poorest class, who received education and were clothed and fed.

The Lord Ordinary (YOUNG), on 6th July 1877, pronounced an interlocutor finding that while existing circumstances continued, the real raisers would act within their trust and according to their duty by distributing the said share of the trust-funds between the "Dundee Industrial Schools Society" and the "Mars Training Ship Institution." His Lordship added the following note:—

"*Note.*—[*After narrating the facts as above stated*]—In the argument submitted to me nothing turned on the use of the popular name 'ragged school,' which is not in fact used by either claimant. It was conceded (I think rightly) that the description of the pupils, the terms of their reception, and the character of the instruction and discipline in the ship, were such that if instead of being a ship in the Tay without the burgh, it had been a building on shore within the burgh, the name 'ragged school in Dundee' would have been applicable. The objections to its applicability were rested on the character and locality of the structure in which this ragged school is conducted.

"With respect to the nature of the structure, I think there is no validity in the objection. If an old ship affords the requisite accommodation, any kind of school may be conducted in it more or less conveniently, and the character of the school will depend precisely on such considerations as those which make this in my opinion a ragged school, as that term is popularly used.

"With respect to the locality, I think the substance of the thing is to be looked to, and, so regarded, I think this ragged school is in Dundee, although without the burgh. It is a Dundee institution. Dundee might be well provided with ragged schools although all of them were without the burgh, and I should not in that case think that this bequest must fail because of the words 'in Dundee,' for '*qui hæret in litera hæret in cortice.*' This opinion is of course only applicable while the ship, although in the water, is kept in its present place, or so close to Dundee that a school on shore equally near would, although outside the burgh, be properly and reasonably regarded as a town school. But while I have thought it proper thus to express my opinion, I have to point out that it only applies to the present time and existing circumstances, and goes no further than this—that in these circumstances, and while they remain unchanged, these trustees will be within their trust and according to their duty in admitting both claimants to participate in the bequest, in such proportions as they in their discretion shall judge proper, and I shall so express my judgment.

"It is perhaps proper, although but for some observations made in argument I should have thought it superfluous, to say that my judgment has no bearing whatever in the case of a legacy immediately payable to ragged schools in Dundee, however the bequest may be expressed. The case I am dealing with is that of the division of an annual contribution, which is exhausted year by year, and admits of all changes of circumstances being followed and attended to by the administering trustees, and my opinion on it involves no indication of opinion upon the case of a proper legacy payable at once."

Mr Swanston, the secretary of the Dundee Industrial Schools Society, reclaimed.

Authorities—*Duff's Trustees* v. *Society of Scripture Readers, &c.*, Feb. 19, 1862, 24 D. 552; *Grant* v. *Grant*, Law Rep., 5 P.C. 727; *Clergy Society*, June 7, 1856, 2 Kay and J. 615; *Wilson's Executor* v. *Scottish Society for Conversion of Israel*, Dec. 2, 1869, 8 Macph. 233.

At advising—

LORD ORMIDALE—I take it to be undoubted that where the description by a testator of the object of his bounty is ambiguous and uncertain, parole evidence is admissible to show what the testator truly meant, as is well illustrated in the comparatively recent case *in re Kilvert's Trust*, Dec. 16, 1871, Law Rep., 7 Chan. Cases 170, to which we were referred at the debate. Applying this principle to the present case, where the testator's description of the object of his bounty as regards the bequest more immediately in dispute is in some degree attended with doubt and uncertainty, I should, in the ordinary case, have been disposed to think that the proper course would have been, before deciding the question, to have allowed the secretary to the Dundee Industrial Schools Society proof of certain of his averments. But keeping in view that the case has come before us very much as a concluded one, so far as further proof is concerned; that the Lord Ordinary's remarks in the note to his judgment, that in the argument submitted to him "nothing turned on the popular name 'ragged schools,' which is not in fact used by either claimant;" and that the same remark may fairly be made in reference to the argument which was submitted to us—I am not disposed to differ from the opinion which has been expressed by the Lord Ordinary.

The LORD JUSTICE-CLERK and LORD GIFFORD concurred.

The Court adhered.

Counsel for Secretary of the Industrial Schools Society (Reclaimer)—Guthrie Smith—M'Kechnie. Agent—J. Duncan Smith, S.S.C.

Counsel for Bogie's Trustees (Respondents)—Black. Agents—Curror & Cowper, S.S.C.

Counsel for The Mars Training Ship) (Respondent)—Lee. Agent—H. W. Cornillon, S.S.C.

Tuesday, February 5.

SECOND DIVISION.

[Lord Young, Ordinary.

JACK *v.* FERGUSON, ETC.

Husband and Wife—Conjugal Rights Act 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 16—*Where the Title of the Trustee on a Husband's Sequestrated Estate was pleaded against a Wife's Claim under that section.*

A wife obtained decree of divorce against her husband in 1874. His estate was sequestrated in 1875. At the death of her father in 1872 she had become entitled to a share of the residue of his estate, which had remained in the hands of his executors,

and to which her husband claimed right *jure mariti*. In a claim by the wife subsequently to the sequestration, under the 16th section of the Conjugal Rights Act 1861, for payment of the share as a reasonable provision for her support and maintenance—*held* that she was entitled to receive it, in respect that intimation given to her husband prior to the sequestration by the pursuer's agents (who were also agents for the executors who held the fund) was sufficient under the Act to protect her interest notwithstanding the husband's sequestration.

Observed (*per* Lord Justice-Clerk) that there are many cases in which a trustee in a sequestration is liable to equities which would not be pleadable against an individual creditor.

Observed (*per* Lords Justice-Clerk and Gifford) that upon a construction of the terms of the 16th section of the Conjugal Rights Act 1861 the diligence which will exclude the claim of a wife upon her husband's estate must be actual, and not constructive, and that therefore sequestration operates no such bar, the title of the trustee being only for the purposes of distribution.

On 29th October 1858 the pursuer Margaret Jack was married to Robert Ferguson. On 16th July 1872 the pursuer's father James Jack died, and, *inter alia*, a sum of £29, 14s. 5d. fell to her as one of his next-of-kin. The executors of the deceased and Robert Ferguson, the husband, were the defenders in this action. On 19th December 1874 the pursuer obtained divorce from her husband, and on 12th March 1875 the estates of the latter were sequestrated. On 20th August 1875 he was discharged on payment of a composition. The £29, 14s. 5d. was still in the hands of the executors.

The pursuer's claim in the present action, brought against her father's executors and her husband (the latter of whom alone appeared), was for the above-named sum of £29, 14s. 5d., and was made in terms of the Conjugal Rights Act 1861 (24 and 25 Vict. cap. 86), the 16th section of which is as follows:—"When a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband or his creditors, or any other person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf; and in the event of dispute as to the amount of the provision to be made, the matter shall, in an ordinary action, be determined by the Court of Session according to the circumstances of each case, and with reference to any provisions previously secured in favour of the wife, and any other property belonging to her exempt from the *jus mariti*: Provided always that no claim for such provision shall be competent to the wife if, before it be made by her, the husband or his assignee or disponee shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband, where he has, before such claim is made by the wife, attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of furthcoming, or has pointed and carried through and reported a sale thereof."

On 11th June 1874 Messrs Chalmers, the agents of the executors, who also acted for the pursuer, in a letter to Mr Mackie, the agent of the defender Ferguson, wrote—"We shall also be glad to hear what provision Mr Ferguson proposes to make for the support and maintenance of his wife out of the portion of Mr Jack's estate falling to her." On 13th June following they wrote again—"We wish to be informed on behalf of Mrs Ferguson, for whom we act, what provision her husband proposes to make for her support and maintenance out of the above sum. We see from your letter that you supposed that we wished for this information on behalf of the executors, which was not the case." On 24th September 1874 the pursuer's agent in Edinburgh wrote to Mr Ferguson's agent—"Mrs Ferguson has no intention to dispute her husband's right to the money lately demanded, though it may be questioned in the circumstances. She thinks the compromise proposed should have been accepted, and she is still willing to agree to it. If still refused, I think the money should remain where it is to await the result of the actions now in dependence, for if this is not agreed to I am instructed to use arrestments. It seems to me a pity to incur expense."

After various procedure the Lord Ordinary (Young), on 26th October 1877, pronounced the following interlocutor:—"Having heard counsel for the parties, and considered the record and whole cause—Finds, decerns, and declares, *quoad* the defender Robert Ferguson, in terms of the declaratory conclusions of the summons: Finds the said Robert Ferguson liable in expenses, and remits the account when lodged to the Auditor to tax and report: Further, *quoad* the other defenders, finds, decerns, and declares in absence, in terms of the declaratory conclusions of the summons, and decerns against them in terms of the petitory conclusions of the summons."

The defender reclaimed, and argued—No sufficient claim had been made before Ferguson's sequestration, or, if made, it had been withdrawn by the last letter. Sequestration was a complete diligence, and made the money in question irrevocably part of the bankrupt's estate. Even if claim had been made before sequestration, that constituted a debt which was discharged on discharge of bankrupt. At time of sequestration the pursuer was divorced from her husband, and therefore in the same position as the other creditors.

Authorities—*Ferguson* v. *Jack's Executors*, Jan. 30, 1877, 4 Rettie 393; Bankruptcy Act 1856, secs. 102, 108, 140; Bell's Comm. 349 (M'Laren's edition).

Argued for pursuer (respondent)—A sufficiently distinct claim was made by the first two letters before defender Ferguson's sequestration, a claim which the last letter did not withdraw. Even if these letters were held not to constitute a claim, sequestration was not such a complete and actual diligence as to bar a subsequent claim. The trustee on a bankrupt's estate was in the same

position as the bankrupt, and the bankrupt could acquire no higher right to his property through him. The defender Ferguson's right to the money was conditional on his making provision for pursuer.

Authorities—Fraser on Husband and Wife, i. 832 (latest edition); *Miller* v. *Learmonth*, November 21, 1871, 10 Macph. 107; *Gordon* v. *Cheyne*, February 5, 1824, 2 S. 675 (old edition).; *Fleeming* v. *Howden*, May 21. 1868, 6 Macph. 782; *Davidson* v. *Boyd*, November 5, 1868, 7 Macph. 77.

At advising—

Lord Justice-Clerk—The small sum of £29 which is involved in this action has given rise to an amount of litigation which is much to be regretted. The case, however, involves some principles of importance relative to the construction and operation of the Conjugal Rights Act 1861.

The sum in question is the amount of intestate succession falling to the pursuer from her father's estate. The defender claims the amount *jure mariti*. The succession opened in 1872, during the marriage of the pursuer and defender. The latter was divorced in December 1874, and he was sequestrated in 1875, and has since been discharged on composition. The pursuer claims a reasonable allowance out of this fund under the 16th section of the Conjugal Rights Act 1861, in answer to which the defender pleads the effect of the trustee's title in the sequestration as satisfying the terms of the concluding words of that section.

The 16th section of the Conjugal Rights Act is as follows—[*reads as above*]. I shall shortly advert to the plea of the defender, which might have presented some difficulty but for an element which, in my opinion, is quite sufficient for the decision of the case. It must be observed that the operation of the first part of the 16th section is to attach a limitation to the *jus mariti* in such cases, and to prevent the right from taking effect excepting under an essential and inherent condition. But for the proviso at the end of the clause it would certainly have been doubtful whether any claim in the husband's right could have been sustained excepting subject to this restriction. The exception includes two classes—1st, The husband himself or his assignee, who has obtained lawful possession of the fund before any claim made by the wife; 2d, Creditors having done complete diligence by arrestment and furthcoming or poinding and sale. It is, to say the least, doubtful if the claim of the defender here derives any support from these exceptions. He has not obtained possession, neither has any arrestment or poinding been used. He pleads the statutory title of the trustee in the sequestration as equivalent to complete possession or diligence. But there are many cases in which a trustee in a sequestration is liable to equities which would not be pleadable against an individual creditor—a principle given effect to in numberless decisions, from *Gordon* v. *Cheyne*, February 5, 1824, 2 S. 675, down to the present time. Further, it may be maintained that the requisite diligence under the clause is actual, not constructive, diligence, that the imputed operation of the trustee's title is only for the purposes of distribution, and that to permit the title of the trustee in a subsisting sequestration of the husband instantly to attach a fund bequeathed to the wife would frustrate the manifest intention of the statute. Lastly, it is certainly not to be assumed that the husband, although discharged, is in any better position than he would have been had he remained solvent. There may be cases in which, in order to recover the funds necessary to pay his composition, a sequestrated bankrupt may be allowed to use the trustee's title; but this can hardly be one of them. The claim is made personally *jure mariti* by the husband himself. If he cannot recover in that character without being subject to the humane condition of this clause, it is difficult to see how he can prevail as his own creditor.

I have thought it right to note these things, as they were strongly brought out in argument; but I am further of opinion that there was a claim made on the part of the wife before the sequestration, and that is conclusive. There is no specific form in which such a claim need be made, but any direct notification to the husband is in my opinion sufficient. Here the notice was quite complete, for the agents who acted for the wife acted also for the executors who held the funds. The letters printed in the appendix place this beyond doubt, and as they were written in 1874 they seem decisive of the case.

Lord Ormidale—Although several questions, some of them not unattended with difficulty, were raised at the debate in this case in reference more especially to the effect of the sequestration as a decree of furthcoming, and the subsequent discharge and reinstalment of the bankrupt, I have upon consideration, and without requiring to deal with these questions, in regard to which I reserve my opinion, come to be satisfied that the Lord Ordinary's judgment reclaimed against is right.

I assume, as I think I am entitled to do, that the correspondence which passed between the agents for the parties in June 1874 sufficiently instructs that a claim was then made on behalf of the pursuer Mrs Jack for a provision out of the fund in question in terms of the Conjugal Rights Amendment Act 1861, and this being so it follows that the fund could not pass to the trustee in the defender's subsequent sequestration in March 1875 except subject to the pursuer's claim, which by force of the statute limited any right which the bankrupt and his creditors could possibly have. The defender's discharge in the sequestration and reinvestiture therefore left the matter just as it had been prior to the sequestration; and consequently the pursuer is entitled now to insist in her claim in the same manner and to the same effect as she might have been to insist in it prior to the defender's sequestration and discharge.

It was not disputed that the £29, 14s. 5d., being the fund in dispute, is no more than a reasonable provision in the circumstances for the pursuer's support and maintenance. The reclaiming note must therefore be refused and the interlocutor of the Lord Ordinary adhered to.

Lord Gifford—I think the judgment of the Lord Ordinary in this case is right, and should be adhered to.

The first question is, Whether prior to the sequestration of the defender Robert Ferguson a claim was made by or on behalf of the pursuer Margaret Jack or Ferguson, who had been the

wife of the said Robert Ferguson, for a reasonable provision for her support and maintenance out of the fund now in question in terms of the Conjugal Rights Act of 1861. If this question is answered in the affirmative, the other questions raised in the case are superseded, for if a claim was made by or for the wife prior to her husband's sequestration that will entitle her to a provision which in this case will exhaust the whole fund.

Now, I cannot read the two letters of Messrs Chalmers, advocates in Aberdeen, dated 11th and 13th June 1874, otherwise than as a very distinct claim on behalf of the pursuer for a provision out of the fund in question. Messrs Chalmers wrote both these letters as the agents of the present pursuer, although Mr Mackie seems to have thought that the first letter was only written on behalf of Mr Jack's trustees. This was corrected and put beyond doubt by the second letter. Both letters were written in answer to a demand which Mr Ferguson had made for payment of the fund. He had not at that time been sequestrated, and was acting on his own behalf. In answer to this demand Messrs Chalmers say in both letters—What provision does Mr Ferguson propose to make for Mrs Ferguson's support and maintenance out of the above sum? These are the very words of the statute, and it is impossible to read the inquiry otherwise than as a claim by the wife for her statutory provision, and that as a condition of any payment to the husband.

The subsequent correspondence was read to us, and it was urged that this claim by the wife was afterwards departed from or withdrawn. I do not think so. No doubt it was said that the wife did not dispute her husband's right to the money. She does not do so still; she admits that it is his in virtue of his *jus mariti;* but this is quite consistent with her claiming a provision therefrom under the statute. I think, therefore, the pursuer's statutory claim being timeously made, is well founded.

It was not disputed that if the wife is entitled to a provision for maintenance and support this would exhaust the £29, 14s. 5d., so that the wife is now entitled to the full amount in the hands of her father's trustees.

If there had been no claim made by the wife prior to her husband's sequestration, a question of some nicety would have arisen as to whether, as in a question with the wife and under the Conjugal Rights Act of 1861, the sequestration of the husband was equivalent to a decree of furth-coming or to a completed poinding and sale at the instance of a creditor, so as to preclude the wife from thereafter claiming a provision under the statute. This question does not arise in the present case, but as it formed the subject of argument, I have no hesitation in expressing the leaning of my opinion that mercantile sequestration has not the effect contended for in favour of the trustee. No doubt the Bankrupt Act declares that the first deliverance in a sequestration, when sequestration is ultimately awarded, shall vest the estate in the trustee, and be equivalent in his person to an intimated assignation to an arrestment followed by decree of furth-coming to a completed poinding and sale, and so on, but it appears to me that these provisions of the Bankrupt Act have reference to that Act alone, and are intended merely to give the trustee under hat statute a completed title to the bankrupt's estate for the purposes of distribution. I think it would be stretching the provisions beyond their true intent if it were to be held that the first deliverance on a petition for sequestration (and such deliverance is frequently a mere order for service) shall be held as equivalent to completed diligence under a different Act altogether, namely, the Conjugal Rights Act of 1861, which statute has a different purpose and a different purview. In construing the Conjugal Rights Act I think that what is required to exclude the wife's equitable claim for maintenance and support out of her own funds is not merely constructive diligence like that declared by the Bankrupt Act, but actual and completed diligence by special and individual creditors of the husband—diligence which has the effect, like actual payment to the husband himself, of giving to the creditor possession of the fund itself, and so excluding the wife's claim thereon. The Conjugal Rights Act seems to contemplate that the wife shall always have an opportunity of claiming a maintenance out of her funds after diligence of creditors has commenced, provided she makes her claim before the diligence is completed. To make the first deliverance in a sequestration equivalent to completed diligence, would be, I think, to deprive the wife of an equitable remedy which it appears to me the Conjugal Rights Act intended to confer.

The Court adhered.

Counsel for Pursuer (Respondent)—Rankine. Agents—Auld & Macdonald, W.S.

Counsel for Defender (Reclaimer)—Lorimer. Agent—Party.

HIGH COURT OF JUSTICIARY.

Wednesday, February 6.

BRUNTON *v.* BREMNER.

(Before Lord Justice-Clerk, Lord Young, and Lord Craighill).

Justiciary Cases—Public-House—Are Railway Servants "Travellers" under the Act 25 and 26 Vict. cap. 35?

An hotel-keeper, whose hotel was near a way-side station, on a Sunday supplied the driver and guard of a passing goods-train with beer. *Held* that in so doing he was not guilty of a breach of his certificate; inasmuch as the persons supplied must be held to be "travellers," who are specially exempted in the prohibition contained in the certificate.

This was an appeal at the instance of John Brunton, hotel-keeper, Cowdenbeath, under the Summary Prosecutions Appeals Act 1875, against a conviction obtained against him under the following circumstances, at the instance of James Fleming Bremner, Chief Constable of Fife:—Brunton was charged with having contravened the Act 9 George IV. cap. 58, the Act 16 and 17 Vict. cap. 67, the Act 25 and 26 Vict. cap. 35, or one or more of said Acts, in so far as early on the