letter of their secretary, dated 5th June 1865, and they contend that any question on this subject falls under the arbitration clause of the Companies' Acts. It is contended, on the other side, that this letter could have no such effect, and could raise no question for the determination of an arbiter under the submission clause of the statute, because the employment or dismissal of the additional porter is a matter properly for the adjustment of the joint committee, and has not yet been brought before them by the defenders.

Now, if the questions were entirely under the statute I should be inclined to sustain that argument, because I do not think that it is any part of the arbiter's duty to determine the construction and applicability of the statute. But there is no dispute about the construction of the statute. It is admitted that that statute gives authority to the companies to appoint a joint committee. The powers of that committee are not conferred by statute, but left to be determined by the agreement of the companies. Now, the construction of any such agreement plainly falls within the arbitration section of the statute, for it includes in so many words questions, disputes, or differences arising "in regard to any agreements as to the matters foresaid." Upon this ground I think that the interlocutor of the Lord Ordinary is well founded. The present question between the companies falls under the arbitration clauses of the statute, and the action has been rightly dismissed.

The other Judges concurred.

The Court accordingly recalled the Lord Ordinary's interlocutor, and found the action excluded by section 58 of the Inverness and Aberdeen Junction Railway Act 1856, and therefore dismissed the action with expenses, and decerned.

Agents for Pursuers—Henry & Shiress, S.S.C.
Agents for Defenders—H. & A. Inglis, W.S.

Tuesday, November 21.

SECOND DIVISION.

MILLER (FINLAY'S TRUSTEE) *v.* LEARMONTH AND OTHERS (MR AND MRS FINLAY'S MARRIAGE-CONTRACT TRUSTEES).

Husband and Wife—Postnuptial Marriage-Contract—Alimentary Provision—Provision to Wife—Conjugal Rights Act, sec. 16. A husband is not entitled by a postnuptial contract to confer on himself, and place beyond the reach of his creditors, an alimentary provision out of a fund to which he had succeeded through his wife, and he is not bound under sec. 16 of the Conjugal Rights Act to make a provision for his wife out of the fund, which was his absolute property.

John Finlay, printseller, Glasgow, was married in 1845 to his present wife, a daughter of Mr Alexander, of the Theatre Royal. Mr Alexander died in Dec. 1851, leaving a considerable fortune. Mrs Finlay's share of legitim from her father's estate was afterwards ascertained to amount to £2600. In February 1852 Mr and Mrs Finlay executed a postnuptial marriage-contract, by which Mr Finlay bound himself, on or before 1st January 1862, to pay £1999 to trustees, and in the meantime to insure his life for that sum, and assign the policies to the trustees; and further, to aliment the children of the marriage, of whom there were then three, till twenty-five years of age. Mr and Mrs Finlay by that deed conveyed to the trustees the whole estate, heritable and moveable, then belonging to Mrs Finlay, or which she should acquire or succeed to, and particularly all that she had succeeded to or should succeed to or acquire from her father and mother or any other persons. The husband renounced his *jus mariti* right of administration; the wife did not renounce her legal rights. The trust purposes, after payment of expenses, were—To give the husband an alimentary liferent of the whole trust property, a similar alimentary liferent thereafter to the wife, and the fee to the whole children of the marriage. The whole provisions to the spouses and children were declared alimentary, and not attachable for debt. Mr Finlay did not pay the £1999, nor did he assign policies of insurance for that amount to the trustees. The whole sum to which Mrs Finlay had become entitled was the £2600 before mentioned, which had been attached before coming into the hands of the marriage-contract trustees. Mr Finlay was sequestrated in 1860, and the whole of this sum was claimed by the trustee in his sequestration. In an action brought in 1863, and concluded in the House of Lords in 1870, it was decided that in the marriage-contract "the assignation by Mr Finlay of the legitim (£2600) was, in the circumstances of Mr Finlay, no more than a reasonable provision for his wife and children," and that the marriage-contract trustees were entitled to administer the fund for the trust purposes. But the question now raised by the claim of Mr Finlay's trustee was expressly reserved, viz., Whether the liferent alimentary right of Mr Finlay was not carried to his creditors by the sequestration. This claim was made on the ground that Finlay was not entitled to confer on himself, and place beyond the reach of his creditors a liferent alimentary provision out of a fund that (though coming through his wife) had become absolutely his own before the marriage-contract was executed.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 27th May* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process, Finds that the liferent interest or provision made in favour of John Finlay by the postnuptial contract of marriage between him and his wife libelled on fell under the sequestration of the estates of the said John Finlay, and is vested in the pursuer as trustee for behoof of the creditors in the said sequestration: Therefore finds, declares, and decerns in terms of the declaratory conclusions of the libel, in so far as regards the whole interests, dividends, or other annual profits or proceeds which have accrued upon the sum of £2600 libelled from and since 15th December 1851, and also in so far as regards the whole interests, dividends, or other annual profits or proceeds which shall accrue or become due upon the said sum of £2600 so long as the said sequestration shall subsist during the life of the said John Finlay, together with any interest which has or shall become due upon the said interest, dividends, or other annual profits and proceeds; and appoints the cause to be put to the roll in order that it may be proceeded with in accordance with these findings.

"*Note.*—On 30th June 1845 John Finlay married Mary Anne Alexander, eldest daughter of Mr Alexander, proprietor of the Theatre Royal, Glas-

gow. There was no antenuptial contract of marriage entered into between them. Mr Alexander died on 15th December 1851, and as there was no contract of marriage between him and his wife, his daughter Mrs Finlay had right to her share of the legitim out of her father's moveable estate. On 28th February 1852 Mr and Mrs Finlay executed a postnuptial contract whereby they conveyed to the defenders, and certain other persons, as trustees, the whole estates, both heritable and moveable, belonging, or which should thereafter belong, to Mrs Finlay, and particularly 'all right, title, and interest which she or the said John Finlay, her husband, now have or may hereafter have in the succession or estates' of her deceased father, or of her mother, or of any other person. By this deed Mr Finlay also bound himself to pay £1999 to the trustees for the trust purposes therein mentioned, and to open and keep up policies of insurance, or to grant security over his heritable estate in their favour for that sum. He also thereby renounced his *jus mariti* over the estate, means, and effects then belonging, or which should thereafter belong, to his wife, and the same are thereby expressly declared to be unaffectable by his creditors or by his debts and deeds. The second purpose of the trust created by the said postnuptial contract is, 'for payment of the free yearly proceeds of the trust-estate to the said John Finlay during his life for his liferent use allenarly.' And it is expressly declared by the contract that the whole provisions therein contained 'shall be nowise attachable for debt, but the same shall be considered alimentary.'

"In an action raised in 1853 by the defenders, as trustees under the postnuptial contract, against Mrs Alexander, widow and executrix of Mr Alexander, and the trustee on her sequestrated estate, and also against Mr Finlay and Mr Miller, the pursuer of the present action, as trustee on Mr Finlay's sequestrated estate, it was decided by judgments of this Court and of the House of Lords that the defenders are entitled to recover and receive the sum of £2600, being the amount of legitim due to Mrs Finlay from the estate of her father, with interest from 15th December 1851, and to hold and administer the same for the purposes of the trust declared in said deed, all questions in reference to the right to the interest or annual proceeds of the said legitim fund from that date being reserved entire.

"The present action has been raised by the trustee on Mr Finlay's sequestrated estate for the purpose of having it found and declared that he has right to the whole annual proceeds of the said sum of £2600 from 15th December 1851, and so long as the sequestration shall subsist during Mr Finlay's life, and of obtaining decree against the postnuptial contract trustees, ordaining them to make payment of the same to him accordingly.

"The legitim to which Mrs Finlay had right vested in her on 15th December 1851, the date of her father's death, and then fell under the *jus mariti* of her husband, and vested absolutely in him—*Macdougal* v. *Wilson*, Feb. 20, 1858, 20 D. 658. It was his sole and exclusive property at, and for upwards of two months prior to, the date of the postnuptial contract containing the provision that the liferent mentioned in his favour should be alimentary and not attachable for debt. The Lord Ordinary considers that the said provision is inept, because no one can so settle his own property as to reserve part of it for his own use and to withdraw it from the diligence of his creditors—Bell's Com. i. 128 and 130; *Keir's Trustee* v. *Justice*, Nov. 7, 1866, 5 Macph. 4. Mr Finlay's liferent of the proceeds of the legitim was therefore carried by the sequestration of his estates on 6th January 1860, and is now vested in the pursuer, as the trustee on the sequestrated estate by virtue of his act and warrant of confirmation.

"It is said by the defenders that the interest of the funds conveyed to them as trustees under the postnuptial contract was truly conferred by that deed upon Mr Finlay for the aliment of his wife and children. There is nothing in the deed to that effect, and even though the liferent of the sum which vested in Mr Finlay as his wife's share of the legitim had been thereby expressly given to his wife for the support of herself and children, and had been declared alimentary, and not affectable by the debts of her husband, it would, in the Lord Ordinary's opinion, be carried by the sequestration of the husband as a donation *inter virum et uxorem*, revocable by him, and revoked by the sequestration—*Kemp* v. *Napier*, Feb. 1, 1842. 4 Dict. 558; *Johnstone* v. *Dunlop*, March 24, 1865, 3 Macph. 758.

"It is further maintained by the defenders that as Mr Finlay has failed to pay them the sum of £1999, or to deliver to them and keep up policies of insurance on his life, or to grant heritable security for the said sum, he and the pursuer, as coming in his place, are not entitled to receive the liferent proceeds of the legitim fund, and that the defenders are entitled to retain the same as against these unimplemented provisions. The Lord Ordinary is of opinion that this claim of the defenders is untenable under the postnuptial contract. The obligations undertaken by Mr Finlay, which have not been fulfilled, are not the consideration and counterparts of the liferent provision of the legitim fund. On the contrary, they all flowed from him. The liferent of the legitim fund is also by the express terms of the postnuptial contract payable to him, and the defenders are not entitled to withhold implement of that trust purpose, and to retain the proceeds in security or satisfaction of his unimplemented obligations—*Keir's Tr.* v. *Justice*, *supra*; *Boswell* v. *Boswell*, Feb. 4, 1846, 8 Dict. 430.

"The defenders further plead that Mrs Finlay and they, as the trustees under the postnuptial contract, are entitled both at common law and under the Conjugal Rights Act 1861 to the liferent of the legitim fund in question, which they say is no more than a reasonable provision out of her own patrimony, and of which neither her husband nor the pursuer, as his trustee, has ever obtained possession. The Lord Ordinary is of opinion that at common law Mrs Finlay and the defenders have no such right. The legitim fund became the absolute property of Mr Finlay when the right thereto opened to his wife, and the interest thereof now belonged to the pursuer as the trustee on his sequestrated estate free from any claim on her part for aliment. The claim for such a provision cannot, it is thought, be maintained at common law by Mrs Finlay in prejudice of her husband's creditors—*Turnbull*, Nov. 25, 1709, Dict. 5895; *Robb*, March 8, 1794, Dict. 5900; *Lee* v. *Watson*, Dec. 1, 1795, Dict. 5889; Bell's Com. i. 634. The Conjugal Rights Act does not, the Lord Ordinary considers, apply. Mrs Finlay and her husband acquired right to the legitim, and it was conveyed to the defenders as trustees under the postnuptial contract long before that Act became law. It is expressly enacted by section 21 of that Act

that it shall come into operation on 1st November 1861, and the words of section 16, which is founded on by the defenders, have not any retroactive effect. Further, it is provided by section 16 that a wife shall have no claim for a reasonable provision for her support and maintenance out of property which she has succeeded to or acquired 'if before it be made by her the husband, or his assignee or disponee, shall have obtained complete and lawful possession of the property, or in the case of a creditor of the husband where he has before such claim is made by his wife attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of forthcoming, or has poinded and carried through and reported a sale thereof.' It cannot be said that Mr Finlay has obtained complete possession of the legitim fund. But by the Bankruptcy Act 1856, sec. 102, the act and warrant of confirmation of the pursuer as his trustee transferred to and vested in him absolutely and irredeemably as at 6th June 1860, the date of the sequestration, with all right, title, and interest, his whole moveable property, so far as attachable for debt, 'to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible,' and it is declared by sections 107 and 108 of that statute that the sequestration is equivalent to a decree of adjudication of the heritable estates of the bankrupt, and to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding."

The marriage-contract trustees of Mr and Mrs Finlay reclaimed.

The Dean of Faculty (GORDON), MILLAR, Q.C., and GUTHRIE for them.

The Lord Advocate (YOUNG), BALFOUR, and LORIMER for the respondents.

At advising—

LORD COWAN—The questions raised in the record have reference to the interest and annual proceeds of the principal sum of £2600 libelled.

The trustees under the postnuptial contract have been found entitled to said principal sum under the judgments of this Court and of the House of Lords in the former litigation. As legitim to which Mrs Finlay was entitled upon her father's death in December 1857 the amount fell under her husband's *jus mariti*, but afterwards, in February 1852, the postnuptial deed was executed by which the sum was conveyed by him to the trustees (defenders) for behoof of his wife and children, subject as a primary purpose of the trust to his own liferent. The estates of Mr Finlay were sequestrated in 1860, and the claim of the marriage-contract trustees in the former litigation was resisted, *inter alios*, by the trustee on Mr Finlay's sequestrated estate. By the judgment of the Lord Ordinary, adhered to by this Division, it was found that the assignation of the legitim to the trustees (defenders) was granted at a time when the husband was solvent, and "was in the circumstances of Mr Finlay no more than a reasonable provision for his wife and children." And further, "that the trustee in the sequestration had no right or interest in the said legitim except to the effect and extent of claiming and receiving from the said trustees the amount of the liferent interest vested in the said John Finlay by the said postnuptial contract." The interlocutor of the Inner House adhered, "with this explanation, that all questions between the parties *hinc inde* in reference to the interest or annual proceeds of the legitim fund are reserved entire." And a similar reservation was contained in the judgment of the House of Lords. The present action has been instituted by the trustee to have it found and declared that the interest and proceeds belong to him for behoof of the creditors in the sequestration.

The leading defence stated to the claim is, that by the postnuptial contract it is provided that Mr Finlay's liferent interest is protected against the diligence of creditors and declared alimentary. The ground on which the Lord Ordinary has proceeded in disregarding this defence appears to me insuperable. The doctrine stated by Mr Bell that no one can so vest his own funds in himself or for his own use as to exclude his creditors has been repeatedly recognised, and must be held as quite fixed in the law of Scotland. There having been no contract of marriage between the spouses, the *jus mariti* carried to the husband all the personal estate falling to the wife *stante matrimonio*, unless it had come to her under a deed by which the *jus mariti* was excluded. Hence, on the death of his wife's father in 1857 Mr Finlay acquired right to this legitim fund, and it follows that the legitim assigned for the purposes of the contract in February 1852 was conveyed to them by the only party who could validly assign it to the trustees. It had no doubt come from the wife's father, and this was legitimately enough pressed in the question decided in the former action. But this does not touch the question now to be decided, Whether the liferent interest provided by the postnuptial deed in favour of the husband could be protected against the diligence of creditors. *Esto* that the deed must be held to be valid as having set aside no more than a reasonable provision by the husband when solvent to his wife and children, the liferent interest reserved to himself stands in a different situation. It is the case of a person setting aside a portion of his funds by assignation to trustees to secure it from his creditors should he become insolvent, but this is just what the law forbids.

An attempt was made to show that the provision in favour of the husband was truly for behoof of the family—as much so as if it had been a direct provision to the wife to take effect during marriage. But the same answer must be given to this plea which prevailed in the case of *Johnston* v. *Dunlop*, referred to by the Lord Ordinary, and affirmed in the House of Lords in 1867. Supposing it to be of the nature contended for, and viewed as a provision by the husband for the wife and children during the subsistence of the marriage, it is essentially revocable, and has been revoked by the husband's sequestration during the marriage; the wife and children must follow the fortune of the husband.

The second defence stated to the action is that the deed provides for a payment by Mr Finlay to the trustees of the sum of £1999 as at Whitsunday 1862, and to secure payment of which he came under an obligation to insure his life, and to make over the policy to the trustees, and that as this personal obligation had not been implemented they are entitled to retain the annual proceeds here claimed in satisfaction of this obligation.

To this defence there are various answers—First, There is no proper *concursus* to give rise to the plea of retention, inasmuch as by the seques-

tration the liferent interest in Mr Finlay as regards the legitim fund has been adjudicated to the creditors, and become vested in the pursuer for their behoof, while the obligation in respect of which retention is pleaded is to recover payment of a sum of money which the bankrupt had undertaken to pay over to the trustees for behoof of himself, his wife, and children at the distance of ten years after the date of the contract, and which did not elapse till two years after the sequestration. In such circumstances I think there is no room for that *concursus* which is essential for the plea of retention. For secondly, the obligation alleged to have been thus constituted against the bankrupt in favour of himself and his family through the trustees is not such as can be pleaded against the bankrupt's onerous creditors to any effect. This would have been plain had there not been the intervention of trustees; but their appointment cannot legally validate an obligation which would have been inept against creditors if granted to the parties directly, and this more especially as it is not granted in consideration of any counter assignation or obligation, but is simply an additional fund which the debtor desired to place beyond the reach of his creditors in the event of his insolvency. And thirdly, were the obligation to be held to partake of a different character and viewed in a different light, it is not one which can be sustained even in a question with the wife and children, on the principle held applicable to the legitim fund as a reasonable provision, seeing that it did not provide any part of the bankrupt's existing funds when solvent, but was an obligation to pay money *de futuro*, and was not exigible till after his bankruptcy. On these grounds I cannot doubt that the defence of retention cannot be sustained.

But the defenders have further endeavoured to support this contract on the ground of its being a remunerative deed inasmuch as her share of certain estates which belonged to her father was conveyed by the postnuptial deed for the same purposes with the other trust-funds. Whether the estate to a share of which Mrs Finlay was entitled be heritable or moveable under the declaration of trust of 1830–31 may be doubtful, but whether viewed in the one light or in the other it cannot affect the present question. If moveable, then it fell under the husband's *jus mariti*, and the right thereto belonged to him, and its settlement by this postnuptial deed cannot be held to change the character of the deed from being a truly voluntary alienation of property by the husband to one of a remunerative settlement. Again, if the wife's right be viewed as heritable, there being no exclusion of the *jus mariti*, the accruing annual proceeds become the husband's as much as the interest of the legitim fund as well before the execution of this postnuptial deed as after its date, in virtue of his rights at common law. This part of the deed therefore cannot be held to support the plea of the defenders on the ground of the deed being remunerative. It is impossible to hold this in a question which relates entirely to the husband's right to the annual proceeds of the trust-estate.

On the whole this defence seems to me no better founded than the others to which I have referred.

The other Judges concurred.

The case was then argued as to the rights of the wife under the 16th section of the Conjugal Rights Act.

Lord Justice-Clerk—It seems to me that the last point is sufficient to dispose of the plea on the 16th section of the Conjugal Rights Act, viz., that the whole fund belongs absolutely to the husband. The statute requires either that the husband should obtain complete possession of the fund, or that some specific diligence should be done by a creditor in order to exclude the claim of a wife. Now, a question may arise whether sequestration has any further effect than to put the trustee in the position of the husband. But in this case the claim does not fall under the section of the statute, as the fund belonged absolutely to the husband.

Lord Neaves—I am of the same opinion. There is no doubt that if the postnuptial trust-deed had not been granted this fund might have been held in a sense to be *in medio*, and so have been liable as it were to stoppage *in transitu* in order that the wife might get something out of it for her support. But I think the view that the deed operated as a novation of the rights of parties is correct. The trustees were to get the whole fee. The wife got no present provision, but a prospective right—a *jus crediti*, which has been found to be irrevocable, and of which she cannot be deprived by her husband or his creditors.

The question might arise whether there is a difference between a voluntary and a compulsory conveyance—whether a judicial adjudger is not in a better position than an assignee. It would be a nice question whether sequestration was equivalent to an adjudication to any creditor.

Lord Cowan—I concur. By the arrangement which was made in 1852 a liferent was conferred upon the husband. The only question is, Whether the creditors are entitled to attach the liferent? We are not now to go back to the history of the different transactions when the rights of the parties were arranged by the deed of 1852 The annuity was to belong to the husband absolutely, and this prevents the application of the 16th section of the Conjugal Rights Act. It is needless to conjecture what our judgment would have been if the fund had not been the absolute property of the husband.

Lord Benholme concurred.

Agent for Finlay's Trustees—W. Officer, S.S.C.
Agents for the Pursuer—Gibson & Ferguson, W.S.

Wednesday, November 22.

FIRST DIVISION.

COUPER *v.* GUNN & CO.

Process—Mandatory. Held that where a party to a cause, even though he be a native of this country, leaves the country *pendente lite* for an indefinite or permanent absence, his adversary may insist upon his sisting a mandatory, and upon the mandatory producing a valid and probative mandate, the object of the practice being not only to give security for the expenses of process, and for the proper conduct of the case, but also that the party may be bound by the procedure taken in his name, and by the decision come to.

The defender in this action, raised in the Sheriff Court at Wick, left the country some time after the record had been closed and proof allowed, but before