contends that he is entitled to be preferred to the balance of Mrs Johnston's share, minus the £400, of her father's estate in the hands of his executors, on the ground that it was effectually conveyed by the marriage-contract to the trustees whom he represents, and which, reserving only a liferent to Mrs Johnston, conferred a *jus crediti* on any children that might be born of the marriage. The various creditors before and after the date of the marriage have disputes among themselves as to the priority of their arrestments, but they all concurred in challenging the marriage-contract. The grounds mainly relied upon were—(1) that the dispositive clause was qualified by a declaration "that the property and sums" were to "belong" to Mrs Johnston; and (2) a clause of apportionment of the provisions of children which, it was contended, postponed the interest of the children, and conferred upon them only a *spes successionis*, and not a *jus crediti*.

The following are the terms of the clause in the marriage-contract :—

"For which causes, and on the other part, the said Miss Mary Jane Murray, with consent foresaid, hereby assigns, dispones, conveys, and makes over to, and in favour of, the said John Robertson and Thomas Hutchison, Robert Walker and James Tait junior, and to the acceptors and acceptor, survivors and survivor of them, and to the heir of the last survivor, and to their assignees or disponees, her whole present right and interest in the estate left by the said deceased James Murray, her father, under and in virtue of his foresaid last will and testament, whereby he conveyed his whole estate to Mrs Jane Strachan or Tait, presently residing at 14 Grove Street, Edinburgh; Dr Hamilton Bell, Charlotte Square, Edinburgh, now deceased; William Hutchison, coachbuilder, Lothian Road, Edinburgh; and the said Thomas Hutchison, and the survivors or survivor of them, or behoof of his children, and all sums of money which may be due to her therefrom, in any manner of way, with all that has followed or is competent to follow thereupon; with power to them to call and sue for, uplift, and receive all sums that may now be due to her from her father's said estate, and generally to do everything concerning the premises which she might have done herself before granting hereof: Declaring always, as it is hereby expressly declared, that the foresaid conveyance by the said Miss Mary Jane Murray is granted in trust only for the purposes, and with and under the powers, conditions, and declarations after specified—That is to say, *primo*, that the said trustees or trustee, acting for the time, shall regularly pay over to the said Miss Mary Jane Murray during her life the free interest or annual proceeds of the property, and sums hereby conveyed: Declaring always, that the said property and sums, and the whole interest and income to arise therein, shall belong to the said Miss Mary Jane Murray, exclusive of the *jus mariti* of the said Robert Dawson Johnston, and shall not be affectable by his debts or deeds, legal or voluntary, nor by the diligence of his creditors, and that the receipts and discharges of the said Miss Mary Jane Murray alone, without the consent of her said intended husband, shall be sufficient for the said sums, or any part thereof. . . . . *Quarto*, That on the death of the longest liver of the said intended spouses the said trustees shall hold the property and sums vested in them as aforesaid, for behoof of the children of the said intended marriage, in the same manner, and subject to the like privileges to the spouses, under the declaration that the power of apportionment of the said provisions shall fall to be exercised, in the first instance, by the said Miss Mary Jane Murray alone, without the concurrence of the said Robert Dawson Johnston; and failing her doing so, by the said Robert Dawson Johnston, in the event of his surviving her."

The Lord Ordinary (Barcaple) sustained the marriage-contract as effectually divesting Mrs Johnston of the fee of her estate.

The creditors reclaimed.

J. M. DUNCAN, for one of them, argued—It is quite obvious from the terms of the marriage-contract that Mrs Johnston, in her conveyance to the trustees, intended to reserve control over the fee of her estate. But whatever her intention was, there is no doubt that the declaration, which qualifies the dispositive clause, is a bar to the construction put upon the marriage-contract by the Lord Ordinary, that she did so divest herself. Further, it is evident from the fourth provision of the deed, that it was intended to postpone the interests of the children until the death of the longest liver of the spouses. Till that event they had only a *spes successionis*, not a *jus crediti*. The general rule of law is, that in such a conveyance the fee remains with the granter of the deed, and that it is only upon the parents' death that the right of the children emerges. Erskine 3, 8, 39; Wilson *v.* Wight, 18th June 1819, Hume's Dec. 537.

The SOLICITOR-GENERAL and SCOTT, for other creditors, adopted Mr Duncan's argument.

GIFFORD and W. A. BROWN, for the judicial factor, were not called upon.

The Court unanimously adhered to the interlocutor of the Lord Ordinary; the Lord Justice-Clerk remarking that the declaratory clause was quite a proper one, as it was quite possible that there might be a fee resulting to Mrs Johnston on the failure of children and the death of her husband. Lord Neaves observed that he reserved his opinion on the question, whether in that event the fee would be atainable in Mrs Johnston's hands.

Agent for Judicial-Factor — John Henderson, S.S.C.

Agents for Creditors—A. K. Morison, S.S.C. J. & R. Macandrew, W.S.

Friday, July 13.

SECOND DIVISION.

MOIR *v.* REID.

Poor — Husband and Wife — Parent and Child. Held that a son-in-law is bound to support the indigent parents of his wife during the subsistence of the marriage.

This was an advocation from the Sheriff Court of Aberdeen. The inspector of the parish of Fordyce, in the county of Banff, brought an action against William Moir, advocate in Aberdeen, concluding for payment of £1, 15s. 5d., being the amount of aliment furnished to the parents of his wife who had become chargeable on the parish, and to be relieved of future advances. The facts were not in dispute, and the defender (advocator) put in a minute consenting that the case should be disposed of, as if he had admitted on record that his means were sufficient to enable him to meet the claim made. He maintained the following pleas :—

1. A son-in-law, who neither derived nor acquired any estate from his wife or her parents is not bound to maintain his wife's parents.

2. The defender not having been *lucratus* by his marriage and his wife not being possessed of any separate means or estate of her own, is not bound to maintain his wife's parents.

3. The present debt or obligation not having emerged at nor previous to the defender's marriage, and not being then a debt or obligation incumbent upon the defender's wife, in respect that the liability of children to maintain their parents depend on their ability to do so, the defender is not liable for it.

4. But assuming that it had so emerged, the defender's wife being then quite unable, from want of means, to provide for the maintenance of her parents, it was not a liability or debt for which she was bound, and hence it cannot fall as a legal debt or obligation upon the defender as her husband.

5. The defender's means or income being no more than sufficient for the maintenance of himself and his wife and family, he is not bound in law to maintain his wife's parents, as it would impoverish himself and his own family were he compelled to do so.

6. *Et separatim*—Assuming, but not admitting, the defender's liability, the defender being unable to do more than contribute to the maintenance of his wife's parents, and having done so voluntarily, and intimated to the pursuer, before this action was raised, his intention to continue to do so as his means and income enabled him, he fulfilled his obligations in a moral and legal point of view, and the present action was uncalled for, and is groundless and untenable.

7. In any view of the case, the defender is not bound, in the circumstances before stated, to do more than contribute towards the maintenance of his wife's parents, and the pursuer is not entitled to maintain the present action against the defender alone, seeing that there is another or others equally liable with the defender, and more able to pay, who have not been called to the action.

8. Generally, and in every view that can be taken of this case, whether moral, legal, or equitable, the defender ought to be assoilzied from the whole conclusions of the summons, and found entitled to his expenses.

The Sheriff-Substitute (Watson) assoilzied the defender, holding that there is no authority for the proposition that a son, deriving no estate through his wife from her parents, while she had no separate estate of her own, is liable to maintain his wife's parents.

The Sheriff (Jameson) altered, and appended to his judgment the following

Note.—This case presents a question of difficulty and of general interest. It has been variously decided in the Sheriff Courts, but has not received an authoritative decision in the Supreme Court. The principal grounds upon which the defender, in his very able pleading, rests his legal defence are that, at the date of his marriage this was not a subsisting debt, and that he was not *lucratus* by his marriage. It is true that his wife's parents did not become chargeable until the 14th December 1864, when they received the small pittance of 1s. per week, but the defender's wife, as their daughter, was always bound to contribute to her parents' support, if she was able, whenever the necessity should arise. Being a natural obligation, it attached to her from the time she became able-bodied, although it remained dormant and contingent until the necessity arose requiring her assistance. It is not disputed that a husband is liable to support his wife's natural children before marriage. Suppose a woman's natural son, from infirmity of mind or body, becomes chargeable to a Parochial Board, it would be no defence to a claim against her husband that the debt had not emerged before marriage, and that he had received no tocher or goods with his wife. This was the view expressed by Lord Gillies in the case of Laidlaw, 3d July 1832—"If this be a debt arising from a natural obligation—if it be a debt against her—I conceive that her husband incurs the same liability as for the other debts of his wife, and that this does not depend upon the amount of effects which she possessed at the time of entering into the marriage." The Lord President expressed himself with equal clearness—"If the daughter would have been liable had she remained single, I do not see how her marriage should extinguish her liability, or how her husband should be free from it." It seems to be conceded by the learned Sheriffs who have decided against the liability of the son-in-law, that if the wife's parents had become chargeable before marriage, the husband would have been liable for their aliment up to marriage at least. But marriage cannot put an end to a daughter's relation to her parents, nor to the mutual obligations that are inherent in it. She cannot say she has no means. She has a husband who comes in her place as administrator of the *communio bonorum*. The aliment of an indigent child born to another father, whether legitimate or illegitimate, is a debt on the common fund—*vide* Bell's Prins., 1570—the aliment of her indigent parents seems to be in the same position. The case of M'Donald, 20th June 1846, is referred to by the Sheriff-Substitute as an authority against the pursuer's claim, but the opinions of the Judges in favour of the sons-in-law in that case rested upon the circumstance that they were domiciled in England, and that they were within the operation of the law of that country, which in regard to claims of this kind seems to depend upon the interpretation of an old statute of Elizabeth, imposing the burden of support only on natural relatives. It has been decided that a father-in-law is liable to aliment her daughter-in-law when his son is alive and unable to maintain her—Duncan, February 17, 1810, F.C. So that if the situation of the defender and his wife's parents had been reversed, had he been disabled from maintaining his wife and children, the expense of their maintenance would then have devolved upon his father-in-law

It is not a valid objection to this action that the other children of the paupers have not been called. Parties liable in aliment are liable *singuli in solidum* in such cases as the present, and have relief against the other children.

It is proper to add that the Sheriff has no doubt of the defender's willingness to contribute to the relief of his poor connections, and that his object in defending this action has been to vindicate his legal position in the matter. A. J.

The defender advocated.

GORDON and SHAND supported the view taken by the Sheriff-Substitute.

The SOLICITOR-GENERAL and W. M. THOMSON argued that the interlocutor of the Sheriff was well founded.

The following cases were relied on in the course of the discussion:—Macdonald, 20th June 1846, 8 D. 830; Donald, 20th May 1860, 22 D. 1119; Clarkson, 7th July 1858, 20 D. 1226; R. *v.* Mundy, 1 Strange, 190, Fraser on Parent and Child, 115 *et seq.*; Corrie, 24th February 1860, 22 D. 897; Laidlaw, 3d July 1832, 10 Sh. 745; Spence, 1796,

M. App. "Aliment" 1; Adam, 1762, M. 398; Marjoribanks, 30th November 1831, 10 S. 79; Aitken, 27th May 1815, Hume, 217: Greig *v.* Adamson, 2d March 1865, 3 Macq. 575; Duncan v. Hill, 28th February 1809 and 17th February 1810, F.C.; Wallace *v.* Goldie's Trs., 20th July 1848, 10 D. 1510.

At advising—

The LORD JUSTICE-CLERK—The question of the liability of the advocator is one of considerable importance and of general application, and it has been argued carefully and ably. The interlocutor of the Sheriff is in favour of the respondent, and the grounds of law on which he proceeds are there clearly expressed. He "finds that by the law of Scotland parents and children are reciprocally liable to aliment each other when in a state of indigence, and that this obligation, which arises from the law of nature, attached to the defender's wife while she was unmarried, and was not extinguished by her marriage with the defender; that the defender became liable for all the debts and obligations of his wife by his marriage with her, and is therefore bound to aliment her indigent parents while able to do so, and during the subsistence of his marriage with their daughter." My opinion entirely agrees with that expressed by the Sheriff; and I think a few plain and obvious considerations will make sufficiently clear the grounds of my judgment. The nature of the reciprocal obligations of parent and child is based upon the law of nature, but is also recognised and given effect to by the civil law of the country. The obligation on both sides is constantly subsisting, but can be enforced only under certain conditions—namely, the concurring existence of indigence on the one hand and superfluity on the other—that is to say, superfluity in the limited sense of the person against whom the claim is made having more of this world's goods than is necessary for his own support. That being the nature of the claim it follows that it can never be made effectual against a bankrupt estate. In that case, there may be indigence; but the other necessary condition must be wanting, because the coincidence of insolvency and superfluity is incompatible. So the discharge of a bankrupt can never relieve him of this claim if at any future period he comes into possession of a superfluity. This obligation, which lay on Mrs Moir prior to her marriage, was no doubt for a time dormant or even contingent and future; but I am not aware that there is any principle in the law of Scotland to prevent a husband becoming liable for the future or contingent debts of his wife, and for her obligations existing before marriage, although they may never become prestable. The foundation of this liability is, that by marriage the wife's person is sunk in that of her husband, and her moveable estate is transferred to him, so that the estates of both become one moveable estate under his control. The legitimate consequence of this is that every personal obligation of the wife is, along with her estate, transferred to the husband, and becomes his debt. Is there, then, anything in the present obligation to introduce an exception to this general rule? The obligation is one which is founded on piety, but it is also recognised and given effect to by the civil law: and while it is not an ordinary civil debt, it is one which the law will enforce against the estate of the debtor; so that if Mrs Moir had remained single she would have been undoubtedly liable. It is said that she brought no estate to her husband, that he was not *lucratus* by the marriage; but it is a fixed principle in our law that this does not affect the husband's liability in any way, nor yet does it make any difference that at the date of the marriage the obligation was not instantly prestable. This might happen in a number of cases in which the husband would be clearly liable— such, for instance, as an ordinary cautionary obligation, or a continuous mercantile guarantee. There is, therefore, in my opinion, no authority and no principle for so limiting the husband's liability as to exclude contingent and future debts. It would have been enough to express thus the principle of my judgment; but for the authorities cited, and in a question of such general interest and of such importance as the present, it is right that I should take notice of them; and, in the first place, I concur entirely with the opinions expressed by the Lord President and Lord Gillies in the case of Laidlaw (3d July 1832). This, though not a decision on the question, contains strong expressions of opinion in support of the views which I have just expressed. On the other hand, there are *dicta* in the case of Macdonald (20th June 1846) to an opposite effect; but while the cases are so far similar that what they contain on the point are equally in the form of *dicta*, there is this difference—those in the case of Laidlaw embody reasons which commend themselves to my mind, while the *dicta* in the other case are pure and simple, unsupported by any reasoning, and, I cannot help thinking, influenced by the circumstance that the parties there sought to be made liable were not subject to the jurisdiction of this Court, being domiciled Englishmen. But there is another authority of more importance, because it is not a mere expression of opinion, but a formal decision. Further, I think, although this decision to which I am now referring is not precisely in point, that it is clearly analogous and involves the same principle—I mean the case of Aitken (Hume, p. 217). That was a case of aliment like the present, and in it a husband was found liable for the aliment of his wife's natural children born to other men before her marriage. But it was contended that the authority of that case was taken off because of the difference in the law between the claim of a bastard and a legitimate child. Now, if it be true that the obligation to aliment a bastard does not rest, as in the case of a legitimate child, on the law of nature, but is a pure and simple civil debt, then the authority of Aitken's case is taken off; but then the question here arises—and it was one which I ventured to put in the course of the argument—if the bastard-child's claim to aliment does not arise *ex jure naturali*, but is an ordinary civil debt, to which class does it belong? Does it arise *ex contractu* or *ex delicto*, or is it based on statute? It is quite clear that it does not belong to any of these, and, that being so, the only category to which it can be referred is that of obediential obligations, based upon the law of nature. I think this view was given effect to in the case of Marjoribanks (30th November 1831), where it was held that the aliment of an illegitimate child born before the sequestration of his father's estate was not affected by the statutory discharge. In this case, therefore, the claim of a bastard for aliment was put on precisely the same footing as that of a legitimate child. This therefore entirely removes the objections stated to the authority of the case of Aitken. A good deal of confusion was introduced into the argument, and I suspect has often been so in similar cases, by confusing two claims which are totally distinct—I mean the claim which a bastard has on his parents, with the claim which one parent has on the other.

The claim of a child against its parents arises *ex iure naturæ*, but when the mother performs the whole obligations which are prestable equally against both parents, she has then a claim against the father. But this claim rests, not on the law of nature, but on the ordinary principle of civil law, that where one or two *correi debendi* pays the whole debt, he has an action of contribution against the other; and therefore when the question arises in this shape, it is no doubt a civil debt. This is well explained in 1 Bell's Com., p. 635. With all possible respect for the opinions expressed in the case of Thomson (February 26, 1842), I have a strong conviction that there was much of this confusion running through the opinions expressed in that case. I think it is impossible to read the opinions of the Judges, especially that of Lord Ivory, without being convinced that they are confusing two things which are quite distinct. I cannot, therefore, attach that weight to their judgment which I should otherwise be bound to do. On the whole matter, I have come to be clearly of opinion that the obligation which arose, at the marriage of the husband and wife, to aliment her father and mother is incumbent on the husband, because it was a debt of his wife constituted before marriage, or, to speak more correctly, an obligation of the wife existing and binding before marriage, though not prestable till after marriage.

The other Judges concurred. In his opinion, Lord Neaves expressly reserved his opinion as to the effect that might be produced on the husband's liability on the death of the wife.

The judgment of the Sheriff was accordingly adhered to.

Agents for Advocator—Murray & Beith, W. S.

Agent for Respondent — Alexander Morison, S.S.C.

Saturday, July 14.

At the meeting of the Court to-day, George Patton, Esq., presented Her Majesty's letter appointing him Lord-Advocate for Scotland, and Edward S. Gordon, Esq., presented her Majesty's letter appointing him Solicitor-General for Scotland. Both gentlemen took the oaths and their places within the bar.

FIRST DIVISION.

PARKER AND CO. *v.* HANDYSIDE AND OTHERS.

Ship—Carriage—Damage to Cargo—Onus probandi. The *onus* of proving that damage to a cargo was occasioned by causes exempting him from liability lies on the shipowner. Circumstances in which held that the *onus* had not been discharged.

These are counter advocations of counter actions raised in the Sheriff Court of Glasgow. In the one action, Handyside & Others, as owners of the screw-steamer United Kingdom, a trader between Montreal and the port of Glasgow, sued Parker & Co., soap manufacturers in Glasgow, for payment of £105, 12s. 9d., being a balance of freight due to them in respect of goods, consisting of peas, flour, and wheat, consigned to the defenders, and carried on a voyage from Montreal to Glasgow which that vessel made, arriving in Glasgow on 13th December 1862, and "which goods were duly delivered to the defenders." In the other, Parker & Co. sued the shipowners for payment of £76, 15s. 8d., the value of goods carried by said vessel on said voyage, consigned and deliverable to the pursuers in Glasgow, but which the defenders failed to deliver in terms of the bill of lading, and loss sustained by the pursuers through damage done in the course of the same voyage to other goods, which damage was occasioned through the fault or negligence of the defenders, or others for whom they are responsible, and in breach of their duty as common carriers. Parker & Co. pled the same grounds in defence to the action for freight.

The Sheriff-Substitute (Strathern) found it expressed in the bill of lading, that, *inter alia*, said peas were shipped in bags at Montreal, and were received there in good order and condition, and were to be delivered from the ship's deck at Glasgow in the like condition; that on the ship's arrival at Glasgow, delivery was given of the goods contained in the bill of lading, with the exception of one barrel flour and eighteen bags wheat (the value of which has been admitted), and of eight bags peas containing 3,190-280 bolls; that twelve bolls farther of said peas were landed so completely damaged by dampness and coal culm that they were left on the quay as valueless; and 55½ bolls were landed also damaged from the same cause, but not to the same extent. He found, with respect to the question of liability for the damaged goods, that as the peas were shipped in good order, the owners of the vessel, as public carriers, were bound to deliver them in the same state, or to prove that the damages were occasioned by peril of the sea, exempting them from liability, the *onus probandi* being on them; that they had failed, however, to prove that the peas were damaged through any such exempting cause, and they were therefore liable in the value; and that the admitted and proved short delivery and damages amount to £76, 15s. 8d., the sum sued for by Parker & Co., and to which extent they were entitled to compensate the claim for freight. He further found the shipowners liable to Parker & Co. in expenses in both actions. The Sheriff-Substitute referred in his note in regard to the question of *onus* to 1 Bell's Com., p. 466; Jones & Co. *v.* Ross and Others, 12th February 1830, 8 S. 495; and Rae *v.* Hay and Others, 7th February 1832, 10 S. 303.

The Sheriff (Alison) found it to be proved that the damage done to the peas in question arose partly from the improper stowage thereof, and partly from the excessive stress of weather during the voyage, and that neither of these causes taken singly would have produced the disaster; that in these circumstances it would be unjust to ascribe the proved damage done to the cargo, solely and exclusively either to the improper stowage or to the stress of weather, but that it falls to be ascribed to the effects of the two jointly; that there are no materials in process for determining which of the two causes produced the most damage; and that in these circumstances the presumption is for equality in the causes of the mischief, which leads to the shipowner being responsible only for one-half of the damage; that the total amount of the damage claimed by Parker & Co. in the action at their instance is £76, 15s., and that the defenders, Handyside and Others, admit the first two items in the account sued for, amounting to £12, 4s. 8d., which leaves the sum of £64, 10s. 4d. as the damage done to the peas in dispute between the parties. He therefore found the defenders, Handyside & Henderson, liable in £32, 5s. 2d., being the one-half of the damage done to the peas in question, which sum, added to the item of £12, 4s. 8d., made the gross amount found due to the parties, Parker & Co., under the action at their instance,