and so on, I think there will be enough in that opinion so altered for the solution of this case. It would then read—"That the husband who acquires is the party to whose presence the law will look during his life in the event of retaining the settlement, and on his death the widow who inherits his settlement, if she remains resident, would be held to carry on the presence begun by her husband." That is sufficient for this case if we follow Lord Benholme's opinion. The husband was born in Abbotshall, and resided there all his life with the exception of a temporary absence from August 1871 till Whitsunday 1873. He died on 12th January 1874, but his wife (the pauper) continued to reside in the parish till Whitsunday 1874, and so prolonged to the period of a full year the residence in the parish from the time of her husband's (and her own) return to it at Whitsunday 1873. She became chargeable in December 1876, and at that date there was no period of five years in the course of which she had not lived for a year continuously in Abbotshall. But, apart from this view, the husband had undoubtedly a residential settlement in Abbotshall at his death in January 1874, for his absence from August 1871 to Whitsunday 1873 did not forfeit or disturb it, and even if his widow had then left she would not have lost the settlement at the time when she became chargeable, which was within three years thereafter.

Lord Gifford—I am of the same opinion. I think that the settlement of the pauper, the widow, is the settlement which her husband had at the time of his death. It is contended that the husband being absent from the parish of his settlement at the time of his death was in the course of losing his settlement by non-residence, and it was pressed upon us that as the widow after her husband's death continued absent from the parish, the absence of the widow should be added to the absence of her deceased husband in order that such united absences might produce the loss of the settlement. Now, I doubt whether it is competent on such a question to add the widow's absence after widowhood to the previous absence of her husband. But it is a sufficient answer to this case to say that if the widow's absence is to be added to that of her husband then the converse must hold, and the residence of the widow after her widowhood in the parish of her husband's settlement must be added to the husband's own residence in order to preserve the settlement from being lost. This by itself would be sufficient for the decision of the present case. In other respects I concur with the observations of your Lordships.

Lord Ormidale—I concur. I am not, however, to be considered as concurring in the view that the separate periods of absence of the husband and wife can be added together so as to lose a settlement any more than their separate periods of presence can be added together to acquire one. Here there was an end to the continuity by the death of the husband. The judgment of the Sheriff-Principal appears to me to be quite right.

The Court adhered.

Counsel for Pursuer (Respondent)—Rutherfurd — Mackay. Agents — Frasers, Stodart, & Mackenzie, W.S.

Counsel for Defender (Appellant)—Johnstone —Henderson. Agent—Charles Henderson, S.S.C.

* *Wednesday, January* 29.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

JACK'S TRUSTEES *v.* MARSHALL.

Succession — Fee and Liferent — Legitim — Where a Father was to Liferent a Fund of which his Children were Fiars and he Claimed Legitim instead.

A testator left in trust "for behoof of my grandchildren Mary, Eliza, and Alexander, the children of my son Robert Jack, and any children that may yet be born to him, the like sum of £3500 sterling equally between them, payable on the death of their father the said Robert Jack; and until the decease of the said Robert Jack, I direct my trustees and executors to pay over to him the income of the said sum of £3500 sterling, monthly, quarterly, or otherwise, as they may deem expedient, for the maintenance of himself and the maintenance and education of his said children; and I desire my trustees to secure that the said children receive a good education suitable to their station in life—it being my express desire that the education of my grandson Alexander Jack (son of the said Robert Jack) shall also be such as specially to qualify him for a partnership in my business." The liferent was declared to be strictly alimentary. The father claimed his legitim. *Held* that income of the money during the father's life was payable to those whose interests were prejudiced by the payment of the legitim, but that the capital was a separate estate in the children, which was not affected by their father's repudiation of the settlement.

Observations upon the case of *Fisher* v. *Dixon*, Nov. 24, 1831, 10 S. 55, and July 1, 1833, 6 W. and S. 431.

The pursuers and real raisers in this multiplepoinding were the trustees and executors of the late Robert Jack, agricultural instrument maker, Maybole, acting under his trust-disposition and settlement dated 4th July 1876.

By the fourth purpose of his trust-disposition and settlement the testator directed his trustees, upon the sale of his works and the realisation of his share and interest in the property and assets of the said firm or copartnership carried on by him along with John Marshall, "to set aside and invest in their own names in trust, in terms of the powers of investment after conferred, and subject to the condition as to the same and as to the residue of my estate stated in the last purpose hereof, the following legacies, viz., ... for behoof of my grandchildren Mary, Eliza, and Alexander, the children of my son Robert Jack, and any children that may yet be born to him, the like sum of £3500 sterling equally between them, payable on the death of their father the said Robert Jack; and until the decease of the said Robert Jack, I direct my trustees and executors to pay over to him the income of the said sum of £3500 sterling, monthly, quarterly, or otherwise, as they may deem expedient, for the maintenance of himself and the maintenance and education of his said children; and I desire my

* Decided January 21, 1879.

trustees to secure that the said children receive a good education suitable to their station in life; it being my express desire that the education of my grandson Alexander Jack (son of the said Robert Jack), shall also be such as specially to qualify him for a partnership in my business, which I hereby declare it to be my express wish he should have, provided that when he is of suitable age my trustees are satisfied that his moral conduct and steady habits are such as to render this desireable, and provided always that the said John Marshall is willing to assume him as a partner." He also further declared—"I declare that the whole of the foregoing provisions shall become vested interests in the persons of the beneficiaries as on the day of my death; as also that if any of my said grandchildren shall predecease the period of distribution of my estate leaving lawful issue, such issue shall be entitled to the provisions which their parent would have taken on survivance, equally among them *per stirpes;*" and further "that the foresaid liferent provisions in favour of my said sons Robert Jack and Alfred Jack are strictly alimentary, and shall not be affectable by their debts or deeds or the diligence or execution of their creditors."

Robert Jack repudiated his father's settlement, and claimed legitim.

Marshall, the residuary legatee, pleaded—"(1) Upon a sound construction of the said trust-disposition and settlement and codicil, the bequest of £3500 therein made to or for behoof of the said Robert Jack and his children was contingent upon the said Robert Jack accepting the same in satisfaction of his legal rights, and the said Robert Jack having repudiated the settlement and claimed his legitim, the said bequest became forfeited, and falls to the claimant as residuary legatee. (2) In any view, the said forfeiture extends to the income of the said bequest during Robert Jack's lifetime, or at least to such part of said income as may be held to be provided to Robert Jack for his own behoof."

Robert Jack's children claimed the whole sum, both capital and interest.

The Lord Ordinary (Rutherfurd-Clark) pronounced the following interlocutor:—"Finds that the trustees of the late Alexander Jack are bound to invest in their own names the sum settled by the fourth purpose of the trust-deed on the children of the truster's son Robert Jack, and to hold the same for the behoof of the claimants Mary, Eliza, and Alexander Jack, and any other children that may be born to the said Robert Jack: Finds that the said sum is not payable till the death of the said Robert Jack, and that the income derived therefrom till the death of the said Robert Jack is payable to the claimant John Marshall," &c.

"*Note.*—Robert Jack has claimed his legitim, and has therefore forfeited any benefit which is conferred on him by his father's settlement. The forfeiture does not affect the interest of his children, and following the case of *Fisher* v. *Dixon*, from which he cannot distinguish the present, the Lord Ordinary has held that the sum settled by the fourth purpose of the deed must be invested for their behoof.

"But the children further claim that the interest, or at least a part of the interest, of the capital should be paid to them, on the ground that they had a benefit in the bequest of the interest. The Lord Ordinary has not been able to adopt that view. He thinks that the father is the true legatee of the income, and that any indirect, and indeed indefinable benefit which the children might have taken through him is lost by the repudiation of the settlement."

Marshall reclaimed, and argued—In *Fisher* v. *Dixon*, November 24, 1831, 10 S. 55, and 1st July 1833, 6 W. and S. 431, the two provisions were separate and independent; here there was only one provision—in favour of the father. Therefore the children had no right either to capital or interest. See also *Ewan* v. *Watt*, July 10, 1828, 6 S. 1125. At all events the children had no right to the interest during their father's lifetime. For if there were two separate rights, that of the father was his liferent. He lost that by claiming legitim; and although it might be the testator's intention to benefit the children, still under the deed they could claim only through their father; and he was in no way fettered in his discretion either as to accepting the provision, or, if he accepted it, in the mode of its application to the children. As to the person entitled to the interest—*Peat* v. *Peat*, 14th February 1839, 1 D. 508; *Breadalbane* v. *Pringle*, 15th January 1841, 3 D. 357; *M'Watt* v. *Davidson*, 15th July 1871, 9 Macph. 995.

Argued for the respondents—As regarded the fee, the case was ruled by *Fisher* v. *Dixon*. As regarded the interest, if, as the other side maintained, there were not two separate estates, then the *unum quid* was in the children, whom the testator plainly intended to benefit. If there were two estates, then, although the income was in the father, still he could not do what he liked with it. The directions in the deed were explicit and binding on him. It was a trust—*Longmore* v. *Elcum*, 2 Young & Collier's Chancery Reports, 363; *Crockett* v. *Crockett*, 1 Hare's Chancery Cases, 451.

At advising—

Lord President—Looking to the terms of the testator's trust disposition and settlement in this case, there can be no doubt that the provision to the children is quite independent of the liferent given to the father, and is quite independent of the control of the father; and therefore it appears to me that as regards the capital the case of *Fisher* v. *Dixon* is a direct authority. It was contended against this view that in *Fisher* v. *Dixon* there were two separate and independent estates, and that it can hardly be said that there are two such estates in this case. But in *Fisher* the right and interest of the children—that which was held not to be affected by the claim of legitim—was quite a separate and independent interest, and that was enough for the decision of the case; and though the judges spoke of two distinct and independent rights, it was only to show that the right of a mother to a liferent could not be converted into a right to the fee, and could not interfere with the children's right of fee.

But there arises the question as to whether the interest on this sum of £3500 during the lifetime of Robert Jack is altogether forfeited by his acceptance of legitim, and goes to the residuary legatees. Now, undoubtedly the testator's intention is expressed in a very peculiar way, but

it is necessary to keep in view that the leading words of the clause are words of direction—imperative words without any qualification—"I direct my trustees and executors to pay over to him [Robert Jack] the income of the said sum of £3500 sterling monthly, quarterly, or otherwise as they may deem expedient." No right is here conferred on the trustees to pay over anything less than the entire income, and though there are words following which perhaps suggest another intention, there is nothing to qualify these leading words. The deed says, in the first place, that the trustees are to pay the interest to Robert Jack "for the maintenance of himself, and the maintenance and education of his children." And no doubt every person's income is primarily appropriated to these purposes. It is not wonderful that the testator should assign the income for the maintenance of a legatee and his children. That is plainly the natural obligation of every one, although nothing had been said on the subject. But then follow these words—"And I desire my trustees to secure that the said children receive a good education suitable to their station in life, it being my express desire that the education of my grandson Alexander Jack should also be such as specially to qualify him for a partnership in my business," &c. Now, this is a very distinct expression of a desire and wish that all Robert Jack's children should receive a good education, and that his son should receive a special one, with a view to joining his grandfather's business. But then, while he expresses this desire, he does not give his trustees any control whatever in the disposal of the income which he directs them to pay over, and without such control I do not see how the trustees could interfere. The only way in which they could interfere would be by witholding the income or by doling it out at their own discretion. But there is nothing in the deed to warrant this. There is nothing to take off the effect of the leading words of direction to pay over to Robert Jack. Whatever it was intended to provide for it seems to me that there is in legal effect nothing else than a liferent provision in favour of Robert Jack.

And I am very much fortified in that opinion by another clause of the deed, which declares "that the foresaid liferent provisions in favour of my said sons Robert Jack and Alfred Jack are strictly alimentary, and shall not be affectable by their debts or deeds or the diligence or execution of their creditors." Now, if the effect of the leading clause had been to create a trust in Robert Jack, it rather appears to me that this clause would have been quite inappropriate. The truster would hardly have called the legacy a liferent provision, or declared that it was not affectable by the debts and deeds of the father. I arrive without much difficulty at the conclusion that the provision in favour of Robert Jack is one to enable him to maintain himself and to discharge his parental obligations to himself and his children.

It is said that his right of liferent is hardly such an independent right or estate that it is naturally forfeited by his claim of legitim. But then, I think that *Fisher* v. *Dixon* points to this, that to create a family provision it must be quite clearly shown that the right of the children is separate and independent. Now, it cannot be said here that the liferent of the children is separate and independent. Any benefit they receive must be through their father, and is forfeited by his acceptance of legitim.

I am therefore in principle in favour of the Lord Ordinary's interlocutor, and the only doubt I have is, whether his Lordship has not proceeded too rapidly in coming to the conclusion that the income is payable to the claimant John Marshall. John Marshall is residuary legatee, but there is a provision that, in the event of the residue not coming up to the sum of £3500, John Marshall is to share equally with the other branches of the family, so that by reducing their legacies his provision is made equal to theirs. Now, it is not impossible that, in the result, the residue will be under £3500, and therefore the persons upon whom the loss will fall will not be John Marshall only, but also the other legatees. Hence, it is better to find that the residue is payable to those who may be interested in the residue of the succession.

Lord Deas—I have no doubt that the principle of *Fisher* v. *Dixon* applies to this case. I say that it applies *a fortiori*—not only is there a separate and distinct fee given to the children of Robert Jack, but it is given to them nominatim, and there is an express clause that it is to vest at the death of the testator.

The only doubt that I had is with reference to what is to be done with the income of the share to be given to Robert Jack's children. In the ordinary case, undoubtedly, when the income is forfeited in consequence of the child claiming legitim, the benefit goes to the residuary legatee upon whom the burden of the claim to legitim falls. The doubt I had was, whether that rule applies here in consequence of the express way in which the testator says "I desire my trustees to secure that the said children receive a good education suitable to their station in life," &c. [*ut supra*]. My doubt was, whether in this case the testator had not so expressly bound his trustees to secure the children's education as to make the whole of the income applicable to that purpose. The father Robert Jack was bound to maintain and educate his children although he had not got a legacy at all, but I do not think it would have been inconsistent with the testator's intention that the income should go to what the Lord Ordinary calls the "indefinable benefit" of the children, which, however, is not only definable, but is very clearly defined by the testator himself. Their education and maintenance is not nearly so well secured when this income passes into the hands of the father as when it is managed by the trustees. And if your Lordship had been of that opinion, I should have been disposed to agree with it, but I am very much moved by the views your Lordship has expressed, and by the fact that the Lord Ordinary has also come to the same conclusion.

Lord Shand—I am of opinion that the Lord Ordinary is right. I am clear that the fee of this sum is given to the children, and is entirely separate from any benefit conferred on the father. The only difficulty is as to the income of the money. But I think that the income is a liferent to the father, and that he forfeited that provision by claiming legitim. Accordingly, I agree with your Lordships and with the Lord Ordinary.

LORD MURE was absent.

The Court pronounced the following interlocutor:—

"Recal the Lord Ordinary's finding 'that the income derived therefrom till the death of the said Robert Jack is payable to the claimant John Marshall;' and in place thereof find that 'the income derived therefrom till the death of the said Robert Jack' is payable to those of the beneficiaries under the settlement whose interest will be prejudiced by the said Robert Jack claiming and receiving his legitim: *Quoad ultra* adhere to the interlocutor reclaimed against, and refuse the reclaiming note."

Counsel for (Pursuers) Respondents—Kinnear—Keir. Agent—Thomas Carmichael, S.S.C.

Counsel for (Defender) Reclaimer—M'Laren—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, February 8.

FIRST DIVISION.

[Sheriff-Substitute of Lanarkshire.

BARR *v.* TOSH (MARTIN & DUNLOP'S TRUSTEE).

Bankruptcy—Public Examination of Bankrupt—19 *and* 20 *Vict. cap.* 79 (*Bankruptcy Act* 1856), *sec.* 91.

At the public examination of a bankrupt by the trustee in bankruptcy the bankrupt may be asked any competent question at the instance of the agent of any of the creditors after the trustee has concluded his examination.

This was an appeal at the instance of James Barr, a creditor on the sequestrated estate of Messrs Martin & Dunlop, civil engineers, Glasgow, against Robert Tosh, the trustee in the sequestration. It appeared that during the examination (but whether before or after the trustee had concluded his examination was not clearly stated) the following question was put to him by Mr Gavin Hamilton as procurator for Mr Barr—"Did you do business for Messrs Cook & Company, Kilbirnie, and did you get payment of any money for that work within the last three years?" The question was objected to, on the ground that the examination must be conducted by the trustee as the statutory representative of the creditors, and that the bankrupt, being bound to disclose the estate to the trustee, such questions were unnecessary and incompetent, and the objection was sustained by the Sheriff-Substitute (CAMPION).

Barr appealed, and argued—The bankrupt was bound under the 91st section of the Bankruptcy Statute 1856 to "answer all lawful questions relating to" his affairs, and the proper object of his examination being to ascertain what his estate consisted of, where it was, and what he had done with it, the question objected to was a legitimate one. It was the universal custom for creditors (themselves or by mandatory) to put questions to the bankrupt after the trustee had concluded his examination.

Authorities—*Delvoitte & Co.* v. *Baillie's Trustee*, 16th Nov. 1877, 5 Rettie 143; *Barstow* v. *Hutcheson*, 21st Feb. 1849, 11 D. 687; *Smyth* v. *M'Clelland*, 23d Dec. 1843, 6 D. 331.

It was answered for the trustee that the question objected to was the first of a written list proposed on behalf of the appellant, and disallowed after inspection by the Sheriff-Substitute, and that the Sheriff's sanction was necessary for any question to be put to the bankrupt by a creditor under section 93 of the 1856 Act.

At advising—

LORD PRESIDENT—I think there is not much difficulty in this case. It appears to me that Mr Hamilton may quite competently put his question provided he does not do so prematurely. The object of the question was to ascertain whether a certain sum of money had come into the bankrupt's hands, and if so what he had done with it, and it is therefore quite a legitimate one. I think we should recal the deliverance of the Sheriff-Substitute, and remit to him to allow Mr Hamilton's question to be put as soon as the trustee has concluded his part of the examination.

Counsel for Appellant — Rhind. Agent — William Officer, S.S.C.

Counsel for Respondent—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Saturday, February 8.

SECOND DIVISION.

[Lord Adam, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* MOON'S TRUSTEES.

Railway — "*Superfluous Lands*" — 8 *Vict. c.* 19 (*Lands Clauses Consolidation Act* 1845) *sec.* 120.

A railway company under their compulsory powers acquired in 1845 a piece of land, most of which they used for the purposes of their undertaking, which was to be completed in July 1850. In 1854 they sold to M part of the remaining land, being the whole unused except ·212 of an acre which was in the immediate vicinity of a station on the line. The latter portion was occupied by M and his successors along with what he had bought for agricultural purposes until 1877, no rent being paid for it. In answer to a claim by the railway company in that year for possession of the ·212 of an acre, which they stated was required by them for the purposes of their line, M's trustees maintained, *inter alia*, that under the 120th section of the Lands Clauses Act 1845 the ground had fallen to them as "superfluous lands," they being adjoining proprietors.

In deciding in favour of the pursuers, the Court *held* (1) that the *onus* of proving the lands to be "superfluous" lay upon the defenders; (2) that to make out lands to be superfluous it was not sufficient to prove that