differently, would require to be collated as in a question with the other children. It is true, however, that the father might, if he pleased, have made the advances on the footing, either express or implied, that they were not to be dealt with, but to be held as a *præcipuum*. There is certainly nothing expressed to that effect in this case, and, in my opinion, there is nothing in the circumstances sufficient to imply it. The expression "free gifts" must, I think, be held as intended merely to denote that the advances were not debts, payment of which could be enforced by the father from his son.

LORD GIFFORD—I concur. The question involved is a very wide one. It has not been made out here that the gift was a *præcipuum*, and as such not imputable to legitim. It is not enough to prove that the money was a "free gift." It must be shown that it was given over and above legitim. This test appears to me conclusive. Suppose the father had changed his mind and come to favour the eldest son, would he not have had to impute? The position really is the same. Advances to a child may be of three kinds—first, loans; secondly, gifts not to be repaid, but still imputable to share of legitim; and lastly, *præcipua*, which must be perfectly clearly intended.

The Court dismissed the appeal, adhered to the judgment of the Sheriff, and found the respondent entitled to expenses.

Counsel for Appellant — Fraser — Thoms. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Respondent — Lord Advocate (Watson)—M'Laren. Agent—William Archibald, S.S.C.

Wednesday, November 8.

SECOND DIVISION.

[Sheriff-Substitute of Fifeshire.

MILLAR *v.* BIRRELL.

Succession—Mutual Deed—Deed produced in Judgment—Testing Clause—Agreement—Jus mariti—*Executor.*

A husband and wife made a mutual disposition and settlement, of which the testing clause was not filled up, nor was the signature of the wife attested. After the husband's death his widow and children agreed to deal with his estate as intestate, and entered into a deed of agreement regulating its division. The effect of the mutual settlement was to give a daughter one-third of her father's estate exclusive of the *jus mariti* of her husband, who at the time of the said agreement was abroad and living separate from his wife, and was not a consenter thereto. He subsequently came home, but never claimed his wife's share of the estate as falling under his *jus mariti*. After his death his son, as his executor-dative, claimed his mother's share of the deceased's estate, on the ground that the agreement was invalid and had not been acted on, and that his father had acquired right to her share *jure mariti*. In the Sheriff Court process the mutual deed was produced by him as an incomplete deed.—*Held* (1) That the mutual disposition and settlement had not been produced in judgment to the effect of preventing its subsequent completion; (2) (*diss.* Lord Ormidale)—that the testing clause having been filled up, the deed was effectual as a settlement of the husband's (the testator's) estate; and (3) that in the provisions to the daughter, the *jus mariti* of her husband having been excluded, the said husband's son and executor could not repudiate the will, and the conventional provisions made therein in favour of his mother, and claim her legitim free from the exclusion of the *jus mariti*.

This was an appeal from the Sheriff Court of Fifeshire against an interlocutor of the Sheriff-Substitute. The appellant was Thomas Millar, corn merchant, Kirkcaldy, executor-dative to his father, the deceased James Millar, farmer, residing at Annfield, in the parish of Auchterderran; and the respondent was Alexander Birrell, trustee on the sequestrated estate of William Martin, farmer, Kirkshotts, in the parish of Auchterderran.

The case came before the Sheriff on a note of appeal from a deliverance of the respondent as trustee aforesaid, rejecting a claim of the appellant to be ranked as a creditor on the estate of the bankrupt to the extent of £193, 4s. 10d. The circumstances in which the claim was made were as follows:—The bankrupt was executor-dative on the estate of his father, the deceased William Martin senior, formerly farmer, Kirkshotts, who died there on 5th February 1869. He was survived by his widow Mrs Janet Greig or Martin, and three children, Thomas Martin, Mrs Janet Martin or Millar, the appellant's mother, wife of the said deceased James Millar, and William Martin, the bankrupt. At the time of the death of William Martin senior, the said James Millar, the appellant's father, was absent from this country in Australia or elsewhere abroad, where he resided for many years apart from his wife (who remained in this country), and never remitted any funds for her maintenance. After the death of the said William Martin senior there was found a mutual disposition and settlement of his affairs, bearing to be granted by him and his wife, which however had not been completed by the filling up of the testing clause, nor was the wife's signature attested by witnesses. His widow and children, including the bankrupt and Mrs Millar, thereafter entered into an agreement by which they agreed to deal with the deceased's estate as intestate, and regulated the manner in which it should be divided by the bankrupt, who undertook to get himself appointed executor. To this deed the said deceased James Millar, the appellant's father, was not a consenting party. Questions arose between the parties as to whether this deed was being duly carried out, and on proof it appeared that it had not been strictly adhered to, but no challenge of the agreement was ever made by any of the parties thereto on the ground that the appellant's father was not a consenter thereto. About three years before his death the appel-

lant's father returned to this country, and for some time resided with his wife. He was made aware of the existence of the agreement, but did not take any steps to vindicate his right to the share of the deceased William Martin's estate which had vested in his wife as one of the next-of-kin and beneficiaries *ab intestato* of the deceased, and which would have fallen under his *jus mariti*. After his death the appellant, on the ground, as he alleged, that his mother had not received what was due to her under the said agreement, and that the agreement was invalid in respect that his father had not been a consenter thereto, ranked as a creditor on the estate of the bankrupt, as executor-dative to the said deceased William Martin, for his mother's share, to which he maintained that his father had acquired right in virtue of his *jus mariti*. Before the claim was brought, Mrs Martin, widow of William Martin senior, died. The trustee in the sequestration rejected the claim, and appeal was taken to the Sheriff.

In these circumstances the Sheriff-Substitute (BEATSON BELL) found in point of law—"(1) That the succession of the late William Martin senior was rightly dealt with as intestate; but (2) That the appellant's father having lived for three years or thereby after returning to this country, and having become aware of the existence of the agreement, and having taken no steps to vindicate his *jus mariti* in the share of the estate which would have fallen to his wife *ab intestato*, his son and executor, the appellant, is now barred from insisting in his father's *jus mariti* over said share."

"*Note.*—As to the first question debated, whether William Martin senior died testate or intestate, I am of opinion that the mutual settlement, No. 35, not having any testing clause, cannot be held as a testamentary deed; and having been produced in Court, cannot now be completed (*Hill* v. *Arthur*, 6th December 1870, 9 Macph. 223). The effect of this intestacy, then, was to vest a share of the estate of the defunct in Mrs Millar, his daughter. The appellant contends that this fell under his father's *jus mariti*, and that he, as his executor-dative, is now entitled to rank for it against the estate of the bankrupt, the executor of the defunct, his father, William Martin senior. But for the circumstances which occurred after the death of William Martin senior, this would have been so, but I am humbly of opinion that these circumstances were such as to bar the appellant from insisting in his claim. The agreement, No. 5 of process, no doubt required the consent of Mr Millar to its validity as regards him, and had he died without coming to the knowledge of his wife's succession to a share of her father's estate, his son and executor might probably have succeeded in vindicating his father's rights; but he came home three years before his death; he lived for a time with his wife, and he had business conversations with his son, the appellant. No doubt the appellant says he did not inform him of the nature of the agreement, but he also says that within a week of his return he informed his father that such an agreement was made, and that it was not worth the paper it was written on—of course from want of his consent. That was a distinct incitement to the father, who does not appear to have been in such circumstances as readily to give up his rights to assert his claims, and he lived a time amply sufficient for the purpose of such assertion, but he took no steps. His wife also says she thinks he was aware of the agreement, but never called it in question in any way. Some speculation as to the reasons for his silence was addressed to me during the debate. The incomplete mutual deed excluded his *jus mariti*, and had he challenged the agreement it might still have been completed, as it had not then been produced in judgment. Again, under sect. 16 of the Conjugal Rights Act, he would have been bound to make a provision for his wife's maintenance from the sum to which she had succeeded, and the whole to which she so succeeded would have been insufficient for her maintenance. He, soon after returning, again separated from his wife, and made her no allowance, apparently not being in a position to do so. The reason which really actuated him must be matter of speculation only, but his failure to act during all these years is a fact which I think under the circumstances amounts to homologation of the agreement on his part. It is unnecessary to consider whether he himself might at the close of life have attempted a challenge, but I am clear that, having died without doing so, the right to such a challenge did not pass to his executor-dative, but that he is barred by the fact of his father having died after three years' acquiescence in the state of things he found in existence on his return to this country."

From this judgment appeal was taken to the Court of Session.

After argument, the Court, by interlocutor dated 15th July 1876, ordered that the testing clause of the mutual disposition and settlement should be filled up, reserving all questions regarding the competency or effect of filling up the testing clause, and all questions as to the deed itself, and, in particular, all questions arising from the signature of Mrs Martin not being attested.

This having been done, the case was advised as follows:—

LORD GIFFORD—This case is now in a somewhat different position from that in which it stood when the interlocutor of the Sheriff-Substitute appealed against was pronounced. The testing clause of the deed or settlement, No. 38 of process, has now been filled up under the the authority of the interlocutor of this Court, dated 15th July last, and the deed is now *ex facie* a completed deed so far as regards the late William Martin. All questions regarding the competency or effect of filling up the testing clause, and all questions as to the deed itself, and, in particular, all questions arising from the signature of Mrs Martin not being attested, are left open under the said interlocutor of 15th July, and these questions are now to be determined so far as necessary for the disposal of the present appeal.

The appeal arises in reference to the sequestration of the estates of William Martin, the son and executor-dative of the said deceased William Martin, the granter of the settlement which I have just referred to; and the appellant's claim in this sequestration, the validity of which claim is now in question, is a claim by the appellant as executor of his father, the late James Millar, who was husband of Mrs Janet Martin or Millar,

the daughter of the said deceased William Martin. His demand is for a share of the moveable succession of the said deceased William Martin, who died in February 1869, as the appellant maintains intestate. The appellant claims the share of the intestate succession which he says devolved upon his mother, and through her *jure mariti* upon the appellant's father.

Now, the first point which arises is, as the case now stands, Did the appellant's grandfather, the late William Martin, die intestate or not? Is the deed, No. 38 of process, the testing clause of which has now been filled up, a valid and effectual testament by the said deceased William Martin. The Sheriff-Substitute held that the late William Martin did die intestate, the deed No. 38 being without a testing clause when it was before the Sheriff-Substitute. His Lordship also held that the deed thus imperfect, having been produced in the Sheriff Court process, that is in the appeal against the trustee's deliverance in the sequestration, the testing clause could not therefore be filled up.

Now, I am clearly of opinion that the production of the deed in the Sheriff Court appeal formed no bar to the testing clause being thereafter filled up in common form, and that the general rule applies, that a testing clause, which is always or almost always filled up after execution, may be filled up at any time before the deed is founded on in judgment. I do not think that in the present case the deed in question was, in the true sense of the expression, founded on in judgment by being produced in this process. The deed was not produced by the trustee, or by any party founding or claiming thereon or having an interest to claim thereon as a completed deed. It was not produced by any beneficiary under the deed, or by any legatee or party favoured thereby. It was produced on 7th June 1876 by the appellant himself, or rather by the agent, to whom the appellant had handed it for the purpose the night before, and it then stood without a testing clause. The appellant says that he found it in his safe in an envelope unopened, and he states elsewhere that he got it from his grandfather, the late William Martin, the granter of the deed. No doubt he also says that his grandfather said he did not wish the deed completed, but I cannot take that off the appellant's hands. It is his mere unsupported verbal statement, and to admit it would be to enable the appellant to set up the deed or not, just as he pleased, by his unsupported parole. If a testator does not wish his written settlement to stand he should say so in writing, or actually cancel the deed with his own hands. I take the deed, therefore, just as if it had been found in the repositories of the deceased William Martin, and I take it to be perfectly clear that it was not in the power of the appellant Thomas Millar, by incidentally producing the deed in the Sheriff Court appeal long after the deliverance of the trustee, to prevent the testing clause being filled up by any party who had an interest to get this done. Even if the deed had been produced incomplete by a legatee or beneficiary who actually founded upon it, this would not prevent other legatees or other beneficiaries who had not founded upon it from insisting that it be duly and regularly completed in common form. But the appellant had an interest to destroy the deed or to render it invalid, for he was maintaining that his grandfather had died intestate, and it would be monstrous to hold that by producing the deed without the testing clause being filled up, or by keeping the deed back, or in any other way, he could at his own hand render it inoperative. I need not go into the cases on this point —it is too clear for argument. I am of opinion therefore that it was competent to fill up the testing clause, and that this has now been well and competently done.

The next question is, Is the deed No. 38 of process, as it now stands, a valid and effectual settlement of the late William Martin? I am of opinion that it is. No doubt it was originally intended as a mutual settlement between the late William Martin and his spouse Mrs Janet Greig or Martin. It is in point of form such a mutual settlement, and in point of fact it bears to be signed by both the spouses, although unfortunately Mrs Martin does not appear to have signed in presence of witnesses, and so her subscription is not duly attested. At the same time, it is worth noticing that in the deed of agreement to which the wife is a party, it is stated that the deed was executed, although the parties had agreed to disregard it. Now, if this had been a question between the spouses, or between the husband or his representatives as against the wife or her representatives, the objection might have been fatal. The deed as a mutual deed is certainly not complete. But the deed or mutual settlement is more than a mutual settlement. It is, besides, a separate settlement by each of the spouses *mortis causa* of their respective estates, to take effect after the death of both of them, and as such I think it must receive effect as William Martin's *mortis causa* settlement, because it is quite complete as to him, although in reference to Mrs Martin it is incomplete, her signature not being attested. By the deed the late William Martin first makes a liferent provision in favour of his wife should she survive him, and then, "after her death," he gives the whole of his estate to his three children, Thomas Martin, Janet Martin or Millar, and William Martin, equally among them. In like manner, Mrs Martin gives her husband the liferent of all her estate, and then after her husband's death, and by way of *mortis causa* provision only, she gives the fee of her estate to the same three children equally. Now this is a complex deed. It is, first, of the nature of a mutual settlement, or it may be a mutual contract between husband and wife, and so far it may be inoperative, because it was never duly completed by both parties; but then it also embodies a separate testament by the husband, to take effect after his wife's death, and with which she has nothing to do; and the deed being fully and regularly completed by William Martin, I do not see any reason why his regular separate testament should not receive effect. Both spouses are now dead, and I think equity clearly requires that the written and expressed will of the late William Martin, to take effect after his wife's death, should now be carried out. I think this is not only in accordance with equity, but also with authority. In *M'Millan* v. *M'Millan*, 28th Nov. 1850, 13 D. 187, it was expressly held that a mutual will, holograph of the husband but not attested and not holograph of the wife, was valid as the husband's will, though it would be totally

ineffectual as to the wife's succession. On the whole, I have not much difficulty in holding that the deed No. 38 of process, though probably invalid as a mutual settlement as between the late William Martin and his wife, if she had disputed it, and if any such question had arisen, is perfectly valid and must receive effect read as a mere *mortis causa* settlement of the late William Martin, to take effect after the death both of himself and of his spouse.

Now, what does this *mortis causa* settlement of the late William Martin really do? No doubt it gives one-third of his estate to his daughter Mrs Janet Martin or Millar, the appellant's mother, and this third in the ordinary case, and if there had been no specialty, would have passed *jure mariti*, so far as moveable, to her husband, the late James Millar, the appellant's father. But then William Martin's settlement contains this very important clause—"but declaring that these presents, so far as in favour of the said Janet Martin or Millar, are granted exclusive of the *jus mariti* of the said James Millar, her husband, and that the property and effects, heritable and moveable, shall not be affected by his debts or deeds, legal or voluntary, nor by the diligence of his creditors, and that the same shall belong to and be used by her, and payable to her, without the intervention of her said husband in any way whatsoever." Now, this effectually excludes the appellant's father James Millar from any interest whatever in William Martin's succession. His *jus mariti* and right of administration as husband of Janet Martin or Millar are effectually excluded. The property bequeathed is left to Mrs Millar by herself alone, and her husband could not interfere with it in any way. If so, neither can the appellant, as executor of his father, the late James Millar, make any claim to any share of William Martin's succession. He has nothing to do with it. It belongs to his mother, who is still alive, and who is a witness in the present proof, and it belongs to her alone in her own right.

It follows, therefore, that the appellant's claim in the sequestration was rightly rejected by the trustee in the sequestration, and that the trustee's deliverance was rightly affirmed by the Sheriff-Substitute, although I reach this result on different grounds from those on which the trustee and the Sheriff-Substitute proceeded. For in the view which I take of the case, it is not necessary to consider the validity or effect of the deed of agreement entered into by the members of William Martin's family for the distribution of his estate. I would have had difficulty in holding that that agreement was binding upon the appellant or upon the appellant's father, who was no party thereto, and who is not shewn to have been carefully cognisant of its terms. I would also have had a difficulty in founding anything on the Conjugal Rights Act as protecting the rights of the appellant's mother Mrs Millar, who is not a party to the present process or a claimant in the sequestration at all. But I think all these questions are quite superseded by the view of the case based upon the validity of William Martin's settlement; and if I am right in holding that this deed utterly excludes the appellant, and destroys his title to claim in the sequestration—that is, destroys the only title upon which he founds his affidavit—it follows that his claim must be rejected and disallowed.

If I am right in holding that the appellant and his father, in whose right he now claims, are entirely excluded from all share of the late William Martin's succession by the terms of Mr Martin's will, which, although intended to be a mutual will between him and his wife, is nevertheless effectual as regulating his own succession, the only other possible plea open to the appellant is that, repudiating the will and the conventional provisions therein made in favour of Mrs Millar, he can, as representing his father, claim her legitim free from the exclusion of the *jus mariti* and right of administration.

Now, in the first place, I greatly doubt whether such claim of legitim could be insisted in under the present affidavit. The affidavit makes no mention of legitim. It is simply a claim for share of succession *ab intestato* by one of the next-of-kin. Even if it were a summons, I doubt whether the one claim could be converted into the other, for the claims rest upon wholly different grounds and different principles, and they give rise to different defences and objections, such as collation *inter liberos*, and similar pleas. The case is not bettered by its being an affidavit in a sequestration where, without an amending affidavit, the trustee can deal with nothing but what is sworn to.

But even if the claim for legitim were open in the present appeal, I think it is excluded. A husband has no absolute right to repudiate his wife's conventional provisions and claim her legitim. It is always a question of circumstances; and where a wife's father has made large provisions for his daughter, but excluded her husband's *jus mariti*, the husband has no absolute right to renounce, or compel his wife to renounce, these large provisions in order that he may claim and get into his own pocket for himself or for his creditors a comparatively small, or at least a much smaller, amount of legitim. This was quite fixed in the case of *Stevenson* v. *Hamilton*, 7 Dec. 1838, 1 D. 181.

In the present case, even if the appellant's father were alive and was claiming legitim in right of his wife, I do not think he would be allowed to do so. Such a claim would reduce the wife's provisions to one-third of what they would otherwise be, for Mrs Millar's legitim would only be one-ninth of her father's executry, whereas her share under his will is one-third. I do not think her husband could compel her to take the smaller amount merely to get quit of the exclusion of the *jus mariti*. This would be plainly inadmissible. Still further, it is in evidence that the appellant's father was abroad and had left his wife unprovided for for at least three years. I think the wife, Mrs Millar, was entitled without her husband's consent to take up her father's succession, and to deal with it as she did in the deed of agreement; and I think that deed of agreement did not require her absent husband's consent. And yet again, the appellant's father, the late Mr Millar, never himself claimed legitim in right of his wife. He returned to this country and survived for some years without making any such claim. The appellant now is in a very unfavourable position for making such a claim, as in his place and on these grounds, even if the claim for legitim were now open, I think it should be disallowed.

For these reasons, I come to the same conclusion as the Sheriff-Substitute, although, in con-

sequence of the emergence of new circumstances, the grounds of judgment are quite different.

Lord Neaves—This is a case of some peculiarity, and one which requires considerable attention in order to work out a judgment. I concur in the opinion just delivered by Lord Gifford, and upon the same grounds, with one unimportant modification, which would go in reality only to strengthen his Lordship's decision.

This deed appeared to have been in all ways regular and correct, save in the want of the testing clause. It is clear that the deed was executed by Mrs Martin as well as by her husband, for in the agreement she acknowledges under her hand that she did so sign and execute. Now, it appears to me that the only ground upon which the invalidity of the deed was maintained was, not that it was not signed by both parties, but that the testing clause was not filled in; and the Sheriff held that a deed "produced in judgment" without being probative cannot be afterwards rendered so by having the testing clause filled in.

But the question which is raised by this view at once occurs? What is meant by "produced in judgment." Suppose a deed situated as this one was, and with testing clause not filled in, and suppose that some one uses it in that state in some process collaterally—for instance, to prove the handwriting of some other person,—the deed being produced under the compulsitor of a diligence, can it be said to be "produced in judgment?" Much less, or at all events as little, can a deed be held as produced in judgment when a party who has a direct motive to get it defeated and rendered of no effect obtains possession of it and thrusts it into a process, or gets up an action with a view to its introduction and consequent nullification. I cannot hold this to be a correct view of what is meant by "produced in judgment," and accordingly I was for allowing the testing clause to be supplied. That has now been done, and the deed is now undoubtedly a probative writ. The wife, Mrs Martin, is a party to it, as acknowledged by her in the agreement, and the deed is a mutual one.

The deed thus being rendered probative, What is its effect? I am not prepared to say that every mutual deed requires to be authenticated by the signature of both parties; thus, in a tack the only essential to render it binding is that there should be an acknowledgment of its having been signed by the other party. I think the case of *Stevenson*, in the 1st volume of Dunlop, settles this point, viz., that the right to legitim where there is a settlement that excludes the husband's power, does not vest *ipso jure*. The bequest of an *option* to a married woman does not necessarily pass to her husband, to the effect of letting him exercise the option by choosing the alternative best for himself and his own interests, but worst for his wife and hers. If then, the *jus mariti* is a power merely of this kind, and subject thus to the control of the Court, no executor can on the death of the husband possess such a power as here is claimed, and turn round and say "I will take up this power as *in bonis* of my father, whose executor I am,"—a power which he never exercised, and which, so employed, will ruin the mother.

Lord Ormidale—I have been anxious to hear the views of some of my learned brethren, whose opinions I understood to be different from my own, before definitely adhering to the opinion I had myself, after much consideration, previously formed. I regret, however, that I am unable to concur in the opinions which have been delivered.

The dispute in this case relates to that portion of the estate or succession of William Martin senior, who died in February 1869, which fell to his daughter Janet, who was then the wife of James Millar, since deceased.

The appellant, as executor-dative of James Millar, claims right to the estate or funds so arising, in respect, as maintained by him, that it vested *jure mariti* in Janet Martin's husband, the said James Millar, and consequently now belongs to the appellant as Millar's executor-dative. This claim is resisted by the respondent, the trustee on the sequestrated estate of William Martin junior, as executor-dative decerned to his father William Martin senior, to whom he says the fund in dispute belongs in virtue of the alleged agreement, No. 8 of process, entered into by the children of William Martin senior, including his daughter Janet, after the death of her father,—her husband having deserted her and being then absent from the country. To this the appellant replies that no effect can be given to the alleged agreement, in respect that the daughter Janet could not by any act or deed of hers deal with a fund which on the death of her father had vested in her husband *jure mariti*, and now belongs to the appellant as his executor-dative. The appellant accordingly claimed to be ranked as a creditor for the fund on the sequestrated estate of William Martin junior.

The respondent, as trustee on the sequestrated estate of William Martin junior, pronounced a deliverance repelling the appellant's claim, and on an appeal to the Sheriff-Substitute his deliverance was affirmed, "in respect that the appellant's father having lived for three years or thereby after returning to this country, and having become aware of the existence of the agreement, and having taken no steps to vindicate his *jus mariti* in the share of the estate which would have fallen to him *ab intestato*, his son and executor, the appellant, is now barred from insisting in his father's *jus mariti* over said share." And from the explanatory note to his judgment it appears that the Sheriff-Substitute has proceeded on the assumption that the appellant's father had died intestate, and that the agreement on which the respondent relies had been so homologated and acquiesced in by the appellant's father as to bar him, and the appellant as now in his right, from disregarding it.

But the case presents itself in a somewhat different aspect now from what it did when before the Sheriff-Substitute. It is now said that William Martin senior did not die intestate, in respect the testing clause of the deed No. 38 of process, *quoad* his signature, has been filled up, and that accordingly the succession of William Martin senior must now be regarded as a testate and not an intestate one. In opposition, however, to this view, it was argued that the deed having been produced in judgment in an improbative condition, the filling up of its testing clause thereafter could have no effect. The rule or principle of law on which this argument was founded is no doubt a sound one in itself when

the facts admit of its operation; but I am quite clear they do not in this case. The deed was not produced in judgment, in any correct sense of that expression, by the respondent, who now founds upon it, before the testing clause was filled up, and therefore I concur in holding that the testing clause might, if there were materials for it, be still filled up.

But that is not sufficient to dispose of the case, for the question still remains, whether the agreement by Janet and the other children of William Martin senior, excluding as it does the *jus mariti* and right of administration of Janet's husband, is good and effectual against the appellant, and this depends upon whether the Sheriff-Substitute is right in holding that the appellant's father had barred himself by homologation or acquiescence from challenging it. The first question therefore, which presents itself for the consideration and determination of the Court is whether this ground of judgment of the Sheriff-Substitute is sound or not. Now, I am quite unable to go along with the Sheriff-Substitute in holding, on the proof, that the appellant's father acquiesced in or homologated the agreement. No act whatever of homologation is established; and neither can I discover any evidence of acquiescence. On the contrary, the proof clearly shews that the appellant's father never even saw the agreement, or knew what was its nature or effect. And neither is there any evidence of its having been represented to him as a good and binding deed, and that he ever adopted any such view of it. On the contrary, it would rather appear that it had been represented to and held by him as a worthless and unavailing deed. And if I am right in this, it is difficult to understand on what ground it can be held that the appellant's father, or the appellant himself as now in right of his father, is barred from maintaining that the agreement is not effectual against him,

If, then, the alleged agreement is to be held, as I think it must, to be an ineffectual and inoperative deed against the appellant, the judgment of the Sheriff-Substitute appealed against, as well as the preceding deliverance of the trustee, must be set aside. And if so, there must, I rather think, be an end to the present litigation.

But it was argued that, independently of the Sheriff-Substitute's judgment and the grounds upon which it is founded, the case of the appellant is untenable, in respect that both the mutual settlement and the agreement, Nos. 8 and 38 of process, are valid and effectual deeds. With reference to the mutual settlement, the case of *M'Millan* v. *M'Millan*, 28th November 1850, 13 D. 187, was cited in support of it; and on the strength of that case it was contended that the deed was sufficient as it now stands to carry at least the whole means and estate of the husband William Martin. I would have been very willing to hold it to be so if I could, but I am not satisfied that I can. In *M'Millan's* case the ground of judgment was that the deed there was of the nature, not of contract at all, but simply of wills by husband and wife, just as if they had been separate and unconnected with each other. Here, however, we have a mutual disposition and settlement partaking so largely, as it appears to me, of the nature of contract, as to make it impossible to hold that one part of it, viz., that relating to the husband's estate, can be held to be operative and effectual independently of the other part, which relates to the wife's estate. In his view, and seeing that there are no witnesses to what is said to be the wife's signature, and that the testing clause is not filled up, and admittedly cannot now be filled up in so far as the wife is concerned, I am not satisfied that the mutual settlement can be given any effect to at all. And this was plainly the view on which the parties appeared to have acted in entering into the agreement, which is the other deed founded on, for in that deed they openly state that Martin senior had died intestate. And it is certainly to be regretted that before coming to the conclusion that the mutual disposition and settlement is effectual, even as regards the husband's succession, an investigation had not been gone into of all the circumstances in which the deed had been left uncompleted, not only during the husband's own life, but for about seven years after his death.

Supposing, however, the settlement, No. 38 of process, is to be held as a good and effectual deed *quoad* Martin senior's own estate, I am unable to see how it can affect the legitim which fell to Janet Martin or Millar on the death of her father. Neither the father or mother, nor both together, could by any post-nuptial or testamentary settlement defeat a claim for legitim. This neither was nor could be disputed. But it was maintained, on the authority of the case of *Stevenson* v. *Hamilton*, 1 D. 181, that the legitim accruing to Janet Martin or Millar on the death of her father did not fall to and become vested in her husband. That case, however, does not appear to me to be in point. There it was merely held by a narrow majority of the Court that an insolvent husband and his creditors were not, in the special circumstances which there occurred, entitled to enforce his wife's legal claims to the effect of repudiating her father's settlement, which she had expressly ratified,—the repudiation being in the highest degree injurious to her and her children. But here (1) there was no settlement by the wife's father at all, supposing I am right in holding, on the grounds I have stated, that the settlement No. 38 of process is invalid; and at any rate (2)—and this is the important point—there has been no ratification by the wife of her father's settlement, supposing the deed No. 38 of process to be an effectual one. On the contrary, the alleged agreement, No. 8 of process, which was executed by the wife, proceeds expressly on the narrative that the settlement No. 38 of process was not a valid or effectual deed, and therefore that her father must be held to have died intestate. It seems impossible, therefore, to hold that the principle of election which influenced so much the majority of the Judges in the case of *Stevenson* v. *Hamilton* has any place in the present case. That specialty therefore, as well as others, being wanting here, it appears to me that the present case cannot be treated as an exceptional one at all, as *Stevenson* v. *Hamilton* was, but must be held to be governed by the general rule, which, as stated by Lord Jeffrey and acknowledged by all the Judges in that case, is undoubted law, that all moveable rights vested in a wife at the time of her marriage, or accruing to her during its subsistence, and as to which the *jus mariti* had not been effectually excluded, are necessarily carried to

the husband by the assignation implied in marriage.

I regret, therefore, that in the circumstances, and for the reasons I have now stated, I feel myself obliged to hold that the Court ought to recall the Sheriff-Substitute's judgment appealed against, and also the deliverance of the trustee, and to remit to the trustee in the sequestration to reconsider the appellant's claim, and to sustain the same in so far as he may find it to be sufficiently established. To the extent to which there was legitim fund or estate accruing to Janet Martin or Millar on the death of her father, I am at present unable to see any sufficient answer to the appellant's claim.

The LORD JUSTICE-CLERK concurred with LORDS GIFFORD and NEAVES.

The Court pronounced the following interlocutor:—

"Find (1) that the deed No. 38 of process, the testing clause of which has now been filled up, is valid and effectual as a settlement of the personal means and estate of the deceased William Martin: (2) That by the terms of said deed the *jus mariti* and right of administration of James Millar, the husband of Janet Martin or Millar, is effectually excluded; And (3) That the present appellant is not entitled as in right of his deceased father either to claim legitim as due to his mother, or to claim any share whatever of the succession of the said deceased William Martin: Find the respondent entitled to one-half of the taxed expenses in the Sheriff Court; and with these variations affirm the judgment appealed from, dismiss the appeal, and decern: Find the respondent entitled to expenses in this Court, except those relating to the first day's discussion, and remit to the Auditor to tax the same, and to report."

Counsel for Appellant — Trayner — Mackay. Agent—Nenion Elliot, S.S.C.

Counsel for Respondent—Adam—Strachan. Agent—D. Hunter, S.S.C.

Thursday, November 9.

SECOND DIVISION.

GLASS *v.* LAUGHLIN.

Appeal—Remit—Competency—Circuit Court—Jurisdiction.

The appellant in a small debt appeal heard upon Circuit was found entitled to his expenses, and a remit made to the Auditor of the Sheriff Court for taxation, and to the Sheriff to decern for them.—*Held* that such a remit to the Sheriff by the Circuit Court was competent, and suspension of a decree granted by him for the taxed amount *refused.*

Observations as to the competency of a review by the Court of Session of a Circuit Court judgment.

Opinion (*per* Lord Young, Ordinary), that as a general rule it must be assumed that the Circuit Court, being a superior if not a Supreme Court, acted within its jurisdiction and according to the law and practice of the Court in any judgment which it pronounced.

This was a suspension at the instance of James Glass, general dealer, Glasgow, in which he sought to have suspended a decree for £56, 5s. 4d. pronounced against him and in favour of the respondent Joseph Laughlin, also a general dealer residing in Glasgow, in the Small Debt Court of Glasgow upon the 29th of February last. The circumstances, as stated by the suspender, under which he sought to have this done were as follows:—In the month of January 1875 Glass raised an action in the Small Debt Court of Lanarkshire against Laughlin, and afterwards upon 10th February obtained decree in his favour. Against this judgment Laughlin appealed to the Circuit Court of Glasgow in terms of the Small Debt Act. At the following Spring Circuit this appeal was heard, and a remit made for inquiry into the facts and circumstances of the case to the Sheriff of Lanarkshire. A further remit was made at the following Autumn Circuit Court, the appeal being finally disposed of with the consent of both parties at the Christmas sittings of that Court, when Lord Young pronounced the following interlocutor:—"Having, of consent, heard parties' procurators on the report of the Sheriff, under the remit made to him by interlocutor of the Circuit Court of Justiciary of 16th September last, Sustains the appeal: Recalls the decree complained of: Remits the cause to the Sheriff to proceed therein as may be just: Finds the appellant entitled to expenses, remits the account thereof when lodged to the Auditor of the Sheriff Court at Glasgow to tax and report to the said Sheriff, and grants power to the said Sheriff to decern for the same."

In terms of this remit the Sheriff of Lanarkshire resumed consideration of the case, and upon 29th February 1876 assoilzied the respondent, and decerned against the suspender Glass for the sum of £56, 5s. 4d., being the amount of expenses of appeal, as ascertained by taxation, under Lord Young's remit.

Glass sought to suspend this decree on the ground that the Court of Justiciary possessed no power, either by statute or at common law, to delegate any part of its functions, and that the part of Lord Young's judgment which granted power to the Sheriff of Lanarkshire to decern for the expenses incurred under the appeal was *ultra vires* and inept.

Upon 16th June 1876 the Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"16*th June* 1876,—The Lord Ordinary having heard the counsel for the parties, and considered the record and whole process, Repels the reasons of suspension: Finds the letters and charge orderly proceeded, and decerns: Finds the suspender liable in expenses, and remits the account thereof when lodged to the Auditor to tax and report.

"*Note.*—The complainer asks suspension of a decree of the Sheriff of Lanarkshire, pronounced under a remit to him by the Circuit Court of Justiciary at Glasgow, in an appeal to that Court under the Small Debt Act. The ground of suspension is that the Circuit Court exceeded its jurisdiction in making the remit, and that there-