is a dispute as to whom the rents of the houses belong.

It may be that Brand is the true proprietor. If so, he can raise an action against his tenants for the payment of his rents, and if they think they are not in safety to pay him, they can raise a multiplepoinding. But however it is tried, the question of right to the rents cannot be tried in such a petition as the one here.

LORD KINNEAR—On the face of the proceedings it is clear that the respondent here—the petitioner in the Sheriff Court—has no title or interest to complain of the arrestments used. Nothing was thereby done but to prohibit certain persons owing money to Gillon from paying it to him during the dependence of an action against him.

Here a third party comes and complains who has no interest in the matter at all. It is said the arrestments were intended to affect the rents of subjects belonging to him. But the arresting creditor did not arrest money due to him but only to Gillon. So, under the form of determining whether the arrestments were good or not, the Sheriff has gone on to determine the question of right, with the common debtor not before him.

It is manifestly not possible to decide the question of right in a process to which Gillon is not a party; it would not be *res judicata* against him, and would decide nothing. If it is impossible to try the question of right in this process, is there any ground on which the petitioner can ask to have these arrestments recalled?

If the moneys arrested belong to the defender in the original action, the arrestments are good, and ought not to be recalled. If they do not, they in no way affect the petitioner, and there is no need to recal them. The question of the recal of arrestments always proceeds upon the assumption that they have been well laid on.

The notion of using a process of recal of arrestments to determine a question of right between the common debtor and some third party seems to me entirely out of the question. I agree in thinking this petition should be dismissed, leaving it to the petitioner to have his rights determined in some competent process.

LORD M'LAREN was absent.

The Court sustained the appeal and dismissed the petition.

Counsel for the Pursuer and Respondent—Young—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for the Defender and Appellant—Dickson—James Reid. Agents—Macpherson & Mackay, W.S.

Wednesday, November 16.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

CRELLIN *v.* LATTA.

Succession — Legitim — Election — Claim to Legitim not Renounced by Provisions of Marriage-Contract.

One of the parties to an antenuptial contract of marriage conveyed to trustees certain funds to which "she will succeed in and through the settlements of her father, particularly a sum of £4000, or such other sum as she may be entitled to" under the said settlement. She never expressly discharged her claim to legitim, and the claim was not satisfied, as neither she nor her representatives ever received any payment or took any benefit under her father's settlement. Nothing had happened to prejudice the rights of other beneficiaries, and the fund out of which legitim was payable was still extant.

In an action by her trustee and executor under a will executed subsequent to her settlement—*held* that the provisions of the antenuptial contract did not amount to election to take her conventional provisions, and that the pursuer as her representative was entitled to the share of legitim which vested in her on her surviving her father, with interest to date.

Charles Muirhead died at Edinburgh on 23rd May 1865, leaving a trust-disposition and deed of settlement dated 18th July 1861. He was survived by his widow and by two sons and two daughters, viz., Charles, James, Mrs Agnes Muirhead or Christie, and Mrs Jessie Muirhead or Carter. The trustees and executors appointed by the said trust-disposition and settlement either predeceased the truster or declined to act, and in 1865 Thomas Steven Lindsay was appointed by the Court of Session judicial factor on the trust-estate. Mr Lindsay continued in possession and management until June 1876, when he resigned and was discharged, and thereafter John Latta, S.S.C., was appointed judicial factor.

By his trust-settlement Mr Muirhead made certain liferent provisions in favour of his widow, and directions were given for the disposal of the fee of the estate, with accumulated surplus revenue after her death. The trustees were directed, *inter alia*, "as soon after the death of my said wife as convenient," to dispone and convey to Mrs Carter certain heritable subjects in Edinburgh. In disposing of the residue of his estate his trustees were directed to pay to Mrs Carter one "just and equal fourth part or share thereof." Mrs Muirhead repudiated the settlement, and claimed her legal rights of terce and *jus relictæ*, which were duly paid to her. The remainder of the trust-estate was held, and the annual income thereof accumulated by the judicial factors down to 23rd May 1886. When further accumulation became

illegal under the Thellusson Act, the income subsequently arising had been and was now being paid to the truster's next-of-kin. The truster's widow was at the date of this action alive, and the capital of said remaining trust-estate remained undivided in the hands of Mr Latta, not divisible in terms of the settlement until her death. In consequence of the widow's action the family considered their position, and opinion of counsel was taken on a number of questions, and certain explanations were made to the children in regard to the position of the estate and their rights under their father's will. At this time it was believed that the provisions in Mrs Carter's favour had vested in her.

In January 1866 Mrs Carter married Mr Crellin, having entered into an antenuptial marriage-contract with him, whereby "considering that the said Mrs Jessie Muirhead or Carter will succeed to certain property and funds in and through the settlements of her father," she appointed certain trustees named therein, one of whom was judicial factor on her father's estate, to hold, invest, and manage a total sum of £8000, part of which was thus described—"First, a sum of £4000 or such other sum as she the said Mrs Jessie Muirhead or Carter may be entitled to, falling to her under the settlement of her said father Charles Muirhead." It was further declared that as these sums were not available at present, and would not be until the death of the liferentix, the investment was postponed until that event took place.

Upon 2nd July 1866 Mrs Crellin executed a last will and testament, by which she declared that if she died without issue the trustee or trustees for the time being should "stand possessed of the said residuary real, heritable, and personal estate, moneys, stocks, funds, and securities upon trust for my said husband, his heirs, executors, administrators, and assignees absolutely."

Mrs Crellin died 10th September 1866. Mr Crellin died 20th January 1885, and his son James Basil Crellin was appointed his executor and legal representative.

On 6th September 1886 an action of multiplepoinding and exoneration was raised in the name of the judicial factor on the trust-estate of Charles Muirhead in order to have the estate distributed under the authority of the Court. After lengthened procedure, the House of Lords on 12th May 1890 dismissed the action except as regards the income struck at by the Thellusson Act subsequent to 23rd May 1886—*Muirhead* v. *Muirhead*, May 12, 1890, 16 R. (H. of L.) 45, and L.R., 15 App. Cas. 289. The ground of judgment was that vesting had not taken place, and would not take place, and the estate could not be distributed under the settlement of the said Charles Muirhead until the death of his widow. No claim was lodged prior to the said decision for the trustees acting under the said last will and settlement of Mrs Crellin. After the said decision Mrs Crellin's testamentary trustees lodged a claim for one-fourth of the income struck at by the Thellusson Act, which, as already mentioned, fell to Charles Muirhead's next-of-kin, and the said claim was sustained by the interlocutor of the Lord Ordinary (Kyllachy) on 5th February 1891.

Upon 16th January 1892 James Crellin, only son of the late James Crellin, assumed and acting trustee under Mrs Jessie Carter or Crellin's last will and testament, raised this action against Mr Latta, concluding for the sum of £675, 1s. 8d. as Mrs Crellin's share of legitim from her father's estate.

The pursuer pleaded—"(1) The late Mrs Crellin having survived her father Mr Charles Muirhead, was entitled to claim legitim from his moveable estate. (2) The said claim for legitim has not been excluded by deed, or satisfied or discharged, and the pursuer, as the surviving trustee under the last will and testament of Mrs Crellin, is entitled now to claim said legitim, with interest thereon."

The defender pleaded—"(5) The claim for legitim is excluded by the actings of Mrs Crellin in accepting and conveying to her marriage-contract trustees the provisions in her favour contained in her father's settlement. (6) The pursuer is barred from insisting in the present claim by his own and his predecessor's actings in the action of multiplepoinding, and by accepting payments in virtue of the judgment therein."

Upon 5th August 1892 the Lord Ordinary (WELLWOOD) pronounced this interlocutor:—. . . "Finds that the pursuer as Mrs Crellin's testamentary trustee is not barred from claiming legitim, right to which vested in the deceased Mrs Crellin on the death of her father Charles Muirhead, and appoints the defender to lodge in process by the first sederunt-day in October a state showing the amount of the legitim fund, and the shares thereof falling to the pursuer, &c.

"*Opinion.*—In this action James Basil Crellin, suing as trustee under the last will and testament of Mrs Jessie Muirhead or Carter or Crellin, sues John Latta, judicial factor on the trust-estate of Mrs Crellin's father Charles Muirhead, for payment to him of certain sums which represent, according to his statement, the share of legitim which vested in Mrs Crellin on her surviving her father, and interest to date. The defence is that Mrs Crellin elected to take certain conventional provisions made for her under her father's trust-disposition and settlement, and thereby renounced right to legitim. Although not without hesitation, I have come to the conclusion that the pursuer is not barred from claiming legitim. The right which vested in Mrs Crellin, *ipso jure*, was never expressly discharged or satisfied. Mrs Crellin never discharged her claim in writing, and the claim was not satisfied, because neither she nor her representatives received any payment or took any benefit under her father's settlement. But it is said that the present claim for legitim is excluded in respect of certain actings on the part of Mrs Crellin and her representatives. I was not referred to any case in which, when, as here, there was no formal discharge and no satisfaction, and where nothing had been done to prejudice the rights of other beneficiaries,

and where the fund out of which legitim would have to be paid was still extant, such a claim was held to be excluded, and I do not think that the circumstances relied on by the defender in the present case are sufficient to support the defence.—[*His Lordship stated the facts.*]

"It is true that Mrs Crellin, or Mrs Carter as she then was, does in that deed convey to the marriage-contract trustees, *inter alia*, certain property and funds to which it is stated she 'will succeed in and through the settlements of her father,' particularly 'a sum of £4000, or such sum as she the said Mrs Jessie Muirhead or Carter may be entitled to, falling to her under the settlement of her said father Charles Muirhead.' The deed then proceeds to declare that this sum of £4000 is not at present available, and cannot be uplifted until the time of payment arrives. I may observe, in passing, that the language used does not indicate that Mrs Carter or her advisers had any doubt that the provisions vested in her. The provision is not referred to as contingent on her surviving her mother. This, it is said, constituted a deliberate and irrevocable election on the part of Mrs Crellin to take under the will and renounce her legitim. The answer is that it is *res inter alios* to the trustees of Charles Muirhead and the other beneficiaries under his will, and I think that that answer is sound.

"It may be that as in a question with her marriage-contract trustees Mrs Crellin would have been precluded from claiming legitim while the purposes of the marriage-contract remained unfulfilled, but it does not follow that her claim for legitim was affected to any greater extent. This may be tested by putting one or two cases which might have occurred. If, for instance, her marriage with Mr Crellin had been dissolved by the husband predeceasing her without issue, and the purposes of the marriage-contract had consequently failed, could it have been maintained that Mrs Crellin was barred from claiming legitim? I think not. If, again, shortly after the execution of the marriage-contract all parties had become satisfied, either in consequence of an opinion of counsel or a decision of the Courts in some precisely similar case, that the conveyance of the conventional provisions to the marriage-contract trustees would carry nothing in the event of Mrs Crellin predeceasing her mother, and if Mrs Crellin had made a will providing that in that event her legitim should be paid to her marriage-contract trustees for the purposes of the contract, would not the will so executed receive effect? I think it would. If those questions are answered as I think they should be, it is clear that the conveyance by Mrs Crellin in her marriage-contract of what she conceived to be her conventional provisions under her father's will, is a matter upon which the defender is not entitled to found. For a purpose with which Charles Muirhead's trustees were not concerned, Mrs Crellin, apparently under an erroneous idea of her rights, conveyed the provisions in her favour in her father's will to her marriage-contract trustees. That conveyance proved abortive. It carried nothing, Charles Muirhead's trustees paid nothing, and it seems to me that this question must be considered just as if the conveyance had never been made. The case would have been practically the same if Mrs Crellin had borrowed money upon the security of her conventional provisions and thereafter had paid up the loan. . . .

"The defender also founds upon certain proceedings which took place under a process of multiplepoinding which was raised in the year 1886. It is sufficient to say that in that process no claim was made for Mrs Crellin's testamentary trustees until after the judgment of the House of Lords finding that no right vested in her to any of the provisions in her favour under her father's will. The claim made for her testamentary trustee was accordingly merely for a share of the accumulations of income which was struck at by the Thellusson Act. That was a claim, not under Charles Muirhead's will, but *ab intestato*. It is true that the present pursuer made a claim in that process, but he did so, not as trustee under Mrs Crellin's will, but as representing his father.

"I am therefore of opinion that none of the matters founded on by the defender are sufficient to bar the pursuer from claiming legitim, right to which vested in Mrs Crellin and transmitted to her representatives.

"In this view it is unnecessary to consider whether Mrs Crellin was fully aware of her legal rights when she entered into the marriage-contract with Mr Crellin. I think that the import of the proof is that she may have known, and probably did know, that an opinion had been obtained to the effect that the provision in her father's will was contingent upon her surviving her mother. But, on the other hand, I think that the terms of her marriage-contract indicate that she and her advisers did not regard and act upon that opinion as sound. Further, there is no evidence that she had put before her at the time such information as would enable her to judge of the comparative values of the sums which she would receive if she took under her father's will or claimed her legitim. One thing at least is clear that no transaction of any kind took place between her and Mr Lindsay, the judicial factor upon her father's estate, and no formal intimation was made to him *qua* judicial factor, although as one of her marriage-contract trustees he necessarily was aware of the terms of the contract. It is also clear that she received nothing whatever under her father's will.

"I have not lost sight of the fact that the provisions in Mrs Crellin's favour in her father's will although contingent were much in excess of her legitim, and that if she had been called upon to make her election, and had been placed in full possession of all the necessary information both as to her legal rights and the respective amounts of her conventional and legal provisions, she might have decided to accept the former. If she had done so in a deliberate and effectual manner, and the judicial fac-

tor had proceeded to deal with the estate and make payments to other beneficiaries upon that footing, it may be that neither Mrs Crellin nor her representatives would have been entitled to fall back upon her legal rights on the plea that the conventional provisions were contingent, and might fail or had failed in consequence of Mrs Crellin predeceasing her mother. It would be a more difficult question whether, if nothing had followed upon an election so made, and the legitim fund remained intact, Mrs Crellin or her representatives might not have repudiated the election and claimed legitim. I am not aware of any case involving that state of the facts, but the tendency of the authorities on this subject is in favour of allowing a child to betake herself to her legal rights if things are substantially entire, even where the provision accepted is not contingent. But I do not think it is necessary to decide that question, or to decide whether, when Mrs Crellin entered into her marriage-contract, she did so in excusable ignorance of her legal rights, because I am of opinion she never made what could properly be called an election in a question with the judicial factor on her father's estate or the other children of the truster.

"The result is, that I shall repel the first six pleas-in-law for the defender, and appoint the defender to lodge a state showing the legitim due to the pursuer as representing the deceased Mrs Crellin."

The defender reclaimed.

At advising—

LORD JUSTICE-CLERK—There is now only one question in the case; that is a simple one; and I think the answer is clear.

Mrs Crellin, who was a widow at the time of her second marriage, executed a marriage contract, by the first provision of which she handed over to her trustees "a sum of £4000, or such sum as she the said Mrs Jessie Muirhead or Carter may be entitled to, falling to her under the settlement of her said father Charles Muirhead."

Now, the judicial factor on Mr Muirhead's estate says that by doing that she made her election to take the provisions given to her under her father's settlement, and gave up all claim to legitim.

I do not think that she did so. The marriage-contract was a contract between her and her husband to pay a certain sum over to the trustees named in the deed. They had no interest to know where the money came from. If Mrs Crellin had succeeded to a sum of £4000 before her death, not under her father's will at all, but as a bequest from a stranger, and had handed it over to the trustees, she would have satisfied the claim in the marriage-contract, and the trustees could have asked no more. The proposition that by making this provision in the marriage-contract she thereby elected to take her conventional provisions, and gave up her claim of legitim, is one I cannot agree to. I think the Lord Ordinary is right.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—I agree on the grounds stated by the Lord Ordinary, which I think are conclusive.

The Court adhered.

Counsel for Reclaimer—Wallace. Agents—George M. Wood, S.S.C.

Counsel for Respondent—H. Johnston—C. K. Mackenzie—Dick Peddie. Agents—Macandrew, Wright, & Murray, W.S.

Friday, November 18.

FIRST DIVISION.

HENDERSON AND OTHERS *v.* HEDRICH & OTHERS.

Process—Proof—Reduction of Testament on Ground of Facility and Circumvention—Diligence for Recovery of Medical Reports on the Health of the Testatrix made during her Life

In an action for reduction of a trust disposition and settlement on the ground of facility and circumvention, which had been set down for jury trial, the defender craved a diligence for recovery, *inter alia*, of medical reports on the health of the testatrix, obtained by the pursuers during her lifetime from certain doctors named. The pursuers objected that the defenders' application was practically an attempt to obtain precognitions of their medical witnesses. The Court *granted* the diligence.

Counsel for Pursuers—Dundas. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for Defenders—H. Johnston. Agents—A. P. Purves & Aitken, W.S.

REGISTRATION APPEAL COURT.

Friday, November 18.

(Before Lord Kinnear, Lord Trayner, and Lord Kincairney.)

SIM *v.* GALT.

Election Law—Burgh Franchise—Residence—2 and 3 Will. IV. cap. 65, *sec.* 11.

A person who had two houses, one in Glasgow, which he held on lease, and one in Ayr, of which he was proprietor, was in the habit of residing in his house in Glasgow from October till April, and in his house in Ayr from April till October. During the months of his residence in Glasgow he was in the habit of coming once a month to his house in Ayr for a few days. He never let his house in Ayr. In the year in question he resided in his house in Ayr for five days in each of the months of February and March, and during the whole of April, May, June, and July.