according to the old scheme during the period between the last augmentation and 1888. That is a question of locality which in my judgment is competent for the Court of Teinds alone. If our decision had been adverse to the defender the pursuer might have raised an action for repetition of over-payments in the Court of Session, and in that action the defender might have stated the plea of *bona fide* consumption which has been argued before us. But we have nothing to do with any such question in this Court, nor can it arise at all in consequence of our decision. It might or might not have been available to the defender if his payment of stipend for the period in question had been below the amount for which he was legally liable, but the decision is that he paid according to his liability, and the plea is therefore unnecessary and inapposite.

The Court pronounced this judgment:—

"Vary the interlocutor in so far as to insert in the seventh line thereof, after the words 'conclusions of the libel,' the words 'but this decree of reduction to have effect only from and after the date of the decree of approbation, 16th July 1888, for the second half of crop 1888 and in time coming;' Recal the interlocutor in so far as it finds the said Henry Walter Hope liable in expenses occasioned by his appearance: Find him entitled to expenses in the Outer House: *Quoad ultra* adhere.

Counsel for the Pursuer—Graham Murray—C. N. Johnston. Agents — Thomson, Dickson, & Shaw, W.S.

Counsel for the Defender Hope—Asher, Q.C.—Sym. Agents—Reid & Guild, W.S.

Saturday, January 24.

FIRST DIVISION.

[Lord Low, Ordinary.

COCHRANE *v.* LAMONT'S TRUSTEE.

Sequestration—Husband and Wife—Claim by Assignee of Wife in Husband's Sequestration—Married Women's Property Act 1881 (44 *and* 45 *Vict. c.* 21), *sec.* 1, *sub-sec.* (4).

By the first section of the Married Women's Property Act 1881, sub-sec. (1), it is provided that the whole moveable estate of the wife shall be vested in her as her separate estate, and shall not be subject to the *jus mariti*. By sub-section (4) it is provided that any money of the wife lent to the husband shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money after but not before the claims of the other creditors of the husband have been satisfied.

A husband less than a week before his sequestration granted to his wife a promissory-note, payable one day after date, for £1370, as the amount of sums lent to him at various times by his wife out of her separate estate. On the same day as she received the promissory-note the wife assigned it and the sum contained therein to a relative in consideration of a payment of £50. The wife's assignee thereafter lodged a claim for £1370 in the husband's sequestration, which the trustee, in respect of the provisions of section 1, sub-sec (4), of the Married Women's Property Act 1881, rejected as an ordinary claim, but admitted to a ranking on whatever assets might remain after the whole claims of the ordinary creditors of the bankrupt had been satisfied.

In an appeal by the wife's assignee, *held* that the deliverance of the trustee was right.

The estates of John Lamont were sequestrated on his own petition on 3rd February 1890. A claim was lodged in the sequestration for Miss Mary Cochrane to be ranked as an ordinary creditor for the sum of £1370.

The claim arose under the following circumstances—Mrs Lamont, the bankrupt's wife, had separate moveable estate by virtue of the provisions of the Married Women's Property Act 1881, and out of that estate she was alleged to have lent at various times sums of money to her husband, amounting in all to the sum of £1370. On 28th January 1890, being the day on which he granted a mandate to his agent to apply for sequestration, the bankrupt granted to his wife a promissory-note for the sum of £1370 payable one day after date.

On the same date Mrs Lamont, with consent of the bankrupt, and in consideration of £50 paid to her by William Anderson junior, accountant, Glasgow, assigned to the latter the sum contained in and due under the promissory-note, and the promissory-note itself, which is described in the assignation as having been granted "for sums advanced by me, the said Mary Anderson or Lamont, from my separate means and estate, on loan to the said John Lamont." On 28th May 1890 Mr Anderson executed in favour of the claimant Miss Mary Cochrane an assignation of the said sum of £1370 and the promissory-note, upon the narrative of the assignation in his favour and that Miss Cochrane had purchased the debt from him for the sum of £50. Mr Anderson was a cousin of Mrs Lamont, and Miss Cochrane was her daughter by a former marriage.

By sub-section (1) of section 1 of the Married Women's Property Act 1881 it is provided—"Where a marriage is contracted after the passing of this Act, and the husband shall at the time of the marriage have his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, shall, by operation of law, be vested in the wife as her separate estate, and shall not be subject to the *jus mariti*." By sub-section (4) it is provided—"Any money, or other estate of the wife lent or entrusted

to the husband or immixed with his funds shall be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

The trustee in the sequestration, Mr Robert C. King, solicitor, Kilwinning, held that sub-sec. (4) of sec. 1 of the Married Women's Property Act 1881 applied to the case, and he accordingly rejected Miss Cochrane's claim as an ordinary claim, but admitted the same to a ranking on whatever assets might remain after but not before the whole claims of the other ordinary creditors of the bankrupt had been satisfied.

Miss Cochrane appealed against this deliverance to the Lord Ordinary on the Bills.

On 9th December 1890 the Lord Ordinary (Low) having heard counsel for the parties, and considered the note of appeal and proceedings, dismissed the note of appeal and affirmed the deliverance of the trustee appealed against.

"*Opinion.*—[*After narrating the circumstances in which the claim arose, and referring to the deliverance of the trustee*]—It is argued for Miss Cochrane that the deliverance of the trustee is erroneous, on the ground that the provision in the Act applies only to the case of the wife herself claiming in bankruptcy, and does not affect an onerous assignee who has acquired right to the debt prior to sequestration. Until sequestration, it was argued, the wife was in as good a position as any other creditor, and that the disability imposed by the Act only came into existence after sequestration, and in the event of the wife herself claiming as a creditor in the sequestration.

"I am of opinion that this argument is not well founded. It seems to me to be a clear case for the application of the maxim *assignatus utitur jure auctoris*. By the first section of the Act, sub-section (1), it is provided that the whole moveable estate of the wife shall be vested in her as her separate estate, and shall not be subject to the *jus mariti*. By this enactment the wife is given right to her moveable estate, which but for the Act would have become the property of the husband. The right so given is, however, limited by the subsequent enactments of the section. Thus by sub-section (2) it is provided that the wife shall not be entitled to assign the prospective income, or unless with the husband's consent to dispose of such estate; and by sub-section (4), already quoted, it is provided that money lent or entrusted to the husband or immixed with his funds shall be treated as assets of the husband's estate in bankruptcy, subject to the right of the wife to a postponed ranking therefor. These limitations appear to me to affect the quality of the right which is given to the wife in her moveable estate, and an assignation cannot alter the quality of the right assigned. I do not think that it could be disputed that an assignation by a wife without the consent of her husband would not be effectual, because the Act which gives to the wife right to her moveable estate subjects that right to the qualification or condition that she shall not dispose of it without her husband's consent. In the same way I think that it is a qualification or condition of the wife's right that if her separate estate is lent or entrusted to the husband she shall only be entitled to a postponed ranking in the event of his bankruptcy.

"The present case is a very strong one for the application of the principle to which I have referred, because it is evident that the promissory-note and assignation were granted on the very eve and in contemplation of the husband's sequestration for the purpose of taking the case outwith the provisions of the statute. If such a device was lawful the provision of the Act founded on would easily be, and would probably generally be, substantially defeated, because it would be open to the wife, when her husband's bankruptcy became imminent, to dispose of her claim at the best price which she could get, and the assignee would rank upon the estate as an ordinary creditor for the full amount of the money lent or entrusted to the husband. Such a transaction would entirely defeat the intention of the Legislature in making the enactment in question, which, I take it, was to prevent the husband's creditors being prejudiced by the change which the Act made in the law in regard to the wife's right in cases in which her moveable estate had as matter of fact come into the husband's possession.

"I am therefore of opinion that the deliverance of the trustee is right, and should be sustained."

The appellant reclaimed, and argued—During the husband's solvency the wife had a perfectly good claim as a creditor for sums advanced by her to him. If she assigned her claim prior to her husband's bankruptcy to an onerous assignee, such assignee was entitled to claim in the husband's sequestration as an ordinary creditor for the amount of the claim. Further, the assignee held the promissory-note under a perfectly good title. The possible defects in title of the holder of a bill or note were exhaustively enumerated in the Bills of Exchange Act 1882. The alleged defect in the wife's title did not fall under the defects there enumerated, and could not affect a holder who acquired the promissory-note for value before it was overdue—Bills of Exchange Act 1882, 45 and 46 Vict. c. 61, sec. 29, sub-sec. (2), sec. 89; *Scottish Widows' Fund, &c.* v. *Buist*, July 14, 1876, 3 R. 1078.

The respondent argued—The promissory-note and the assignation were, as the Lord Ordinary said, evidently granted for the purpose of taking the case outwith the provisions of the Married Women's Property Act, but the statute could not be defeated in such a way, as the maxim *assignatus utitur jure auctoris* clearly applied. What was assigned was the wife's right subject to the qualification imposed by sub-sec. (4) of sec. 1.

At advising—

LORD PRESIDENT—I do not think that the Bills of Exchange Act has any application here. This is a question of ranking upon a sequestrated estate, and the provisions of the Bills of Exchange Act have reference merely to the rules which are to regulate the relations of solvent persons in ordinary circumstances. The promissory-note is not worth anything at all, and must be looked upon as a donation between husband and wife. Being gratuitous, it is quite without effect as regards the present question, and it is granted without any cause whatever if it is granted for the same right as the wife has already under sub-section 4 of section 1 of the Married Women's Property Act 1881. There is therefore no need to appeal to the Bills of Exchange Act.

As regards the construction of the Married Women's Property Act 1881, there is no difficulty at all. It is there provided by section 1, sub-section 4, that "any money or other estate of the wife lent or entrusted to the husband or immixed with his funds shall be treated as assets of the husband's estate in bankruptcy." That is the leading provision. If a wife lends or entrusts to her husband her separate estate, and he afterwards becomes bankrupt, then all the money so lent or entrusted to him is to be treated as assets of his estate, and that is a very broad and sweeping proposition, and it is only qualified by a reservation in favour of the wife in very special terms—"under reservation of the wife's claims to a dividend as a creditor for the value of such money or other estate after but not before the claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied." Now, giving effect to this latter clause it is plain that no wife could possibly claim to compete with the onerous creditors of her husband for the amount of her own estate which had been allowed to pass into the hands of her husband and to be immixed with his funds.

Then the only other question is, whether an assignee of the wife is in a better position with regard to a claim in the husband's sequestration than the wife herself. I am very clearly of opinion that he cannot be. He knows quite well what he is taking—that it is a claim of debt by a wife against her husband, but a claim of debt which is created by her having allowed her funds to become immixed with those of her husband, or by her having allowed them to be entrusted or lent to him, and knowing this the assignee must of course also know (for he is bound to understand the Act of Parliament) that this claim for £1370 which he bought at the price of £50 on the eve of the husband's bankruptcy was nothing more than right to rank for that sum after the claims of the onerous creditors of her husband had been satisfied.

I think therefore the Lord Ordinary's decision is well founded.

LORD ADAM—I am of the same opinion. Mrs Lamont, the bankrupt's wife, is said to have lent her husband sums of money at various dates amounting in all to £1370, and on 28th January 1890, a few days before his sequestration, the husband granted her a promissory-note for that sum. If the husband were solvent, the wife or any person in right of the promissory-note, would be entitled to receive payment of it from him, but that is not the position of matters. The husband has been sequestrated, and this claim consequently is a claim in his sequestration, and the provision of the 4th sub-section of section 1 of the Married Women's Property Act 1881 must be taken into account, which is to the effect that "any money or other estate of the wife, lent or entrusted to the husband or immixed with his funds shall be treated as assets of the husband's estate in bankruptcy"—that is to say, that the £1370 alleged to have been lent to the husband by the wife is to be treated as assets of the husband's sequestrated estate. Now, if there had been no reservation of the wife's claim, it would have been impossible for her to recover any part of the money lent to her husband, for it would have been part of the husband's estate in bankruptcy, but then there follows a reservation in the wife's favour—and it is the only right she has—of a claim to a dividend as a creditor after the claims of the other creditors of her husband have been satisfied.

That is the nature of the wife's right, and it being of that nature, I agree that she cannot give a higher right to her assignee.

LORD M'LAREN—This is a claim by the wife's assignee against the estate of her husband in bankruptcy for money lent by the wife to the husband. The Lord Ordinary has affirmed the trustee's deliverance and rejected the claim on grounds which appear to me to be clear and unanswerable.

The claim is necessarily founded on the first section of the Married Women's Property Act of 1881, and in considering the rights given by that section the several sub-sections into which it is divided must be read together as one substantive enactment. The operation and effect of the Married Women's Property Act was not simply to rescind the *jus mariti*, leaving the wife to have the same interest in her estate as an unmarried woman, but the Act gives the wife by operation of law what is called a "separate estate," a kind of property not known to the common law, and which could only be constituted prior to the date of this Act by means of a trust. Now, the first section, while giving the wife a separate estate, is careful to define what is meant by that term. You have in separate sub-sections a definition of the separate estate by its various incidents. Her powers as to disposal and anticipation of income are limited, and there are special provisions with reference to diligence and bankruptcy. Therefore it is in vain to contend that the estate which is here given is the same thing as the estate in moveable property taken by a man or an unmarried woman. One incident of the separate estate thus created is that in the case of such estate being lent to the husband or immixed with

his funds, the wife's claim in bankruptcy shall be postponed to the claims of other creditors. It appears to me, agreeing with the Lord Ordinary, that the restriction thus imposed is one affecting the estate itself, and that it would therefore affect the claim of any assignee to the rights which the wife had against her husband.

It was endeavoured to distinguish the claim here made from the case contemplated in the statute by the circumstance that the husband had granted to his wife a promissory-note for the money lent to him, and it was said that the clause referred to in the Bills of Exchange Act contains an exhaustive enumeration of all the objections which can be maintained against the onerous assignee of a bill. I agree with your Lordship that the case contemplated by the Bills of Exchange Act is the case of a claim against a solvent debtor. The argument on that clause would really amount to a reversal of all the conditions of bankruptcy law intended to secure against improper alienations, because we know very well that bills come under the bankruptcy laws, although we do not find any reference to the exceptions in the Bills of Exchange Act, which is not intended to regulate every possible legal proposition that might be maintained with reference to bills of exchange, but only those points which are in immediate connection with the subject. Agreeing with the views of the Lord Ordinary, I am of opinion that the present claim is not well founded, and that the judgment ought to be affirmed.

LORD KINNEAR — I am of the same opinion. It appears to me that the effect of sub-section 4 of section 1 of the Married Women's Property Act of 1881 is to put the wife in exactly the same position as regards her husband's bankruptcy as any other creditor of his in so far as she has lent money to him, subject only to the condition that her claim to a dividend is after the claims of the other creditors have been satisfied.

It is provided in the Act that any money "lent by a wife to her husband shall be treated as" assets of his estate in bankruptcy. That is exactly the position of money lent to anyone else who becomes bankrupt. The money is treated as part of the whole assets of the bankrupt estate, and the lender is ranked with the rest of the creditors. The effect of this provision therefore is, that the wife is not entitled to have the money separated from her husband's estate, but must submit to having it treated as part of his estate in bankruptcy. But the Act proceeds to add a very material qualification, and provides that the wife shall be entitled to claim a dividend for the value of the money she has lent to her husband "after but not before" the claims of the other creditors have been satisfied. It appears to me, then, that the wife's right is simply a personal claim to a debt which she may assign if she please, but only subject to the qualification which attaches to it in her own person.

I agree in thinking the Bills of Exchange Act has no application whatever.

The Court adhered.

Counsel for the Appellant — Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Respondent — Cosens. Agent—F. J. Robertson, W.S.

Saturday, January 25.

SECOND DIVISION.

[Lord Low, Junior Lord Ordinary.

THE HON. T. H. A. E. COCHRANE, PETITIONER.

Parent and Child — Tutorial Power of Father—Factor loco tutoris Refused.

In proceedings for borrowing over entailed estates, the value of a consenting heir of entail—a pupil—was fixed, but her curator *ad litem* failed to see that the sum was paid or secured. The heir of entail in possession subsequently executed a trust-deed for his creditors, and the realisation of his estates paid the secured creditors in full, leaving for unsecured creditors a dividend of 7s. 6d. per pound. The pupil's father settled with the unsecured creditors, except his daughter, took assignations to their debts, and thus acquired right to the reversion of the entailed estates subject to the debt due to his daughter. As the trustees considered that his interest was thus adverse to that of his daughter he obtained the appointment of a factor *loco tutoris* to uplift, discharge, and apply the debt due to her. The factor sued the curator *ad litem* for any loss resulting from his failure to see that the debt was paid or secured, but the action was dismissed as beyond the limits of the factor's appointment. The pupil's father then petitioned for recal of the factor's appointment and the appointment of a new factor, especially to sue for, uplift, and receive the debt due to the pupil.

Held that as in regard to this claim there was no conflict of interest between the pupil and her father, they were the proper parties to prosecute such an action.

In 1882 the late Earl of Glasgow borrowed under the sanction of the Court £150,000 over his entailed estates. Miss Louisa Gertrude Montagu Cochrane, daughter of the petitioner the Hon. Thomas Horatio Arthur Ernest Cochrane, Dunkeith, Kilmarnock, was one of the heirs of entail whose consent was required. In these proceedings Mr William Smith, LL.D., Edinburgh, was appointed curator *ad litem* to Miss Cochrane. The value of her interest was fixed at £9250, but this sum was not paid or secured.

In 1885 Lord Glasgow conveyed his whole