

engineer." If there was anything but jocularity in that, the meaning must simply be that there was an absence of regulation which Mr Cunningham or some superior employee of the company ought to have framed. Well, let it be that there was absence of regulation, I put the question, "What regulation?" I put that question at a very early period of the opening, and the answer I got was, "Oh! a regulation that the crane-man should not set the crane in motion until he was certified that the coast was clear." Well, I thereupon made the remark, "But suppose the regulation to be in these terms—'You shall not set the crane in motion until you are certified that the coast is clear, by the stevedore or his man upon the spot certifying you that it is all clear before you heave away.'" I suppose that would be an abundantly sufficient regulation, but then that is just the regulation that exists, and it has been acted upon. It was acted upon in this case. Unfortunately the party whose duty it was to attend to that regulation neglected to see that the coast was clear. When he was turning round he saw the man in the way, but then it was too late, and the man unfortunately suffered.

I think it too clear for argument, as I said before, that this was a case in which the jury ought on the evidence to have returned a verdict for the defenders. The verdict has therefore, I think, been erroneously given, and a new trial will be granted.

LORD CRAIGHILL—I take the same view, and have nothing to add.

LORD RUTHERFURD CLARK—I also take the same view.

LORD LEE—The evidence is that the accident occurred through the order to heave away being given without seeing that all was right. I think it is proved that it was the duty of the stevedore, as the person to whose orders the crane was to be worked, not to give the order to heave away without satisfying himself that all was clear and right. I think it not proved that the accident arose in any way through a want of regulation on the part of the railway company. I do not think that any regulation which the railway company could have made would have prevented the accident if it be the case—as I think it is the case—that the crane had to be worked to the order of the stevedore. I therefore entirely agree with your Lordship.

LORD JUSTICE-CLERK was absent.

Rule made absolute, reserving the question of expenses.

Counsel for Pursuer—Strachan—M'Lennan. Agent—A. Rodan Hogg, Solicitor.

Counsel for Defenders—Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Friday, June 3.

## FIRST DIVISION.

[Lord Kinnear, Ordinary.]

GRAHAM AND OTHERS (DICKSON'S MARRIAGE-CONTRACT TRUSTEES) v. FINLAY AND OTHERS (DICKSON'S TESTAMENTARY TRUSTEES) AND OTHERS.

*Succession—Election—Legitim—Provisions in Marriage-Contract not Declared to be in Satisfaction.*

A father bound himself in his daughter's antenuptial-contract of marriage to make over £8000 to trustees to hold the same for behoof of his daughter and her intended husband "in liferent, for their and the survivor's liferent use allenerly, and of the child or children" of his daughter "or their issue in fee." It was declared that, failing his daughter's children, the fee should belong to such persons as he might appoint, and failing any appointment by him, to his nearest heirs and successors whomsoever; "but under this provision, that notwithstanding the above destination" it should be in the power of the daughter, "in the event of her having no children, or if they shall all predecease her without leaving issue, to dispose by will or testamentary deed executed by her of any part of the said trust-funds not exceeding £4000." After her father's death his daughter claimed legitim. The Court at that time found that she was not barred by her acceptance of the marriage-contract provisions from claiming legitim. After her husband's death she tested upon the £4000. *Held*, in an action of multipounding raised after the daughter's death, that the power of testing conferred on her was an onerous consideration in her marriage-contract, and that she was not barred from exercising it by having claimed legitim.

*Opinion per Lord Mure* that this question was *res judicata*, in respect of the previous judgment of the Court.

*Opinion contra per Lord Shand.*

*Opinion per Lord Adam* that so soon as the power of testing had been determined in the present case to be a provision, the previous judgment applied.

By antenuptial-contract of marriage, dated 26th December 1854, entered into between William Dickson, accountant in Edinburgh, now deceased, on the one part, and the also now deceased Miss Eleanor Jane Somerville, afterwards Mrs Dickson, only child of the now deceased Colonel Somerville, and the said Colonel Somerville, on the other part, the said Colonel Somerville bound himself to transfer and make over the sum of £8000 of the stock of 3 per cent. Consolidated Government Annuities to the trustees therein appointed, to hold the same for the "behoof of the said Eleanor Jane Somerville, and the said William Dickson, her intended husband, in liferent, for their and the survivor's liferent use allenerly, and the child or children of the said Eleanor Jane Somerville, or their issue in fee, in the terms after mentioned, . . . declaring

that the trustees shall be bound and obliged to pay the free dividends, interest, or annual produce received for the capital sums invested in their names, regularly as the same shall be received, to the said Eleanor Jane Somerville during her life, upon her own receipt, notwithstanding her marriage, and after her death, to the said William Dickson in liferent, for their respective liferent uses alienarily, and as an alimentary fund, and the fee of the said trust-fund shall belong to the said children of this marriage, or of any subsequent marriage into which the said Eleanor Jane Somerville may enter, or their issue, subject to the powers of division and appointment before and after specified; whom failing, to such person or persons as the said Lieutenant-Colonel Henry Erskine Somerville may appoint; and failing any appointment by him, to his nearest heirs and successors whomsoever, and shall remain vested in the trustees agreeably to the directions contained in this contract; and the said fund shall not be attachable for the debts of the said William Dickson or Eleanor Jane Somerville, nor affectable by the diligence of their or either of their creditors, and the orders, receipts, and discharges of the said parties respectively, as above provided, shall alone be sufficient discharges to the trustees; but under this provision, that notwithstanding the above destination it shall be in the power of the said Eleanor Jane Somerville, in the event of her having no children, or if they all shall predecease her without leaving issue, to dispose by will or testamentary deed executed by her of any part of the said trust-funds not exceeding £4000 sterling." The said sum of £8000 was transferred by Colonel Somerville to the trustees.

Colonel Somerville died on 7th March 1863, leaving a trust-disposition and settlement dated 3d February 1852, with relative codicils by which he disposed of his estate. After his death there was found in his repositories a postnuptial contract of marriage entered into by him and Mrs Eleanor Dixon or Somerville his wife, dated 13th August 1818, by which his whole estate was to go, after the death of the spouses, to the child or children of the marriage. On becoming aware of the existence of this deed Mr and Mrs Dickson claimed right to the whole estate left by Colonel Somerville. In order to settle this question an action of multiplepounding and exoneration was raised by Colonel Somerville's trustees, in which appearance was entered for Mr and Mrs Dickson, who lodged a claim wherein Mrs Dickson, as the sole surviving issue of the marriage between Colonel Somerville and his wife, claimed to be ranked and preferred (1) to the whole fund *in medio*, in terms of the provisions of the said postnuptial contract of marriage between her said parents: or (2) to one-half of the fund *in medio*, in so far as the same consisted of the free moveable estate of Colonel Somerville as legitim.

By interlocutor dated 20th July 1864 Lord Barcaple (Ordinary), before whom the action depended, found that it was *ultra vires* of Colonel Somerville to revoke the said postnuptial marriage-contract, and that in terms of said contract Mrs Dickson was entitled to the whole free estate belonging to her father at his death. A reclaiming note was presented against this interlocutor, and on 3d March 1865 the Second

Division recalled the interlocutor, found that the said contract of marriage was intended to take effect, and could only take effect, in the event of Colonel Somerville predeceasing his wife; and that having survived his wife, he had full power still to settle his succession notwithstanding the said marriage-contract, and that his succession fell to be regulated by his trust-disposition and settlement and codicil. With these findings their Lordships remitted to the Lord Ordinary to proceed further in the cause. An appeal was then taken to the House of Lord, and on 16th May 1867 the judgment of the Second Division was affirmed.

The case is reported as *Somerville's Trustees v. Dickson and Others*, March 3, 1865, 3 Macph. 602; *affd.* May 16, 1867, 5 Macph. (H. L.) 69.

The case having come back from the House of Lords, and procedure thereon having been resumed in the Court of Session, Lord Barcaple, on 19th November 1867, pronounced the following interlocutor:—"The Lord Ordinary," &c.—"Finds that there are no grounds on which it can be held that the provisions made by Colonel Somerville for Mrs Dickson in the antenuptial contract of marriage between her and Mr Dickson were in full of her claim of *legitim*: Finds that she is not barred by the acceptance of these provisions for claiming *legitim*: Finds that these provisions do not fall to be imputed to account of or in extinction of her claim for *legitim*: Finds that Mrs Dickson was entitled to one-half of the free moveable estate of Colonel Somerville at the date of his death as *legitim*, and appoints the raisers within fourteen days to give in a state of the moveable property of the truster, brought down to this date."

Mr Dickson died on 31st May 1881, and Mrs Dickson on 16th May 1886, without issue. She left a trust-disposition and settlement dated 21st October 1880, and registered in the Books of Council and Session, 25th May 1886, whereby she disposed to William Finlay and others, her trustees, her whole property, heritable and moveable, including the said sum of £4000 sterling, of which she was entitled to dispose in virtue of the said provision in her said contract of marriage, and whatever part of the sum of £8000 of the stock of the three per cent. Consolidated Government Annuities she was or might be entitled to in the name of legitim as the only child of the said Henry Erskine Somerville who survived him.

Upon Mrs Dickson's death her testamentary trustees claimed (1) the proportion of the half-year's dividend on the said £8000 of stock corresponding to the period from the 5th day of January to the 16th day of May, both 1886; (2) the sum of £4000 sterling, part of the stock of which she had the power of disposal under the provisions of the said contract of marriage; and (3) one-half of the balance of the said stock or proceeds thereof, as part of the legitim falling to her as the only child of the said Henry Erskine Somerville who survived him.

James Law and others, Colonel Somerville's trustees, disputed the third branch of this claim, and accordingly James Cunningham Graham and others, Mr and Mrs Dickson's marriage-contract trustees, raised an action of multiplepounding to determine the rights of parties.

Mrs Dickson's testamentary trustees, *inter alia*,

pleaded—“(2) Mrs Dickson having been entitled, in terms of her marriage-contract, to dispose by testamentary deed of £4000 of the said £8000 stock, and having disposed thereof by her trust-disposition and settlement, the claimants are entitled thereto, with interest. (3) Mrs Dickson being entitled to legitim, and the balance of the said sum of £8000 stock being part of the free moveable estate of her father, one-half thereof vested in her as legitim, and now belongs to the claimants. (4) It is *res judicata* and *separatim*, the result of a sound construction of Mrs Dickson's marriage-contract, that the acceptance by her of her marriage-contract provisions, including the power of disposal, did not exclude her right to legitim.”

Colonel Somerville's trustees pleaded—“(1) On a sound construction of her contract of marriage, Mrs Dickson was barred by the principle of approbate and reprobate from both exercising the power of testamentary disposal conferred upon her by the deed, and claiming her *legitim* against the deed, and having exercised her power of disposal, her trustees' claim to *legitim* should be repelled. (2) *Separatim*, on a sound construction of her marriage-contract, and her father's trust-disposition and settlement and codicils, Mrs Dickson was barred from both claiming her *legitim* and also exercising her power of appointment or testamentary disposal under her marriage-contract; and she having elected to take her *legitim*, her trustees are entitled to one-half of the fund *in medio* as legitim, but to no part thereof under her pretended exercise of her power of testamentary disposal. (3) In any event, one-half of the remaining half of the fund *in medio*, which was not subject to Mrs Dickson's power of testamentary disposal, falls into dead's part of Colonel Somerville's estate, to which the claimants, as his testamentary trustees, are entitled.”

On 25th January 1887 the Lord Ordinary (KINNEAR) pronounced this interlocutor:—“Repels the first and second pleas-in-law for the claimants James Law and others: Sustains the pleas-in-law for the claimants William Finlay and others, and the third plea-in-law for the claimants James Law and others: Ranks and prefers the claimants William Finlay and others (1) to the proportion of the half-year's dividend on the £8000 stock corresponding to the period from 5th January 1886 to the 16th day of May 1886, being the date of Mrs Dickson's death; and (2) to the sum of £4000 sterling of the proceeds of the said £8000 stock; and ranks and prefers the claimants the said William Finlay and others, and the claimants the said James Law and others, each to one-half of the balance of the fund *in medio* and dividends accrued thereon, under deduction of the expenses of the real raisers and of the expenses after mentioned, and decerns.

“*Opinion.*—The only question in controversy between the parties is that which is raised by the third branch of the claim for Mrs Dickson's trustees, where they claim, on account of legitim, one-half of such portion of the sum of £8000 held by Mrs Dickson's marriage-contract trustees, as may have fallen into the residue of Colonel Somerville's estate.

“By the marriage-contract in question, Mrs Dickson's father, Colonel Somerville, put £8000 into the hands of trustees for behoof of the

spouses in liferent, for their and the survivor's liferent use allanarly, and of the children of the marriage in fee, with a declaration that, failing children, the fee should belong to such person or persons as Colonel Somerville might appoint; and failing any appointment by him, to his nearest heirs and successors whomsoever. But it was further provided, that notwithstanding this destination of the fee, Mrs Dickson, in the event of her leaving no children, should have power to dispose by will of any part of the trust-funds not exceeding £4000. Mrs Dickson, who survived her husband, died without issue; and she has left a trust-disposition and settlement, by which, *inter alia*, she has disposed of the sum of £4000, on which she was entitled to test, and also of whatever part of the said sum of £8000 she may be entitled to in name of legitim, as the only child of Colonel Somerville who survived him.

“Colonel Somerville's trustees maintain that she is barred, by the principle of approbate and reprobate, from exercising the power of testamentary disposal conferred upon her by the marriage-contract, and at the same time claiming *legitim* against that deed; and that as she has in fact exercised her power of disposal as to the sum of £4000, her trustees' claim to *legitim* out of the other must be repelled. They do not dispute, however, that, notwithstanding the provisions in her favour contained in her marriage-contract, Mrs Dickson became entitled to *legitim* at her father's death; and, indeed, this has been already determined by a final judgment pronounced by Lord Barcaple in 1867. The only question, therefore, is whether any part of the £8000 falls into the *legitim* fund; or, whether Mrs Dickson, although she is not barred by the marriage-contract from claiming *legitim* generally, may not be barred from claiming any part of the fund settled by that deed otherwise than upon the rights given by the deed itself, and in strict accordance with its provisions.

“It appears to me that there is nothing in the marriage-contract, taken by itself, to raise a plea of approbate and reprobate, or to compel Mrs Dickson to elect between inconsistent rights. Her father settles money that is absolutely his own, and to which she had no right whatever independently of his gift. The question of election, therefore, could not arise until she came to claim *legitim* upon his death. When that claim was brought forward, she might have been put to an election, if it could have been maintained successfully that her marriage-contract provisions were intended to be in lieu or in satisfaction of *legitim*. But the contrary has been decided by a judgment that is admitted to be unimpeachable. I think it follows that any part of the funds in the hands of the marriage-contract trustees which may have fallen into the residue of Colonel Somerville's estate must suffer a division, like the rest of the free moveable estate, between dead's part and *legitim*; and Mrs Dickson must be entitled to her share, because it is decided that she was entitled to *legitim*. The judgment sustaining her right to *legitim* means that she was entitled to one-half of the entire moveable estate left by Colonel Somerville, after providing for his debts; and it is now certain, in consequence of her death without issue, that the

£4000 held by the marriage-contract trustees was in fact a part of Colonel Somerville's moveable estate at his death.

"It is said that the right to test with regard to one-half of the £8000 was given to Mrs Dickson on condition of her abstaining from making any claim to the remaining half. But this is a misconception of the legal effect of the marriage-contract. It is in no proper sense of the term a condition of the benefits given to Mrs Dickson, that she shall not disturb the other provisions of the contract. There was no legal right in her which could enable her to disturb them. But the provision applicable, in the event which has happened, to the £4000 in question is, in effect, that it shall fall into the general estate of Colonel Somerville. In other words, it is not disposed of by the marriage-contract, but by Colonel Somerville's testamentary settlement; and it is this disposition by testament, and this alone, which Mrs Dickson's right of *legitim* enables her to challenge. She can claim no part of the £4000 without claiming against the testamentary settlement, and therefore forfeiting the liferent bequeathed to her by that deed. But she makes no claim against the marriage-contract. The argument that the claim now made by her trustees, in accordance with her will, involves a claim against the marriage-contract, appears to me to proceed upon two false assumptions—First, that the £4000 which has fallen into residue is disposed of by the marriage-contract, instead of by the testament; and, secondly, that the marriage-contract expresses or implies an intention that the benefits given to Mrs Dickson should be taken in lieu of *legitim*."

Colonel Somerville's trustees reclaimed, and argued that Mrs Dickson was not entitled both to claim *legitim* and also to test upon this £4000. The provision conferring on her a power of disposal was either testamentary, or part of the marriage-contract. If it was testamentary she was barred from testing by having elected to take *legitim*; if it was part of the contract, then the doctrine of approbate and reprobate applied. She could not unconditionally exercise the power conferred by the contract, and at the same time uphold the contract which only conferred that power subject to a condition—*Kerrs v. Wauchope*, 5th May 1819, 1 Bligh 1. She must take the power as qualified. The plea of *res judicata* did not touch this question, for Colonel Somerville's trustees never denied that Mrs Dickson was entitled to *legitim*, and that was all that Lord Barcaple's judgment decided. He never had before him the question as to the power of disposal—D. xlv. 2, 7, sec. 4, *de except. rei jud.*

It was argued for the respondents that the power to dispose was not a testamentary provision, but was one of the considerations of the marriage-contract. It was an onerous consideration, for an absolute right to dispose might be used during lifetime as a fund of credit—*Hyslop and Others v. Maxwell's Trustees*, Feb. 11, 1834, 12 S. 413, *per* Lord Corehouse. There could be no question of approbate and reprobate here; for to raise that question a testator must test upon something on which he has no right to test. That was not the case here, and accordingly the doctrine of *Kerrs v. Wauchope*, *supra*, did not apply. The provision was a part of the marriage-

contract, and consequently the question was *res judicata*.

At advising—

LORD PRESIDENT—The division of the moveable estate of Lieutenant-Colonel Somerville was the subject of the previous multiplepointing, and in that process his only child Mrs Dickson claimed *legitim*. She was found entitled to do so by an interlocutor pronounced by Lord Barcaple, dated 19th November 1867. The interlocutor pronounced by his Lordship was this:—"Finds that there are no grounds on which it can be held that the provisions made by Colonel Somerville for Mrs Dickson in the antenuptial contract of marriage between her and Mr Dickson were in full of her claim of *legitim*: Finds that she is not barred by the acceptance of these provisions from claiming *legitim*: Finds that these provisions do not fall to be imputed to account of or in extinction of her claim for *legitim*: Finds that Mrs Dickson was entitled to one-half of the free moveable estate of Colonel Somerville at the date of his death as *legitim*." Now that is really giving effect to the principles settled in the case of *Breadalbane v. Chandos*, 1836, 14 S. 309, and 2 S. and M'L. 377; and I think that the Lord Ordinary very well applied these principles in deciding that case in accordance with them.

A considerable sum of money was paid to Mrs Dickson in consequence of that judgment, and a sum of £8000 remained, which forms the fund *in medio* here. That sum of £8000 was settled by Mrs Dickson's marriage-contract, to which her father was a party; and the contention of Colonel Somerville's trustees in the present case is embodied in their second plea-in-law:—"Separatim, on a sound construction of her marriage-contract and her father's trust-disposition and settlement and codicils, Mrs Dickson was barred from both claiming her *legitim* and also exercising her power of appointment or testamentary disposal under her marriage-contract; and she having elected to take her *legitim*, her trustees are entitled to one-half of the fund *in medio* as *legitim*, but to no part thereof under her pretended exercise of her power of testamentary disposal." The reference to Colonel Somerville's trust-disposition and settlement and codicils I do not quite understand. I do not see how they can be of any avail in determining the extent of Mrs Dickson's claim, or the effect of what she has done. The contention, however, really is that according to the true construction of the marriage-contract, Mrs Dickson is not entitled both to claim *legitim* and also to exercise the power of disposal conferred on her by that contract. The opposite contention is very well set forth in the second and third pleas-in-law stated for Mrs Dickson's trustees—"2. Mrs Dickson having been entitled, in terms of her marriage-contract, to dispose by testamentary deed of £4000 of the said £8000 stock, and having disposed thereof by her trust-disposition and settlement, the claimants are entitled thereto with interest. 3. Mrs Dickson being entitled to *legitim*, and the balance of the said sum of £8000 stock being part of the free moveable estate of her father, one-half thereof vested in her as *legitim*, and now belongs to the claimants."

The whole question depends on the con-

struction of the marriage-contract. The deed itself is simple enough. There are provisions by the husband in favour of his wife and of the possible children of the marriage, and on behalf of the lady the father undertakes to make over to trustees the "sum of £8000 of the 3 per cent. Consolidated Government annuities;" and the way in which the trustees are directed to dispose of this sum is "that they shall hold the same for behoof of the said Eleanor Jane Somerville and William Dickson, her intended husband, in liferent, for their and the survivor's liferent use alienarily, and of the child or children of the said Eleanor Jane Somerville, or their issue, in fee." These are the whole of the trust purposes, with the exception of that to which I am to refer particularly, and on which the whole question here depends. The whole trust purposes are exhausted when the estate is settled in accordance with these directions.

But there follows the provision which has been referred to as being a testamentary provision by Colonel Somerville. He declares that, failing his daughter's children, the fee shall belong to such persons as he himself may appoint, "and failing any appointment by him, to his nearest heirs and successors whomsoever, and shall remain vested in the trustees agreeably to the directions contained in this contract." On the one side it was contended that this was a testamentary provision, and on the other side that it was a part of the contract. I think it is neither the one nor the other. It is a simple declaration of the effect of the spouses dying without issue—an effect which would have been operated by law although the provision had not been inserted. For what does it amount to? It provides that if the spouses die without issue the £8000 shall revert to the person from whom it came, that it shall pass by his will, or in the event of his making no will, to his executors. It thus interferes with nobody, and it does not interfere with the operations of the common law. The provision is thus merely declaratory of what will certainly take place on his marriage-contract provision not being fulfilled, or being fulfilled *quoad ultra*. What then was the use of this declaration? Its use is quite clear. It was to introduce the power of disposal. It was equivalent to saying that, failing children of the marriage, the sum shall revert to Colonel Somerville, and go by his will; "but under the provision," now that means that what is to follow is to interfere with the law as it stands,—that the £8000 is not so to pass, but that something else is to happen "under this provision, that notwithstanding the above destination it shall be in the power of the said Eliza Jane Somerville, in the event of her having no children, or if they shall all predecease her without leaving issue, to dispose by will or testamentary deed executed by her of any part of the said trust-funds not exceeding £4000 sterling." Now, it seems to me that taking the whole clause together it comes to this. The parties saw that, in the event of there being no children, the £8000 would revert to Colonel Somerville, and they therefore made this stipulation and condition as part of the contract, that in that event Mrs Dickson should have power to dispose of one-half of the fund. That forms an article of contract between Colonel Somerville and Mr and Mrs

Dickson, and between the two spouses. It is impossible to say it is not a provision of the marriage-contract. It seemed to be thought that it was a power of disposal, and that that was not a valuable provision. But it was shown by Mr Low that it is a provision of pecuniary value; that it is capable of being sold in the market.

Now if Mrs Dickson is entitled to exercise this power, which is secured to her as matter of contract, how is that to interfere with her right to *legitim*? The provisions of the marriage-contract are not in any way to be taken in discharge of, or to be imputed towards payment of, *legitim*. It follows that the £4000 falling into the estate of Colonel Somerville became subject to her claim of *legitim*; and as regards the other £4000, of course it does not belong to her in the same sense, but, when she exercised the power of disposal over it, it fell to her trustees.

I am therefore very clearly of opinion that the Lord Ordinary has arrived at a right conclusion, and that the two propositions stated in the pleas-in-law for Mrs Dickson's testamentary trustees are sound, viz.—“(2) Mrs Dickson having been entitled, in terms of her marriage-contract, to dispose by testamentary deed of £4000 of the said £8000 stock, and having disposed thereof by her trust-disposition and settlement, the claimants are entitled thereto with interest,” and (3) “Mrs Dickson being entitled to *legitim*, and the balance of the said sum of £8000 stock being part of the free moveable estate of her father, one-half thereof vested in her as *legitim*, and now belongs to the claimants.”

LOLD MURE—I am quite of the same opinion, and I agree with your Lordship's explanation of the clauses of the deed, but if I had felt any difficulty, it would have been removed by a consideration of the interlocutor, dated 19th November 1867, pronounced by Lord Barcaple, which in my opinion disposes of the whole question.

That interlocutor was pronounced in a question between the same parties, and there it is laid down "that there are no grounds on which it can be held that the provisions made by Colonel Somerville for Mrs Dickson in the antenuptial contract of marriage between her and Mr Dickson were in full of her claim of *legitim* : Finds that she is not barred by the acceptance of these provisions from claiming *legitim* : Finds that these provisions do not fall to be imputed to account of or in extinction of her claim for *legitim* : Finds that Mrs Dickson was entitled to one-half of the free moveable estate of Colonel Somerville at the date of his death as *legitim*." It is quite true that at the date of this interlocutor there was no question regarding the exercise of this reserved power. But Mrs Dickson had been drawing the liferent of the £8000, and of the other provisions during her married life, and it was pleaded that she was thereby barred from claiming *legitim*. This plea was rejected by Lord Barcaple. But the language of the deed itself declares that this power is a provision, and accordingly I think that the question is *res judicata*. The main point maintained by the claimers, as presented at the close of the argument, was, that this lady having claimed *legitim*, had no longer power to execute a testamentary deed disposing of the £4000. The observation has already been made that from the beginning

to the end of the deed there is no exclusion of *legitim*. And then, I think, the clause by which Mrs Dickson was entitled to execute a testamentary deed as to the £4000 conferred a right, which is just as much a provision as any other of the rights conferred by the contract in question. It was valuable and irrevocable in its nature, and it was one of the conditions on which the marriage proceeded. Is there any condition by which she loses this power if she claims *legitim*? I can find nothing of the sort express or implied.

Accordingly I am clear that we should adhere to the Lord Ordinary's judgment.

LORD SHAND—I agree with your Lordship in thinking that the Lord Ordinary's judgment should be adhered to. I must say it would make no difference to my view of the case if the provision had been a direct bequest. The claimants would still have been entitled to the £4000, because I see nothing to show that Mrs Dickson's right was conditional upon her not claiming *legitim*. On the whole matter, I think we should adhere to the Lord Ordinary, except in so far as he sustains the plea of *res judicata*; the question determined in the previous case being, in my opinion, other than that decided here.

LORD ADAM—It is clear that this right of disposal of £4000 possessed by Mrs Dickson was a valuable right; it was made a matter of stipulation, hence it was not in any view testamentary. It was not disputed that she had the right to claim *legitim*, and having these two rights, why should she not exercise both? I see no case of approbate and reprobate.

With regard to the matter of *res judicata*, although this question was not in terms decided by Lord Barcaple, yet the moment it is decided that this power to test is a provision, it comes under his judgment.

The Court adhered.

Counsel for Reclaimers—Asher, Q.C.—H. Johnston. Agents—Henderson & Clark, W.S.

Counsel for Respondents—Pearson—Low. Agent—John T. Mowbray, W.S.

## HIGH COURT OF JUSTICIARY.

Friday, June 3.

(Before Lords Young, Craighill, and M'Laren.)  
[Dean of Guild, Glasgow.]

GOURLAY v. LANG.

*Justiciary Case—Dean of Guild—Glasgow Police Act 1866 (23 and 30 Vict. cap. cclxxii.), secs. 364, 365.*

The 364th section of the Glasgow Police Act 1866 provides that the proprietor of any building within the city who intends to alter it "in a manner which will affect the exterior dimensions thereof," shall apply to the Dean of Guild for a warrant. The 365th section of the statute imposes a penalty for

making such an alteration without a warrant.

The proprietor of a house within the city having struck out two windows in the gable, without having applied for such a warrant, was convicted before the Dean of Guild of a contravention of the Act. *Held* that the building had not been altered in a manner which would affect the exterior dimensions thereof, and conviction *quashed*.

James Gourlay, house factor, 81 Wilson Street, Glasgow, appealed against a conviction obtained in the Dean of Guild Court, Glasgow, on a petition by the Procurator-Fiscal of Court praying the Dean of Guild to find the appellant guilty of a Guild offence within the meaning of the "Glasgow Police Act 1866," particularly sections 364 and 365 thereof, "in so far as he did, during the six months last past, by himself or by tradesmen employed by him, and acting under his instructions and authority, and for whom he is responsible, alter a building, or part of a building, situated at and entered to by No. 43 Bridgegate Street, Glasgow, of which he is the sole proprietor, in a manner which affects the exterior dimensions thereof, without a warrant of your Lordship so to do having been applied for and obtained, as required by said Act, being a Guild offence within the meaning of the said Act."

The 364th section of the Act provides that "Every person who intends to erect any building within the city (not expressly authorised by Act of Parliament) or to alter any such building of which he is the sole proprietor, in a manner which will affect the exterior dimensions thereof" . . . "shall make application to the Dean of Guild Court for warrant to do so." The 365th section of the said Act provides—"Any person who erects, or who alters in any of the respects herein-before mentioned, any building within the city, . . . without a warrant, or otherwise than in conformity with a warrant of the Dean of Guild, shall be deemed guilty of a Guild offence, and be liable to a penalty. . . ." The alterations complained of were described in the petition as the forming of a window 5 feet high and 3 feet wide in the north gable of the first flat of the building in question, and of another window of similar dimensions in said gable on the second flat of the building. These alterations were made without a warrant having been obtained from the Dean of Guild. They had been made in consequence of an application by the present respondent, as representing the Local Authority in Glasgow, under the Public Health (Scotland) Act 1867, to the Sheriff of Lanarkshire, under the circumstances narrated in the judgment of Lord Young *infra*.

The questions of law for the opinion of the Court, as stated by the Dean of Guild in the case, were:—"(1) Whether the procedure before the Sheriff in the foresaid proceedings under the Public Health (Scotland) Act 1867, in so far as held proved by me, amounted to an order by the Sheriff to make the alterations complained of; and if so, whether it superseded or rendered unnecessary compliance by the appellant with the provisions of sections 364 of the Glasgow Police Act, before carrying out said alterations? (2) And whether I was justified in holding that the forming of the windows in the gable of the building in question is an alteration struck at by section 364 of the Glasgow Police Act?"