tion with the Judges of the other Division. The case is that of a man with 24s. a-week and unmarried, who applies for the benefit of the poor's roll. Without laying down any general principle or saying anything that would affect any other case. I am of opinion that the applicant in this case is not entitled to prevail.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court refused the application.

Counsel for Applicant—Adam. Agent—C. T. Cox, W.S.

Counsel for Dr Campbell—W. Campbell. Agents—Murray, Beith, & Murray, W.S.

Friday, March 18.

SECOND DIVISION.

RAIT *v.* ARBUTHNOTT.

Succession—Destination in Will—Fee and Liferent—Parent and Child—To Parent in Liferent and Children not Named in Fee—Retention of Fee by Testator's Executor till Death of Liferenter.

A testator directed his executors to pay his widow the free income of the residue of his estate during her life, "and after her death, or after my death if she shall predecease me, I leave and bequeath the liferent of the said residue or remainder to" his son "during the whole days of his life, and in regard to the fee of the said residue or remainder, I hereby leave and bequeath the same to the child or children of my said son, with power to my said son to apportion the said fee amongst his children in such manner as he may think right, and failing such apportionment the said fee shall be payable amongst the said children equally, share and share alike." After the death of the testator and his widow, survived by his son, who had issue—*held* (1) that the testator's son had no right to the fee of the residue, and (2) that the executor was bound to retain the residue in his own hands until the death of the son.

Succession — Legitim — Obligation Undertaken by Father in Son's Marriage-Contract—Collation.

A father in the marriage-contract of his son undertook to cause to be vested in the marriage-contract trustees a third part of the whole property which should belong to him at the time of his death. In his last will the father directed his executor to perform the obligation undertaken by him in the said marriage-contract. On the death of the father, *held* (1) that the son was entitled to claim legitim out of the residue of the father's estate remaining after performance of the said obligation, and (2) that in claiming legitim the son was not bound to impute thereto the provision made for him by the father in the marriage-contract.

In the marriage-contract of his daughter Mrs Kathleen Georgina Arbuthnott or Rait, dated 6th August 1877, the Honourable Walter Arbuthnott bound and obliged himself, and his heirs, executors, and successors, to make payment at the first term of payment after his death to the marriage-contract trustees, for the ends, uses, and purposes therein written, "one just and equal third part of the whole property, heritable and moveable, real and personal, which shall belong to him the said Walter Arbuthnott at the time of his death.

In the marriage-settlement of his son Walter Charles Warner Arbuthnott, dated 14th January 1878, the Honourable Walter Arbuthnott covenanted with the trustees under the marriage-settlement "that in case the said Walter Charles Warner Arbuthhott, or any issue of the said intended marriage, shall be living at the death of him the said Walter Arbuthnott . . . then . . . he the said Walter Arbuthnott will, by his last will, or some codicil or codicils thereto, or some other instrument, well and effectually give, devise, and bequeath unto, or otherwise cause to be vested in the trustees, one full third part in value at least of the residue, after payment of his funeral and testamentary expenses and debts, of all the heritable and moveable property and other real and personal estate to which he the said Walter Arbuthnott, or any person or persons in trust for him, shall at his death be entitled, in possession, reversion, remainder, or expectancy, or otherwise howsoever . . . and that in case he the said Walter Arbuthnott shall not in any manner, and subject only as aforesaid, well and effectually give, devise, and bequeath unto, or otherwise cause to be vested in the trustees one full third part in value at least of such residue as last aforesaid, then one-third part in value at least of such residue as last aforesaid, shall immediately after the death of him the said Walter Arbuthnott, and at the cost of his estate, and subject only as aforesaid, be assured and transferred by his heirs, devisees, executors, and administrators, and all other necessary parties, if any, unto or otherwise vested in the trustees."

Mr Arbuthnott, who was a domiciled Scotsman, died on 5th January 1891, leaving a last will and settlement dated 27th July 1886, and registered in the Sheriff Court Books of the county of Kincardine 14th January 1891. The said last will and testament was in the following terms—"I, the Honourable Walter Arbuthnott, residing at Hatton, in the county of Kincardine, in order to settle my affairs after my death, do hereby nominate and appoint my son-in-law Arthur John Rait, Esquire, of Anniston, late Major in the Royal Horse Artillery, Companion of the Order of the Bath, to be my sole executor, with full power to him to intromit with my whole moveable estate, and I direct my

said executor in the first place, to make payment of my deathbed and funeral expenses, and of all my just and lawful debts; in the second place, to pay and perform the obligations undertaken by me in antenuptial contract of marriage between the said Arthur John Rait and my daughter Mrs Kathleen Georgina Arbuthnott now Rait; in the third place, to pay and perform the obligations undertaken by me in the marriage-settlements entered into on the marriage of my son Walter Charles Warner Arbuthnott and Miss Emma Marion Hall Parlby; in the fourth and last place, in regard to the residue or remainder of my whole means and estate, I hereby direct and appoint my said executor to pay to my said wife the free income thereof during the whole days of her life, and after her death or after my death if she shall predecease me, I leave and bequeath the liferent of the said residue or remainder to the said Walter Charles Warner Arbuthnott during the whole days of his life, and in regard to the fee of the said residue or remainder, I hereby leave and bequeath the same to the child or children of my said son, with power to my said son to apportion the said fee amongst his children in such manner as he may think right, and failing such apportionment, the said fee shall be payable amongst the said children equally, share and share alike." Mr Arbuthnott left no other testamentary writing and no heritable or real estate.

On the death of Mr Arbuthnott, Lieutenant-Colonel Arthur John Rait accepted the appointment in his favour as executor of the deceased, and was duly confirmed. The testator was survived by his wife the Honourable Anna Maria Ottley or Arbuthnott and two children, the said Walter Charles Warner Arbuthnott, Major in the Royal Artillery, and the said Mrs Kathleen Georgina Arbuthnott or Rait, both of whom had issue. The testator's widow died intestate on 17th March 1891.

In these circumstances a question arose between the testator's executor and Major Arbuthnott as to the effect of the bequest in favour of the latter contained in the fourth purpose of Mr Arbuthnott's last will and testament. The executor maintained that the effect of the said bequest was to give Major Arbuthnott a mere liferent interest in the residue or remainder of Mr Arbuthnott's means and estate, and that it was his duty as executor of the deceased to retain the said residue and remainder, paying the income thereof to Major Arbuthnott, and holding the fee for behoof of Major Arbuthnott's children. On the other hand, Major Arbuthnott maintained that the terms of the said bequest in his favour were such as to entitle him to the fee of the said residue or remainder, and that the executor was bound to hand over to him the said residue or remainder as his own absolute property, or alternatively, that if he Major Arbuthnott had no right to the fee of the said residue and remainder, the executor was not entitled to retain the said residue and remainder, but was bound to hand over the same to Major Arbuthnott for behoof of himself and his children, according to their respective rights of liferent and fee.

Further, in the event of the said bequest conferring on him merely a liferent right, Major Arbuthnott maintained that in addition to the trustees under his marriage-settlement being entitled, by virtue thereof, and of his father's will, to receive one-third of his father's estate, he himself was entitled to claim legitim out of the said estate remaining, after deducting the amounts payable under the obligations undertaken by his father in his own and his sister Mrs Rait's marriage-contracts. The executor on the other hand maintained that any claim for legitim by Major Arbuthnott was excluded by the provision made by his father for him in his said marriage-settlement, and in any view, that in computing the amount of Major Arbuthnott's legitim, the said provision made by his father in his marriage-settlement must be imputed thereto, and that as this provision exceeded the amount which could be claimed as legitim out of the whole estate of Mr Arbuthnott, no claim for legitim existed.

For the decision of these questions a special case was presented for the opinion and judgment of the Court. The first party to the case was Lieutenant-Colonel Arthur John Rait, the truster's executor; the second party was Major Walter Charles Warner Arbuthnott.

The questions of law were—"(1) Whether the bequest in favour of the second party, contained in the fourth purpose of the said last will and testament, confers upon him a right to the fee of the residue and remainder of the estate of the Honourable Walter Arbuthnott? (2) In the event of the foregoing question being answered in the negative, Whether the first party is bound to retain the said residue and remainder in his own hands until the death of the second party, paying to the latter only the income thereof? or, Whether the first party is bound to pay over said residue and remainder to the second party for behoof of himself and his children according to their respective rights, and if so, on what terms and under what conditions, if any? (3) Whether the second party, in addition to the performance of the obligations undertaken by the Honourable Walter Arbuthnott in his, the second party's, marriage-settlement, is entitled to legitim out of the residue of his father's estate remaining after performance of the obligations contained in the second parties' marriage-settlement, and in the marriage-contract of the first party and Mrs Kathleen Georgina Arbuthnott or Rait? (4) In the event of the third question being answered in the affirmative, Whether the second party, on claiming legitim, is bound to impute thereto the provision made for him by his father, the said Honourable Walter Arbuthnott, in his, the second party's, said marriage-settlement?"

Argued for the first party—(1 and 2) The

second party had no right to the fee of the residue under the will. The case of *Froy's Creditors*, November 25, 1735, M. 4262, did not rule the present. That case only applied where there was in the will either a direct conveyance to a parent in liferent and his children not named in fee, or where the trustees were ordered in the will to convey or pay. Here there was no divestiture of the granter, the fee remained *hæreditate jacente*. There was also a power of apportionment given to the father, which was inconsistent with the father taking the fee. The expressions used in the will clearly showed that it was the intention of the testator that the second party should get only the liferent of the residue, and the intention of the testator must prevail. Opinion of Lord Chelmsford in *Ralston* v. *Hamilton*, July 19, 1862, 4 Macq. 419. There was here a trust not to pay but to hold, and the case fell under the rule laid down in *Scott* v. *Napier*, May 14, 1827, 2 W. & S. 550. (3 and 4) If the second party got the third of the estate in terms of his marriage-settlement and the will of the testator, he was not also entitled to legitim out of the residue. His legal rights were impliedly excluded since the intention of the settlement was universal, and provisions had been made for him in the settlement. Where a father bound himself to make provision for a son, it was a fair presumption that he intended that provision to come in place of his son's legal rights, and the son was not entitled to get the benefit of the provision and also to claim legitim.

Argued for the second party—(1 and 2) The destination here gave the fee of the residue to him. The case was ruled by *Froy's Creditors*. The only cases outside the rule there laid down were (1) where such a word as "allenarly" was used in the will, and (2) where there was a continuing trust for the purpose of keeping the liferent apart from the fee. Here no such word as "allenarly" was used, and there was no provision made for a continuing trust. It was a direct bequest amounting to a direction to pay—Opinion of Lord Westbury in *Ralston* v. *Hamilton*, July 19, 4 Macq. 405; Bell's Prin., sec. 1710, *et seq.*, and cases there quoted; Ross's Leading Cases (Land-Rights), iii. 602, *et seq.*; *Beveridge's Trustees* v. *Beveridge*, July 20, 1878, 5 R. 1116. (3 and 4) The second party was entitled to legitim out of the residue. The testator had undertaken an obligation in the marriage-settlement of the second party. This obligation was a debt on his estate. The testator having in his will fulfilled this obligation, did not prevent the second party claiming his legal rights, and there was no circumstance calling either for election or collation—*Breadalbane* v. *Chandos*, August 16, 1838, 2 S. & M. 377; *Somerville's Trustees* v. *Dickson's Trustees*, June 3, 1887, 14 R. 770.

At advising—

LORD JUSTICE-CLERK—The late Honourable Walter Arbuthnott had a son and a daughter, both of whom were married during his lifetime. In their marriage-settlements, to which he was a party, he bound himself to leave one-third of the value of the residue of his estate, subject to any income he might leave to his widow, out of the annual proceeds of his residue. By his testament, which is dated 27th July 1886, he appointed the first party to be his sole executor, and directed him to fulfil these obligations in the children's marriage-contracts. He then directed his executor as follows—"In the fourth and last place, in regard to the residue or remainder of my whole means and estate, I hereby direct and appoint my said executor to pay to my said wife the free income thereof during the whole days of her life, and after her death, or after my death, if she shall predecease me, I leave and bequeath the liferent of the said residue or remainder to the said Walter Charles Warner Arbuthnott during the whole days of his life; and in regard to the fee of the said residue or remainder, I hereby leave and bequeath the same to the child or children of my said son, with power to my said son to apportion the said fee amongst his children in such manner as he may think right, and failing such apportionment the said fee shall be payable amongst the said children equally, share and share alike."

The first question which arises on this clause is, whether the second party is entitled to the fee of the residue. It appears to me that the answer to that question is not doubtful. The words of the deed are express and unambiguous. They effectually and separately dispose of the liferent and of the fee by two separate bequests. There is here no question of a fee left hanging in doubt; it is expressly bequeathed to others than the person to whom the liferent is bequeathed. The words of the deed are too clear for doubt.

The second question proceeds upon the assumption that the answer to the first question is as I have already answered it, and relates to the control of the fee during the subsistence of the liferent. Is the first party to hold it, or must he hand it over to the second party? The answer to that question seems to me to be equally clear. The second party having no right to the fee, but only a right of apportionment, to take effect on the lapse of his liferent, I hold that the first alternative of the second question must be answered in the affirmative, and the second in the negative.

The third question is, whether the second party is entitled to claim legitim out of the residue of the estate remaining after the marriage-contract obligations have been fulfilled. I see no principle upon which he can be excluded from demanding his legal rights should he be advised to do so. The sum payable to his marriage-contract trustees is a debt due under contract by the father's estate, and not a bequest in any way to the second party so as to compel him to give up his legal rights to a share of the residue left after contract obligations have been met. There is nothing in the deed which can debar him from claiming these rights. I therefore propose to answer

the third question in the affirmative.

The fourth question is subsidiary to the third. It is, whether in claiming legitim the second party is bound to impute thereto the provisions made in the marriage-contract? On the same ground I hold that he is not. What the father must do through his executor in fulfilment of contracts—which is just through his executor paying a debt, the time of payment of which is the date of his decease—cannot constitute a bar in the way of a child who is benefitted by the contract from making such claim on residue as would be open to him did no such contract exist. It follows that what he gets by the contract cannot be founded on to diminish his claim at law to a share of the residue of his father's estate.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD TRAYNER concurred.

The Court found and declared in answer to the first question that the bequest therein mentioned in favour of the second party did not confer upon him a right to the fee of the residue and remainder of the estate in question; in answer to the second question, that the first party was bound to retain the said residue and remainder in his own hands until the death of the second party, and *quoad ultra* answered the second question in the negative; and answered the third question in the affirmative, and the fourth in the negative.

Counsel for the First Party—H. Johnston—Fleming. Agents—R. C. Bell & J. Scott, W.S.

Counsel for the Second Party—Guthrie—Dundas. Agents—Mylne & Campbell, W.S.

Friday, March 18.

SECOND DIVISION.

[Sheriff Court of Wick.

ANDERSON *v.* LEITH (ANDERSON'S TRUSTEE).

Bankruptcy—Sale—Husband Selling to Wife the Furniture of their Dwelling-house—Mercantile Law Amendment (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 1—*Married Women's Property (Scotland) Act* 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 1, *sub-sec.* 4.

A wife agreed to pay to her husband money from her separate estate to the value of the household furniture belonging to her husband, in return for which the furniture was to be sold by him to her. Payments to an amount exceeding £225 were made by the wife to her husband at various times from January 1886 till December 1890, when the husband wrote, and handed to his wife a "sale-note" acknowledging the payments, and in consideration thereof stating that he had sold her the furniture, which was inventoried at £225. The furniture remained in the joint use and enjoyment of the spouses.

On the sequestration of the husband's estates the wife sought to interdict his trustee from selling the furniture.

Held, that even assuming a *bona fide* transaction between the spouses, it was not one which fell within the provisions of the Mercantile Law Amendment (Scotland) Act 1856, sec. 1, and even if the Act had applied, the furniture had been "lent or entrusted" by the wife to her husband and "immixed with his funds" in the sense of the Married Women's Property (Scotland) Act 1881, sec. 1 (4), and was liable to the claims of his creditors.

The Mercantile Law Amendment (Scotland) Act 1856 provides—Section 1. "From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence in process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same."

The Married Women's Property (Scotland) Act provides—Section 1 (4). "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."

This was a petition in the Sheriff Court at Wick by Mrs Mary Benvie or Anderson, wife of the Reverend William Harley Anderson, M.A., minister of Pulteneytown, residing at Rosemount, with his consent and concurrence, against Robert Leith, solicitor, Wick, trustee on Mr Anderson's sequestrated estate. The object of the petition was to interdict the defender from carrying away certain furniture, the alleged property of the pursuer in the house at Rosemount, which he had seized and intended to sell for the benefit of the creditors.

Mr Anderson's estate was sequestrated upon 4th September 1891, and the defender was unanimously appointed trustee on 16th September, and his election was thereafter duly declared and confirmed.

The pursuer alleged that upon 9th December 1890 Mr Anderson sold her all the furniture, originally his own property, in terms of the following sale-note—"I, William Harley Anderson, M.A., minister of Pulteneytown, residing at Rosemount, Wick, hereby acknowledge that I have received from Mrs Mary Benvie or Anderson, my wife, out of her separate estate the sum of Two hundred and twenty-five pounds sterling (£225), which has been paid to her at various times since the death of her father, the late Wm. Benvie, Esq.,