

answer if any other parties were here apart from the original wrongdoers, but they cannot be heard to plead, now that the house is erected, that they are not to be liable for the consequences of their own fraud. The circumstances which make restitution impossible are due to the fraudulent act of the defenders themselves. That is the ground of my judgment. On the whole matter I think the interlocutor of the Lord Ordinary ought to be recalled.

The Court repelled the defender Ritchie's plea of no title to sue, and remitted the cause to the Lord Ordinary to proceed.

Counsel for Pursuer (Reclaimer)—Campbell Smith. Agent—John Macmillan, S.S.C.

Counsel for Defender Ritchie (Respondent)—Rhind—G. Burnet. Agent—D. Todd Lees, S.S.C.

Counsel for Defenders Davison and Paterson (Respondents)—Trayner—Millie. Agent—William Officer, S.S.C.

Wednesday, December 13.

FIRST DIVISION.

[Lord Fraser, Ordinary.]

POE V. PATERSON.

Succession—Husband and Wife—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), sec. 3, sub-sec. 2, and sec. 6.

Held that sec. 6 of the Married Women's Property Act 1881, which gives to a husband, in the event of the dissolution of the marriage by the death of the wife, the same right in his wife's moveables as is taken by a widow in her husband's moveable estate, is applicable to all marriages, whether contracted before or after the passing of the Act.

Robert Wilson Poe was married to his wife Janet Adam or Poe on the 1st August 1878. Mrs Poe died intestate and domiciled in Scotland on 13th January 1882, leaving no children. She had prior to her marriage become entitled to a legacy of £250, exclusive of the *jus mariti* of any husband she might marry, which sum was invested in a mortgage in her favour, and remained so invested at the date of this action. She had also become entitled prior to her marriage to a share of the residue of the estate of an uncle, but owing to an interposed liferent in favour of her father the money was not payable till his death. He died on 10th January 1882 intestate and domiciled in Scotland, leaving no widow, and she thereby became entitled, as one of his two children, to one-half of his whole estate, which was entirely moveable.

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21) came into operation on 18th July 1881, the date of the passing of the Act. Sections 1 and 2 abolish the *jus mariti* and right of administration in the case of marriages subsequent to the passing of the Act, and provide that a wife's property shall not, except in certain circumstances, be liable to the diligence

of her husband's creditors. Section 3 provides—“In the case of marriages which have taken place before the passing of this Act—(1) The provisions of this Act shall not apply where the husband shall have before the passing thereof, by irrevocable deed or deeds, made a reasonable provision for his wife in the event of her surviving him. (2) In other cases the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of this Act.” Section 6—“After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be.”

Founding on this provision Poe raised the present action of declarator against Mrs Isabella Adam or Paterson, the sister and executrix-dative *qua* next-of-kin of his wife, concluding for declarator that he was entitled to one-half of the whole free personal estate which belonged to his wife at the date of her death, and that the defender should be ordained to exhibit a full account of her intrusions as executrix with the personal estate of Mrs Poe.

He pleaded, *inter alia*, that he was entitled to decree of declarator in respect of the terms of the two trust-dispositions and settlements by which the legacy of £250 and the share of residue of Mrs Poe's uncle's estate were left to her, and that at common law, and “*separatim*, by virtue of the Married Women's Property (Scotland) Act 1881, particularly sec. 6 thereof.”

The defender pleaded, *inter alia*—“(1) Upon a just construction of the trust-dispositions and settlements above referred to, the pursuer is not entitled to any part of the free personal estate which belonged to his late wife, and to which she acquired right under these deeds. (2) The pursuer's claim, in so far as resting on The Married Women's Property (Scotland) Act 1881, cannot be sustained, in respect of the provisions of section 3, sub-section 2, of said Act.”

The Lord Ordinary pronounced the following interlocutor:—“Sustains the second plea-in-law for the defenders, assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses,” &c.

“*Opinion.*—The Lord Ordinary is of opinion that the 6th section of The Married Women's Property (Scotland) Act 1881 is not retrospective; and therefore that it does not apply to the case of married persons who were husband and wife at the time when it passed. There is a special provision in the 3d section which deals with the case of marriages which have taken place before the passing of the Act. That section is composed of two sub-divisions, the first of which declares that the provisions of the Act shall not apply where the husband shall have before the passing thereof by irrevocable deed made a reasonable provision for his wife in the event of her surviving him. The second sub-division is in the

following terms:—‘In other cases the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, moveable or heritable, and income thereof, to which the wife may acquire right after the passing of the Act.’ The words ‘provisions of this Act,’ must mean the whole provisions of the Act—both the provisions which go before and the provisions which follow this 3d section. The provisions are not to apply to anything except to property acquired by a wife (who was a wife at the time of the passing of the Act) subsequently to the Act coming into operation. All the other provisions of the statute are to have no retrospective effect upon the property of husbands and wives then married, except to the limited extent allowed by the second sub-division of section 3.

‘This is made more clear by the 4th section, which provides for the case of a married pair (who were married before the Act) voluntarily bringing themselves within its provisions. That section enacts—‘It shall be competent to all persons married before the passing of this Act to declare by mutual deed that the wife’s whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by this Act;’ and then it is enacted that there shall be due publication of such declaration.

‘No doubt the 6th section, taken by itself, would apply to the case of persons married before as well as those married after the Act passed. Its language is quite general and unqualified—‘After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband’s moveable estate, according to the law and practice of Scotland.’ But the generality of this language is controlled by the second sub-division of section 3d, and it must be read as if it had been confined to the case of any woman who was married after the passing of this Act, and who may die domiciled in Scotland.

‘In the present case the deceased wife of the pursuer succeeded to property as her separate estate, partly before and partly after the passing of the Act. But the Lord Ordinary is unable to draw any distinction as regards the rights of the husband between the two classes of property. It is only in virtue of the statute that he can claim as against the next-of-kin of his intestate wife any part of her estate; and the statute, except to the limited extent already explained, impliedly declares that no husband who was such at the date of the Act can claim any right under it.

‘The legislation is of the most extraordinary description. It abolishes the *jus mariti*, and imposes no obligation upon the wife to contribute one farthing to the household expenses. It interferes with the vested interests of husbands who were husbands when it passed, by declaring all future acquired property of the wife to be exempted from the *jus mariti*, and it does not confer upon the husband, as the Lord Ordinary is compelled to hold, any right to demand a share of his wife’s separate estate should he survive her, even out of that property which by the common law would have fallen under his *jus mariti*.

‘It is with reluctance that the Lord Ordinary is forced to decide as he has done in this case, but the Act of Parliament leaves him no alternative.’

The pursuer reclaimed, and argued—No restrictive words were to be found in sec. 6; in this respect it differed from the first four sections, which were expressly limited in their application; it was accordingly applicable to all marriages. It was a substantive enactment, and like the sections which followed it was not controlled by any prior section.

Authority—*Caledonian Railway Company v. North British Railway Company*, February 17, 1881, 8 R. (H. of L.) 23.

Argued for respondent—In order that the pursuer might prevail, the words ‘previously enacted provisions’ must be inserted into secs. 2 and 3. Sec. 6 is controlled by sec. 3 and its sub-sections, which have a controlling effect upon the whole provisions of the Act, and are not limited in their effect to the immediately preceding clauses.

At advising—

LORD PRESIDENT—It appears that the pursuer Robert Wilson Poe was married to his wife on 1st August 1878, and that she died intestate and domiciled in Scotland on 13th January 1882. Mrs Poe seems to have received various sums of money during her lifetime, some of them prior and some subsequent to 18th July 1881, which was the date when the Married Women’s Property (Scotland) Act 1881 came into operation. The pursuer’s claim is made against the executrix of his late wife for one-half of her moveable estate, in terms of sec. 6 of that Act, and the defence comes to be that sec. 6 does not apply to any case in which a marriage was entered into before the passing of the Act. The question accordingly seems to be one dependent upon the construction of the statute.

Now, the Act is entitled ‘An Act for the amendment of the law regarding the property of married women in Scotland,’ and the preamble narrates that it is necessary further to protect the property of married women, this object having been to a certain extent attained by a prior Act (40 and 41 Vict. c. 29). Now, the first observation which one would make upon reading this statute as a whole is, that whereas secs. 1 and 2 are in express terms confined to marriages contracted subsequent to the passing of the Act, and secs. 3 and 4 to those prior to the passing of the Act, secs. 5, 6, 7, and 8 do not contain any limiting words at all. The first section begins with the words—‘When a marriage is contracted after the passing of this Act,’ such and such regulations shall apply; and section 2 is in similar terms. Now, the effect of these two sections is to exempt the property of married women from their husbands’ creditors, and from the effects of bankruptcy. The 3d section deals with ‘marriages which have taken place before the passing of this Act;’ and sec. 4 says—‘It shall be competent to all persons married before the passing of this Act’ to do such and such things; therefore as regards the first four sections, they are clearly limited in their application. The 5th section is in these terms—‘When a wife is deserted by her husband, or is living apart from him with his consent, a Judge of the Court of Session or Sheriff Court, on petition addressed to the Court, may dispense

with the husband's consent to any deed relating to his estate." Now, this section contains no words limiting it to marriages contracted either before or after the passing of the Act; and as regards the subject-matter of the provision, I can see no reason why it should in any way be so limited; therefore *prima facie* it applies to both classes of marriages. In sec. 6, which more immediately applies to the present case, the opening words I think are of some importance; they are in these terms—"After the passing of this Act the husband of any woman who may die domiciled in Scotland" shall take such and such benefits. Here I find no limiting words, and only one restriction, viz.—that the wife must die domiciled in Scotland. The 7th section opens with similar words, and provides for "the children of any woman who may die domiciled in Scotland" having a right of legitim in her moveable estate. The last section makes certain exemptions of contracts and other legal rights from the operation of the Act. Now, it appears to me that there is such a marked distinction between the 5th, 6th, 7th and 8th sections and the four which precede them that no difficulty of construction presents itself to my mind. The first four sections are limited by their language to marriages contracted subsequent or prior to the passing of the Act—the latter are absolutely unlimited, and are therefore clearly applicable to all marriages.

But then it is said for the defender that there is a provision in the second sub-section of sec. 3 which has a limiting effect upon the whole provision of the Act. This was in fact the only point which was seriously pressed upon us for the defence. To understand the precise meaning and intended operation of this sub-section, it is necessary to observe somewhat closely what it is that the 3d section contemplates. The first two sections, taken together, have the effect of practically abolishing the *jus mariti*, and making a married woman independent in the possession of her separate estate. But the 3d section provides—[*His Lordship read sec. 3, above quoted*]. Now, the substance of these sub-sections is accordingly this—that as regards marriages contracted before the passing of this Act, the husband's *jus mariti* shall be excluded only from estate of the wife acquired by her after the passing of this Act. The Act shall have no application beyond that provision.

But the language of sub-section 2 must be particularly observed. It says—"In other cases the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded, to the extent respectively prescribed by the preceding sections, from all estate, moveable or heritable, and the income thereof, to which the wife may require right after the passing of this Act." The exception corresponds with and applies to the rule laid down by secs. 1 and 2, and it seems to me that it would be difficult according to any ordinary rule of construction to bestow on these words—"the provisions of this Act shall not apply"—the meaning requisite to give effect to the exceptions here made. Thus, the provision of sec. 6 which enables a husband to succeed to a portion of his wife's estate in intestacy, has nothing to do with the exception made here. The application of this sub-section is only to the rule of secs. 1 and 2.

Therefore it appears to me that though some

ambiguity may arise from the circumstance that secs. 6, 7, and 8 are really not covered by the title and preamble of the Act, yet it would not be fair to extend the words of this sub-section to the application contended for by the defender. It is hardly legitimate in all cases to appeal to the consequences of an enactment as a justification of a particular construction which is sought to be put upon it; still such an argument may occasionally be advanced with great force in the case of so startling and anomalous a piece of legislation as that here in question. But I think one cannot help seeing that the limited application of secs. 6 and 7 which is contended for by the defenders would be followed by some strange consequences. Suppose, for example, a wife's estate to be acquired entirely after the date of the passing of this Act, the marriage having taken place before that date, the husband would lose all interest in his wife's separate estate under sub-section 2, sec. 3. He would be in the same position as if he had married after the passing of the Act; and yet according to the defender's contention he is not to take benefit under the 6th section. A similar result would ensue under the provisions of sec. 7 with regard to children. It seems to me, therefore, that such a result would be unjust and impolitic, but it would follow as a necessary consequence on the defender's construction of the statute. Or take another case—suppose a marriage has been contracted before the date of this Act, and the wife's separate estate has by deed or marriage-contract been exclusively settled upon her, so that she is really in the same position as if she were under sections 1 and 2 of the Act—again the question would arise, Is the husband to have any share in his wife's succession? One would think that this is surely one of the cases for which the Act was intended to provide. Yet the husband would receive no share of his wife's estate if the construction of the statute urged by the defender be adopted. I am therefore clearly of opinion that we must construe the statute looking to the fair meaning of its words, and that we should read secs. 5 to 8 as applying to all marriages, whether contracted before or after the passing of this Act, and hold sub-section 2 of sec. 3 as being limited in its application to the immediately preceding clauses.

LORD DEAS—The pursuer was married to his late wife on 8th August 1878, she died intestate and childless on 13th January 1882, survived by her husband, the pursuer. Her sister Mrs Paterson has been decerned and confirmed her executrix. The surviving husband brings this action against the executrix concluding for one-half of his wife's whole personal estate as accruing to him under sec. 6 of the Married Women's Property (Scotland) Act, which is in these terms—[*His Lordship here read sec. 6, ut supra*]. This section on the face of it clearly warrants the pursuer's demand against his late wife's executrix for one-half of his deceased wife's personal estate, provided there is nothing to exclude the demand in any other part of the statute. But the Lord Ordinary thinks section 6 is controlled and its provisions thereby excluded by the operation of the second sub-section of section 3, which bears that in other cases besides the case mentioned in sub-section 1 the provisions of the

Act shall not apply except as regards the partial exclusion of the *jus mariti* and right of administration. This second sub-section of section 3, it will be observed, commences with the words "in other cases the provisions of this Act shall not apply." Is this to be held as meaning that "the whole provisions which go before, as well as the whole provisions which follow, this 3d section are to be controlled by it?" The statute does not expressly say so, and I humbly think it is not to be so construed. Having exhausted the matters dealt with in the 3d section and its two subdivisions, there is nothing to suggest, that the Legislature did not intend the sixth section to be, as in its words it bears to be, a substantive enactment that after the passing of the Act "the husband of any woman who may die domiciled in Scotland shall take by operation of law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland." There was nothing to prevent the Legislature by a subsequent section introducing a substantive and independent enactment, and by all the rules of construction applicable to deeds as well as statutes, posterior clauses are held much more readily (to say the least of it) to derogate from anterior clauses than anterior clauses from posterior clauses. The last expressed will either of the Legislature or testator is more ordinarily held to rule. If the Lord Ordinary's view be correct, that the effects of subsection 2 of section 3 is to prevent section 6 from being read as a substantive and independent enactment, it seems to me that it would equally prevent sections 5, 7, and 8 from being considered in that light. That would be a conclusion too startling to be readily entertained even in regard to a statute which, as the Lord Ordinary points out, involved results some of which appear to be anomalous. I am of opinion that the interlocutor reclaimed against ought to be recalled, decree pronounced in terms of the declaratory conclusion of the libel, and the case remitted to the Lord Ordinary to proceed in the accounting.

LORD MURE—I concur. This Act appears to be framed on the principle of restricting the application of each section by express words when any limitation is intended to be made as to the time within which the marriages must be contracted, to which the different sections apply. This is clear, I think, from the terms of the four first sections, as in contrast with the others. The first and second deal exclusively with marriages contracted after the passing of this Act, while the third and fourth are made to apply to marriages which have taken place before the passing of this Act. The four first sections having been so framed, when we come to sections 5, 6, and 7, and find that they contain no restricting words, the natural inference is that they were not intended to be restricted in their application, but to extend to all marriages whether contracted before or after the Act. I do not very well see how it could be held, having regard to the provisions as they stand, that anything else was intended. It was conceded in argument that the 5th and 7th sections must be so construed, and the Lord Ordinary states in his note that the language of the 6th section taken by itself is quite general and unqualified, and would apply to the case of per-

sons married before as well as those married after the Act passed. But he holds that this "generality of the language" is controlled by the second subdivision of the 3d section. I am unable to adopt the construction by which the Lord Ordinary has arrived at this conclusion. The opposite construction may no doubt give rise, as was anxiously contended for by the defender, to a difficulty in reconciling the different sections of the Act, but I agree with your Lordships in the exposition you have given of the apparently conflicting provisions of the statute, and in holding that those apparent anomalies are not sufficient to entitle us to decide against the plain words of the 6th section.

LORD SHAND—I am of the same opinion. There can be no doubt, I think, that if the language of section 3 of this Act is to be taken literally, the defender would be entitled to succeed, for the statute provides by the first sub-section of section 3 that its provisions are not to apply where the husband shall have before the passing thereof by irrevocable deed made a reasonable provision for his wife in the event of her surviving him. The second subdivision is in the following terms—"In other cases the provisions of this Act shall not apply, except that the *jus mariti* and right of administration shall be excluded to the extent respectively prescribed by the preceding sections from all estate, heritable or moveable, and income thereof, to which the wife may acquire right after the passing of the Act." Thus the *jus mariti* and right of administration of the husband are only excluded in this case with regard to property acquired by the wife subsequent to the marriage, and not even from that if the husband has by antenuptial contract made a reasonable provision for his wife. If the contention of the defender is to prevail, it would be necessary to insert some such words as "the preceding provisions shall not apply." Some controlling words must be found if the words are not to be used in their ordinary sense. Now, it appears to me that a consideration of the other clauses shows that section 3 is to be interpreted as your Lordship has done. It is also of great importance to keep in mind the position in the Act in which we find this provision. Had it been at the end of the statute it would have been very different and it could not reasonably have been held to apply only to one or two sections, but coming where it does, so near the commencement of the statute, I can see no difficulty in limiting its application to the sections which precede it. Then as to the 5th, 6th, 7th, and 8th sections, they are expressed in such general terms that no good reason has been suggested for restricting these provisions to marriages contracted subsequent to the passing of this Act. If section 6 is made applicable to marriages contracted after the passing of the Act, then the husband gets some compensation; he has no control over the acquired estate of his wife, but he gets a share in her moveable estate. I am therefore inclined to think that though the literal interpretation of section 3 would lead us to the conclusion maintained by the defender, yet I am clear from the position in which this section stands in the statute that its provisions are limited to the sections which immediately precede it.

The Court recalled the interlocutor of the Lord Ordinary, repelled the first and second pleas-in-law for the defender, and found in terms of the declaratory conclusion of the summons.

Counsel for Pursuer—Trayner—Pearson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defender—J. P. B. Robertson—Shaw. Agents—Douglas, Kerr, & Smith, W.S.

Wednesday, December 13.

FIRST DIVISION.

[Lord Lee, Ordinary.]

APTHORPE v. EDINBURGH TRAMWAYS COMPANY.

Reparation—Carrier—Ticket Issued subject to Company's Bye-Laws—Wrongful Apprehension—Bill of Exceptions.

A tramway company issued a certain class of tickets at reduced rates subject to regulations specified in their bye-laws. A, who was aware of the regulations, purchased one of those tickets, and endeavoured to make it available for a journey by one of the tramway cars without complying with the regulation under which it was granted. Held that though lawfully in the car, since he might have paid the ordinary fare in the course of the journey, he was acting unlawfully in violating the regulation in question, and that the conductor of the car was justified, on his refusing to give his name and address or pay the ordinary fare, in giving him into custody.

Evidence—Admissibility of Evidence.

In an action arising out of these circumstances, held that a question put to the conductor of the car, whether, on reporting the matter to the managing director of the company, he was told that he had made a mistake, had been properly rejected as irrelevant.

The Tramways Act 1870 (33 and 34 Vict. c. 78) provides by section 46—“Subject to the provisions of the special Act authorising any tramway, and this Act, the promoters of any tramway . . . may make regulations for regulating the travelling in or upon any carriage belonging to them, and for the better enforcing the observance of all or any of such regulations it shall be lawful . . . for the promoters to make bye-laws . . . provided that such bye-laws are not repugnant to the laws of that part of the United Kingdom where the same are to have effect.”

The Edinburgh Tramways Company, which was formed under a private Act obtained in 1871, with which were incorporated, *inter alia*, the general provisions contained in parts 2 and 3 of the Tramways Act of 1870, which include section 46 above quoted, was in use to run from Stockbridge to the Register House an omnibus in connection with the tramway cars from that point to Newington. The company made a regulation that tickets furnished to passengers who wished to make the whole journey from Stockbridge to Newington should be examined and marked on the arrival of the omnibus at the Register House. The object of

this regulation was to prevent the transfer of a ticket available for the remainder of the journey to Newington to a passenger who had not come from Stockbridge, and was not therefore entitled to the benefit of the reduction of fare which the company made in favour of persons who made the whole journey, the cost of the whole journey being 3d., while the cost of either half was 2d.

In pursuance of this regulation, the company issued the following notice, which was exhibited in the omnibus from and after its promulgation on 30th May 1882:—“STOCKBRIDGE AND NEWINGTON.—On and after the first day of June passengers wishing to travel between Stockbridge and Newington, either way, will require to have the tickets issued by conductors changed at the office—53 North Bridge. By order. Shrubhill, 30th May 1882.”

This was an action of damages at the instance of Albert Apthorpe, residing in Raeburn Place, Edinburgh, against the company, for having, as he alleged, wrongfully caused him to be apprehended by the police as a person refusing to pay his fare. The dispute between the parties arose out of the refusal of the pursuer to comply with the rule as to change of tickets just quoted. The facts out of which the dispute arose are so fully narrated in the opinion of the Lord President that they need not here be set forth at length.

The case was tried before LORD LEE and a jury on the following issue:—“Whether the defenders on or about the 9th June 1882, in or near High Street, Edinburgh, wrongfully apprehended the pursuer, or caused him to be apprehended, to his loss, injury, and damage?” Damages were laid at £100.

The jury found for the defenders.

The pursuer moved for a rule on the defenders to show cause why a new trial should not be granted, on the ground that the verdict was against the weight of evidence; and also presented a bill of exceptions to the charge of the presiding Judge. These exceptions are dealt with *seriatim* by the Lord President.

Argued for pursuer—The bye-law which it was alleged he had broken was not binding upon the public, since it had not been passed either by the Local Authority or the Board of Trade—See General Tramways Act (33 and 34 Vict. cap. 78), sec. 46. The course which the conductor ought to have followed was to have refused to carry the pursuer, not to have carried him a part of the way and then given him into custody. The Lord Ordinary was wrong in refusing to allow the questions, to which the exception narrated *infra* referred, to be put to the conductor.

Authorities—*Menzies v. Highland Railway Company*, June 8, 1878, 5 R. 887; *Smith v. Green*, March 10, 1853, 15 D. 549.

Argued for defenders—As the pursuer consented to go to the Police Office, there was no apprehension in the ordinary sense of the word. The conductor was justified in his conduct by the pursuer refusing to give his name and address. Under the General Tramways Act power was given to make bye-laws, and it was not necessary to submit these to the Board of Trade in order to make them effectual. If the right existed to make the regulation, it must also be held to exist to enforce it. As to the directions to the jury, the first proposed by the pursuer was unsound in law, and the second, third, and fourth were mislead-