reduced, in terms of the conclusions of the summons. (3) *Separatim*, the said conveyance and alienation falls to be reduced, in so far at least as the provisions therein conceived by the said Mrs Margaret Taylor or Grant to and for behoof of the said Dr Grant and children are excessive. (4) Generally, in the circumstances, the pursuer is entitled to decree of reduction as concluded for. (5) This action should be conjoined with the process of adjudication libelled."

The pleas in law for the defenders, the Trustees,

were—"(1) The pursuer has not set forth, and does not possess, any title to sue or to insist in the present action. (2) The statements of the pursuer are not relevant or sufficient to support the conclusions of the action. (3) The statements of the pursuer being unfounded in fact, the defenders are entitled to absolvitor. (4) The said process of adjudication should be sisted until the present action is disposed of."

The pleas in law for defenders Dr and Mrs Grant were—"(1) The pursuer has not set forth, and does not possess, any title to sue or to insist in the present action. (2) The statements of the pursuer are not relevant or sufficient to support the conclusions of the action. (3) The defenders, Mr and Mrs Grant, being neither jointly nor severally indebted or resting owing any sum to the pursuer, and the said conveyance by Mrs Grant to her marriage-contract trustees not being to his hurt and prejudice, the defenders ought to be assoilzied. (4) The said conveyance by Mrs Grant to her marriage-contract trustees having been made for true, just, and necessary causes, it is not liable to reduction under the Act 1621, cap. 18, or at common law. (5) The said conveyance not being excessive or exorbitant, it is not challengeable to any extent. (6) The statements of the pursuer being unfounded in fact, the defenders are entitled to absolvitor. (7) The said process of adjudication should be sisted until the present action is disposed of."

The Lord Ordinary pronounced the following interlocutor:—

"27*th January* 1874.—The Lord Ordinary having heard parties' procurators and considered the closed record and productions, sustains the second plea in law for the defenders, dismisses the action, and decerns, reserving to the pursuer any legal claims which he, as a creditor of the defender Mrs Grant, may have to the income of the trust property in question: Finds the pursuer liable in expenses, of which appoints an account to be given in, and remits the same when lodged to the Auditor to tax and report.

"*Note*—The Lord Ordinary has not been able to see anything in the circumstances of the case to warrant him in coming to a different conclusion from that arrived at in the case of *Carphin*, 24th May 1867, 5 Macph. p. 797, relied on by the defenders, in which it was held that the pursuers had not set forth any grounds relevant and sufficient in law to render the contract of marriage null or reducible, either at common law or under the Act 1621, c. 18. He has, since the debate, examined the Session Papers in that case, and he finds that the summons of reduction is there laid both at common law and under the statute in substantially the same terms as those of the present summons. And although the obligations undertaken by the husband in the marriage contract here in question, as the counterpart of the conveyance of the property belonging to his wife, to the marriage-contract Trustees, may not be so large in amount as those undertaken by the husband in the case of *Carphin*, they appear to be in other respects of as onerous a description; so that the conveyance of the wife's property in contemplation of the marriage must, it is thought, be held to have been granted for 'true and just cause' in the sense of the statute. The provisions made in favour of Dr Grant are, in one view, no doubt in excess, as alleged by the pursuer, of those undertaken by him in favour of his wife; but that is not, in the opinion of the Lord Ordinary, in itself enough to do away with the onerous nature of the contract. For the same observation applies to the case of *Carphin*, where the husband appears to have been insolvent at the date of the marriage, and not even to have had means sufficient to enable him to enter a profession.

"It is further alleged in this case that the property placed in trust in contemplation of the marriage was 'greatly in excess of what in the circumstances was fair, just, and reasonable.' In this respect, therefore, the pursuer's averments appear to be more distinct than those made in the case of *Carphin;* and the Lord Ordinary had at first some doubt whether, having regard to the case of *Duncan*, 7th February 1785, Dict. 987, he ought to dismiss the action as irrelevant, without giving the pursuer an opportunity of proving this allegation. On further consideration, however, he is satisfied that this averment, as contended for by the defenders, ought to be read with reference to what is stated in the 5th article of the condescendence as to the annual value of the property. And looking to the position of the parties, the Lord Ordinary has been unable to come to the conclusion that a property valued at from £50 to £60 a year was in excess of what was in the circumstances a fair and reasonable marriage-contract provision. He has therefore sustained the second plea in law for the defenders, reserving to the pursuer, as in the case of *Carphin*, any legal claim which he may be able to instruct as a creditor, to recover payment of his debt out of the income of the property."

The pursuer reclaimed.

Authorities quoted—*Duncan*, M. *voce*, Bankrupt, 987; *Carphin*, 5 Macph., 24th May 1867.

At advising—

Lord Justice-Clerk—I am clear that neither at common law nor under the Act 1621 is the marriage-contract reducible. The circumstances are remarkable, and though the case itself may not be important, an important principle is involved. This lady lived in family with her brother, who advanced various sums of money—at what time and for what consideration is not stated—amounting in all to four or five hundred pounds and he alleges that at some time or other, with some funds, including the monies she had borrowed from him, she purchased a property. In 1859 the advances cease, from which time the pursuer has remained the creditor of his sister, and has done nothing to get his debt paid except to obtain a bond in 1864, although the estate was available. In January 1871 the lady marries, and even then the brother takes no steps to make the estate of his debtor available for payment. After the lapse of two years he brings an adjudication of his debtor's estate; then this contract is recorded, and it appears that the estate has been conveyed to trustees for the joint life-interest of the spouses; the fee to the children of the marriage; failing issue, to the children of the husband by a former marriage, and then this action of reduction is brought—first, under the Act 1621, and, second, on the ground of fraud at common law. I do not think the contract is struck at by the Act 1621. I doubt whether the principle of exorbitant would apply so far as the children are concerned. The marriage was a true, just, and necessary cause, and these were not conjunct and confident persons. As to fraud at common law, what is it? It was no fraud in the wife to reasonably provide for her

husband, and the husband undertook liability for her debt. The question whether the spouses could declare the property to be alimentary, and so put it beyond the reach of their creditors, does not arise here, but in the adjudication, which will carry any interest the debtor has in the property.

LORDS NEAVES and BENHOLME concurred.

LORD ORMIDALE—I concur, though at one time I entertained doubts as to the point of excess in the provisions, but on close examination I am clear there is no exorbitancy in the provisions, and that reduction is not the proper action to get rid of the excess, if there is excess, especially when the income is conveyed so as to form an alimentary fund for the two spouses. The proper mode is to arrest in the hands of the trustees. A multiplepoinding would then be brought and the question would necessarily arise how far the provision would be alimentary. There is no statement in record of what the excess is, unless we find it in the alimentary nature of the provision or in the ultimate destination of the corpus of the estate. On the statute 1621, and at common law, I am clear that the allegations do not show—(1) that the parties were conjunct and confident, nor (2) is it said that there was any insolvency on the part of any concerned—certainly not on that of the lady whose insolvency it would be absolutely necessary to state in order to make the reduction relevant under the statute. I am far from thinking a reduction of an ante-nuptial contract cannot be sustained at common, law but it would require a very different state of facts from what is disclosed here.

The Court adhered.

Counsel for Pursuer—Watson and Trayner. Agents—Henry & Shiress, S.S.C.

Counsel for Defenders—Asher and Readman. Agents—Morton, Neilson & Smart, W.S.

Saturday, May 16.

FIRST DIVISION.

THE PRESBYTERY OF LEWIS *v.* RODERICK FRASER.

[Sheriff of Ross, &c.

Church Judicatories—Proof—Witness, Citation of—Judge Ordinary.

Held that it was competent for a presbytery of the Established Church to apply to the Judge Ordinary to grant warrant to compel the attendance of recusant witnesses.

Opinion (*per* Lord Ardmillan), that the same rule applied to Judicatories of Nonconformist Churches.

This was a petition presented by the Presbytery of Lewis to the Sheriff of Ross, Cromarty, and Sutherland, in the following circumstances:—

In April 1873 the Presbytery found it necessary to proceed by libel against Mr Roderick Fraser, a minister within the Presbytery, for acts of alleged drunkenness and profane language, and a proof of the charges was ordered. The Presbytery granted warrant to summon witnesses, and the witnesses were duly cited by a sheriff officer. A number of the witnesses failed to attend the diet of proof without any reason being assigned for their non-appearance, and this petition was presented to the Sheriff to grant warrant to summon the recusant witnesses.

Mr Fraser, the minister accused, opposed the application.

The Sheriff (FORDYCE), on 4th April 1874 pronounced the following interlocutor, with subjoined note:—

"*Edinburgh, 4th April* 1874.—The Sheriff having considered this petition, along with the original libel referred to therein, with list of witnesses, and authority of the Presbytery to officers to cite attached thereto, at the instance of the Presbytery of Lewis against the respondent, the Rev. Roderick Fraser, minister of Uig, and having also considered the whole productions contained in the Inventory of Process; and having heard parties by their counsel thereon, and advised the cause, refuses to grant the warrant craved in said petition: Dismisses the same as incompetent: Finds the petitioners liable in payment to the respondent of the expenses of process; allows an account thereof to be given in; remits the same to the Auditor of Court to tax and report, and decerns—one word being delete before signing.

"*Note.*—The question raised in this petition, which was represented by counsel for the petitioners as one of great importance in the conduct of ecclesiastical causes of the class referred to, was argued by the counsel for the parties with much ability and force. The substance of the argument for the Presbytery seemed to be—

"That the Courts of the Established Church of Scotland being recognised by the law of the realm, the Civil Courts, where the former were defective in power to carry out their own sentences, were bound, on being required, to aid the former in making their sentences effectual. In cases, for instance, where a minister is prosecuted before the Presbytery on such charges as are contained in the libel above referred to, the Church Courts have not the power to compel witnesses to attend to give evidence in the Church Courts, though properly summoned by them to appear and do so. In these circumstances, they were entitled to apply for and obtain the aid of the constituted civil tribunals, to enforce the attendance of such contumacious witnesses by issuing letters of second diligence.

"Thus the Sheriff, who is the representative of the Crown, the fountain of the law of the land, was, as head of the law within his own jurisdiction, bound to 'look after every matter which regards the Crown's interest' (Ersk. i. 4, 6). The Sheriff was especially bound to give aid in cases of the sort referred to. Thus the Act 1690, c. 5, '*ratifying the Confession of Faith and settling Presbyterian Church Government*' for Scotland, adopts and confirms the Confession of Faith, and thereby makes it the law of the land. Now, one of the provisions of the Act 1690, c. 5, as set forth in the 23d (subordinate) chapter or division, which relates to the powers of the civil magistrate with regard to ecclesiastical matters, provides as follows:—(3) 'The civil magistrate may not assume to himself the administration of the word and sacraments, or the power of the keys of the Kingdom of Heaven, yet he hath authority, and it is his duty, to take order that unity and peace be preserved in the church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline