heirs, in the correct sense of the term. It could only be so, if it were merely filling up the gap left in the deed of 1821, after the heirs-male of James Grant, the carpenter; for to that case alone is a deed of nomination, properly so called, applicable. The deed is what it calls itself, a deed of revocation and alteration; and, if ineffectual in that character, it cannot have efficacy imparted to it by merely giving it a different name.

"4. The pursuer stated an additional objection to the deed of 1840, considered as a deed of entail, viz., that it imposed the fetters by a mere reference to the clauses contained in the previous deed, and not by any embodiment of the due legal clauses in itself. It is unnecessary to consider this objection, if the Lord Ordinary be right in the view already expressed; for the view implies that there is no legal deed of conveyance, in which the clauses are or could have been inserted. The Lord Ordinary may only say in a single sentence, that he considers the objection well founded; *Gemmell* v. *Cathcart*, 13th Nov. 1849, D. 12, 19; H. of L. 13th Dec. 1852, 1 M'Q. 362. This plea may in truth be said to be necessarily involved in the other. If the deed were a deed of nomination, properly so termed, a mere reference to the primary entail would be all that was necessary. Being as it is, a deed of revocation and alteration, the fettering clauses must be inserted as in an original deed of entail, to which it is precisely equivalent. The decision on the one point truly decides the other.

"5. The result of the foregoing views is to hold that no effectual entail exists of the lands of Raddery. The pursuer, being now admittedly his father's heir-at-law, is therefore entitled as such to hold the lands in fee-simple."

The defenders reclaimed.

BALFOUR for them.

DUNCAN in answer.

The Court adhered to the interlocutor of the Lord Ordinary.

Agents for Pursuer—Mackenzie & Fraser, W.S.

Agents for Defenders—Mackenzie & Black, W.S.

Saturday, January 30.

LANG, PETITIONER.

(*Ante*, p. 208.)

Separation—Custody of Children—Conjugal Rights Act—Nobile Officium. Circumstances in which the Court declined, in exercise of its *nobile officium*, to withdraw from a father, separated from his wife by a decree of the Court, the right which he has by law to the custody and education of his children.

Opinion by Lord Benholme that the Conjugal Rights Act does not confer on the Court more extensive powers as to regulating the custody and education of children than the Court possesses at common law.

This case now came up on a petition by the wife for the custody and aliment of the children. The petitioner made the following averments:—

"The petitioner was married to the said John Lang on or about 31st March 1845.

"Of the said marriage there have been born eleven children, seven of whom survive, viz., Robert, born on or about 2d January 1846; Janet, born on or about 24th January 1850; John, born on or about 11th September 1851; William, born on or about 16th December 1853; Mary, born on or about 21st July 1857; Elizabeth, born on or about 23d November 1861; and Joseph, born on or about 15th October 1863. At the time when the petitioner left the said John Lang's house, as after mentioned, all of the said seven children resided with their parents there except Robert, who had left the house in May 1867, and commenced business on his own account.

"For many years back the said John Lang has been irregular and intemperate in his habits. For several years he has been greatly addicted to the use of intoxicating liquors, and has frequently been, for some days at a time, in a continuous state of drunkenness, and has occasionally laboured under *delirium tremens*. The deceased Dr Robert Hunter, Sauchiehall Street, Glasgow, who was for some time the usual medical attendant of the family, having attended the said John Lang while under *delirium tremens*, and having recommended that a male nurse should be got for the purpose of watching and restraining the said John Lang, so as to prevent him injuring himself or others, a male nurse was accordingly got from time to time, and remained in attendance on the said John Lang, sometimes for a week at a time.

"For several years back, and more particularly within the last four years or thereby, the said John Lang has been, especially when recovering from fits of drinking, in the frequent practice of conducting himself in his dwelling-house, No. 7 Somerville Place, Glasgow, with great and alarming violence of manner and language; with indecent behaviour, as, for example, by smashing doors with dumb-bells; by threatening with dumb-bells, sticks, knives, or other weapons in his hands, to take the lives of the inmates; by threatening to commit suicide; by profane swearing, and using opprobrious epithets and language towards members of his family; and by exposing his person in presence of various members of the family. For several years back, and more particularly within the last four years, or thereby, foresaid, the said John Lang has been in the practice of rising from his bed and going out of his house to the streets at eleven or twelve o'clock at night, or very early in the morning, and returning home not earlier than about six o'clock in the morning, and, when not in his dwelling-house, has been in the practice of conducting himself in a grossly unbecoming manner; as, for example, by habitually consorting with women of bad fame.

"For some years previous to the petitioner leaving the said John Lang's house, as after-mentioned, he conducted himself towards her with great cruelty, frequently using personal violence towards her, and habitually treating her very contumeliously. During that period, he was in the frequent practice, in presence of the children, to apply opprobrious epithets to her, and to speak insultingly of her, as, for example, to call her a hypocrite, a damnable woman, a withering curse to him, and a rotten-hearted wretch, and to say that she was past having children, and was of no more use to him. He also, during that period, frequently assaulted her; as, for example—(1) in or about the summer of the year 1865, in a house in Gourock, where the said John Lang and his family were residing; (2) in or about December 1866, in the said John Lang's said house in Glasgow; (3) in or about the end of April 1867, in the said house in Glasgow; (4) in or about 24th May 1867, in a house in Dunoon, in which the said John Lang had summer quarters at the time; and (5) on or about 24th June 1867,

in the said house in Glasgow. On the last of these occasions the said John Lang, after having for several hours conducted himself towards the petitioner with great violence of language and behaviour, and having, during these hours, repeatedly ordered her and the children to leave the house, threatened the petitioner with serious personal violence if she did not leave the house immediately. Thereupon the petitioner left the defender's said house, under a well founded apprehension that her life was in danger, and she has remained separate from the said John Lang ever since. The petitioner, when she so left the said John Lang's house, took with her the two youngest children, viz., Elizabeth and Joseph, besides the said children, Janet and John, who spontaneously accompanied her, and she and these four children presently live in family together at No. 100 Crown Street, Hutchesontown, Glasgow. The said children, William and Mary, still reside with the said John Lang.

"Some time ago the petitioner, in consequence of her said husband's cruel treatment of her as aforesaid, instituted against him an action of separation and aliment before your Lordships, the summons in which was signeted 2d August 1867. In the said action, after certain procedure, Lord Jerviswoode, Ordinary, on 20th March 1868, pronounced an interlocutor containing decree of separation against the said John Lang, and to this interlocutor their Lordships of the Second Division, on a reclaiming note, adhered. Subsequently, viz., on 27th October 1868, their Lordships of the Second Division pronounced a decree against the said John Lang for aliment to the pursuer, at the rate of £85 sterling per annum.

"Of the said four children, residing with the petitioner, the two youngest, viz., Elizabeth and Joseph, are respectively a little above seven and five years of age, having, as above mentioned, been born on or about 23d November 1861 and 15th October 1863 respectively. From the said John Lang's habits, the petitioner believes and avers that it is very inexpedient that these two children should be kept in the custody of their father. The petitioner believes and avers that, on the contrary, it is expedient that these two children should continue to remain in the custody of the petitioner, and be maintained and educated under her charge until they respectively attain puberty. But notwithstanding the circumstances above set forth, not only does the said John Lang refuse to pay for the maintenance and education of the said two youngest children, for whose support the petitioner has no means, but the petitioner has reason to apprehend that the said John Lang will, unless interdicted from so doing, take them from the custody of the petitioner, and take and keep them in his own custody, by all which the present application is rendered necessary.

"The said John Lang is a tailor and clothier. He carries on his business in an excellent double shop in Great Hamilton Street, Glasgow, and has often from ten to sixteen men at a time in his employment. He has been long established in business, and his income from his business is not less than £500 a-year. He is also proprietor of heritable property in Struthers Street, Calton, at Glasgow, from which he draws, after all deductions, a clear rental of not less than £100 per annum. He has also a considerable amount of cash in bank, besides other means. The allowance asked for in order to maintain and educate the foresaid pupil children is reasonable and moderate in the circumstances."

The petition concluded with the following prayer:—"In the meantime, to interdict, prohibit, and discharge the said John Lang, and all others acting under his instructions, from taking, or attempting to take, or obtaining the custody of, or interfering in any way with the said Elizabeth Lang and Joseph Lang, or either of them, until the further orders of the Court; and, on resuming consideration hereof, with or without answers—(1) to grant warrant to the petitioner to retain the custody of the said pupil children, Elizabeth Lang and Joseph Lang, until they attain puberty respectively, or for such other period as your Lordships may appoint; (2) to grant warrant to the petitioner to give, while the said Elizabeth Lang and Joseph Lang remain in her custody, such directions as may be necessary for their proper education; (3) to give to the petitioner such instructions, if any, as to your Lordships may seem proper in regard to the education of the said Elizabeth Lang and Joseph Lang; (4) to decern and ordain the said John Lang to pay to the petitioner, while the said Elizaboth Lang and Joseph Lang, or either of them, remain in her custody, the sum of £25 sterling for the maintenance and education of each of these children so remaining in her custody, or such other sum yearly as your Lordships may determine, payable in two equal portions, half-yearly, at Whitsunday and Martinmas, beginning the first term's payment at Whitsunday 1869 for the half-year immediately succeeding, and so on half-yearly and termly in advance; together with a proportional allowance for the period of the petitioner's said custody previous to Whitsunday 1869; and (5) to find the said John Lang liable in the expenses of this application, and of the procedure to follow hereon."

The respondent lodged answers to the petition, in which he pleaded that the statements in the petition were irrelevant, and insufficient to support the prayer thereof.

The respondent thus maintained his plea:—

"The respondent's rights cannot be ousted upon any such grounds.

"The right of custody of lawful children is given absolutely to the father by the law of Scotland. The last writer upon the subject says, that the father is entitled to the custody of the child, and may remove it from place to place, and from one country to another. 'He can recover it from any person who detains it, though the person guilty of its detention should be its own mother.' Again, he says—'Here (that is, in Scotland), that the father is the legal custodier of the children, holds even when he is the guilty party; for, although he has broken the vow of conjugal fidelity to his wife, it does not follow that he will also wrongously discharge his parental duties to his children.'

"Professor More, in his notes upon Stair, says—'the father is entitled during the pupilarity of his children to have the custody of his children, and to direct their residence and education.' Again, he says that, although bound to educate his children, 'he cannot be controlled in this respect, however waywardly he may conduct himself, and in whatever state of ignorance he may allow his children to grow up.' The Court cannot interfere with the father who is willing to perform his duties, or dictate to him either in what style as to aliment and clothing he shall keep them, or what kind of education he shall give them. The statement by

Mr Cowan of the law is supported by the authorities to which he refers, viz., Craig, ii, 20, sec. 27 and sec. 29: and ii, 21, sec. 16; Stair, i, 15, sec. 13; and Erskine, i, 6, sec. 53 and 56. The doctrine was recognised in the cases of *A.* v. *B.*, 10th Dec. 1847, 10 D. 229; *M'Iver*, 2d July 1859, 21 D. 1103.

"In England the mere fact of the husband's separation from his wife, and his gross violation of conjugal duties, does not affect his parental rights: and there the Court cannot deprive a father, though living in adultery, of the custody of his child, unless misconduct on his part was shown *with reference to its management and education.*

"In Scotland the Court has been very slow to interfere with the father's rights. In the case of *Sir Stair Agnew*, the Court were induced to order children to be taken from the custody of the father, the mother being dead, only upon the deposition of the maternal grandfather and his son that they had reason to believe *that the lives of the children were in danger.* In *Cameron* v. *Cameron*, the allegations were that the father, after compelling his wife by his violence to leave him, cohabited with his female servant, and treated his only child, a boy, in the most improper manner, causing him to perform all the ordinary duties of a menial servant—carrying the water, emptying the ashes, going errands, and waiting upon his father and the servant, who sat at table—his studies and attendance at school being entirely neglected; and that he was in use to beat his son wantonly, and without the slightest cause. The case of *Harvey*, which was in its circumstances extraordinary, related to children who were past puberty, and therefore is not applicable. In *Macfarlane* it was laid down by Lord Jeffrey, without objection from the rest of the Court, 'that unless the health or morals of the child be affected by allowing its father to have the custody, we must just submit to that general rule which delivers the child to him.'

"In the present case there is no allegation that either the health, morals, or education of the respondent's children would suffer if they were in his custody—nothing which would entitle the Court to interfere with his right to that custody if he shall choose to enforce it,—for it is part of the prayer of the petition to grant warrant to the petitioner to *retain* them until they attain puberty, and to authorise the petitioner to give such directions as may be necessary for their education. In short, the petition seeks to deprive the respondent of all company of or intercourse with his children, all control over his children, and all power to direct their place of residence and their education, and that without an allegation that the respondent ever failed in any of his duties to his children while they remained with him, that he ever neglected their education, or that he ever misconducted himself in any respect with regard to their management or education, or that there was or will be any danger to their lives or morals by their living in his house.

"It might be enough for the respondent to stand upon this total want of statement relevant to support the prayer of this petition. But he thinks it right to add that he has, and has always evinced, the greatest affection for his children. He has much pleasure in their society, and he has always performed the part of a kind and perhaps too indulgent a father towards them. If it were necessary, he can adduce evidence to the care with which they have been educated and brought up. Since his wife left him an unmarried sister has lived with him, and all his friends and neighbours will concur in saying that while his children have always been remarked for their respectable appearance and behaviour, this has noways deteriorated since his wife left. Both his clergyman and others will testify, if necessary, that their religious and moral training has been carefully attended to. The respondent claims the right to have the company of his children in his own house, that they shall not be brought up separate from him, so that their affections may be alienated from him, and that he shall have the sole direction, which is his right, of their place of residence and their education, and the sole management of their living and upbringing."

CLARK and BLACK, for petitioner, argued that the respondent's habits were such as to expose the children's morals to danger from the bad example of their father, and were also such as to render him unfit to superintend their education; that, apart from this, the petitioner having been, through the respondent's cruelty to her, driven from his house, and compelled to sue for the judicial separation which she had obtained, ought not to have her pupil children taken from her, as this would be to punish her for having succeeded in the process of separation; that, at common law, there were no limits to the power of the Court, by virtue of their *nobile officium*, to regulate the custody of the children; that the powers conferred upon the Lord Ordinary and the Court by the Conjugal Rights Act, as to regulating the custody and education of children incidentally in the course of actions of separation and divorce, were not more extensive than the powers possessed by the Court at common law, the purpose of the Act *quoad hoc* being merely to save trouble and expense by enabling the question of the children's custody and education to be settled in the action of separation or divorce without the necessity of a separate application; that the powers conferred on the Court of Session by the Conjugal Rights Act as to this matter were the same as the statutory powers possessed in England by the Court in matrimonial causes, and that in such causes in England the habitual practice of the Court was to assign the custody of the pupil children to the innocent party, the Court being of opinion that that party's interests ought to be consulted as well as the children's—*Boynton* v. *Boynton*, 1861, 30 L. J. Mat. Cases, 156; *Suggate* v. *Suggate*, 1859, 29 L. J. Mat. Cases, 167; *Martin* v. *Martin*, 1860, 29 L. J. Mat. Cases, 106.

PATTISON for respondent.

At advising—

LORD BENHOLME expressed the opinion that the Conjugal Rights Act did not confer upon the Court powers more extensive than they possessed at common law; but the LORD JUSTICE-CLERK and LORD NEAVES expressed doubts upon this point. Their Lordships, however, were unanimous in holding that, whatever might be the practice in England, the rule in Scotland was, that the interests of the mother could not be considered; and that the sole question was whether the interests of the children required that the father should be deprived of his natural and legal right to regulate their custody and education. The circumstances of the present case were not such as to show that if the children were brought up by their father there would be any danger to their lives, or any such danger of their morals or education suffering as to justify the Court in withdrawing the children from their father's custody.

Agent for Petitioner—W. H. Muir, S.S.C.
Agent for Respondent—James Young, S.S.C.

Tuesday, February 2.

FIRST DIVISION.

SHAW *v.* DOW AND ANOTHER.

Jurisdiction—Insolvent—Heritage in Scotland—Fraudulent disposition—Reduction. D, proprietor of heritage in Scotland, and residing there, being insolvent, convened his creditors, and offered a composition of 5s. per £. At an adjourned meeting this offer was accepted. D, having executed a disposition of his heritable property for a price between the first and second meetings of his creditors, left Scotland, and took up his permanent residence in England. A creditor, who had accepted the composition, brought a reduction of the composition contract and of the disposition, alleging that the sale of the property was a fraudulent device for the purpose of putting it beyond the reach of the creditors. *Held* that as, if the creditors' allegations were made out, D was still proprietor of heritage in Scotland, the Court had jurisdiction to entertain the action.

Jurisdiction—Arrestment jurisdictionis fundandæ causa—*Debt—Illusory—Reduction—Prescription.* (1) It is not a relevant objection to arrestment *jurisdictionis fundandæ causa* that the debt arrested is prescribed. (2) A debt of £1, 8s. 6d. arrested *jurisdictionis fundandæ causa* is not "illusory."

Question, is arrestment *jurisdictionis fundandal causa* a proper foundation for trying reductive conclusions?

Dow was at one time an innkeeper in Scotland, and proprietor of heritable estate there. Having become insolvent, he called a meeting of his creditors in June 1862. The pursuer Shaw, a creditor for £800, attended the meeting along with other creditors. Dow produced a state of his affairs, and offered a composition of 5s. per pound, requesting a fortnight's delay to find security. The creditors, with one exception, agreed to Dow's proposal. At the adjourned meeting no security was offered by Dow; but Dobie, as Dow's agent, intimated that a composition of 5s. per pound would be paid to such creditors as were willing to take it. Shaw accepted the composition, and discharged his debt. Shaw, in this action, now alleged that the state of affairs submitted by Dow to his creditors was not a full and fair disclosure, but was false and fraudulent; that between the first and second meetings of his creditors he executed a pretended disposition of his heritable property to the other defender for the fraudulent purpose of putting that property beyond the reach of his creditors. "The said disposition was executed by the defender Dow when he was insolvent, and after he had contracted the debt due to the pursuer, as well as debts to other creditors, and after he had called together a meeting of his creditors and offered them a composition of 5s. in the pound on their debts, and between the date of the first and adjourned meeting of his creditors before mentioned, and when he knew himself to be on the eve of bankruptcy, and without the knowledge of his creditors or of the pursuer; and these facts were all well known to the other defender Dobie when he accepted of the same. The said sum of £250 sterling, being under deduction of the sum of £1200, the balance of the sum of £1450, alleged to have been instantly advanced and paid to the defender Dow as the price of the said subjects, was neither advanced nor paid by the defender Dobie; and the defender Dow was not then indebted to the defender Dobie in any sum whatever. The alleged sale was not a *bona fide* sale, but a device resorted to by the defenders for the purpose of putting the subjects beyond the reach of the defender Dow's creditors. The pursuer believes and avers that it was part of the arrangement that the defender Dobie should reconvey the property to the defender Dow, but that no back letter or other writing to that effect should pass between them. Or otherwise, the said sum of £1450 sterling, under the burden and deduction of £1200, was not a fair, just, or adequate price for the said subjects, which were and are worth £2000 or thereby. The said disposition was granted without any true, just, and necessary cause, and without a just price really paid for the same. And the said disposition was granted and taken by the defenders fraudulently and collusively, with a view to defraud and disappoint the pursuer and the other just and lawful creditors of the defender Dow."

The pursuer concluded for reduction of (1) the minutes of meetings of Dow's creditors; (2) the discharge of the debt of £800 granted on payment of the composition; and (3) the foresaid disposition. He admitted that Dow did not now reside in Scotland, but maintained the jurisdiction of the Court on the grounds (1) of Dow being still owner of the heritable property, and (2) of arrestments *jurisdictionis fundandæ causa.*

The defender Dow pleaded no jurisdiction.

The Lord Ordinary (BARCAPLE), on 19th December 1868, pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties on the preliminary defences for Andrew Dow—Finds it is stated by the pursuer that the said defender Andrew Dow has resided in England since June 1862, and that he still resides there: Finds that the pursuer alleges, as a ground for holding that the said defender is subject to the jurisdiction of this Court, that he is the owner of heritable subjects in Scotland: Finds that the pursuer's averment as to this matter is, that the defender Dow was, in and prior to the said month of June 1862, proprietor of heritable property in Langholm, known as the Crown Inn there, of which he executed a disposition in favour of the other defender Dobie, dated and recorded in the Register of Sasines on the 18th of said month, and that it was arranged that the defender Dobie should reconvey the property to the defender Dow, but that no back letter or other writing to that effect should pass between them; or otherwise, that the price for which the said disposition bore to be granted was not a fair, just, or adequate price: Finds that the defender Dow admits that he was proprietor of said subjects, and conveyed them in June 1862 to the other defender, but in other respects denies the pursuer's said averments, and states that he has no heritable property in Scotland: Finds that, in these circumstances, there are not *termini habiles* for sustaining jurisdiction against the defender Dow in this action in respect of his being owner of heritable subjects in Scotland, or of his connection with said property in Langholm, or on any other ground, except in so far as jurisdiction may have been founded against said defender by arrestment: Finds that the pursuer alleges that he has founded jurisdiction against