this agreement being admittedly valid, the interest must be paid over to the bankrupt's trustee, and the Lord Ordinary has so found. I see no ground for impugning this finding. What effect any revocation by the wife might have had upon the interest of parties, were such revocation competent to her, it is not necessary to inquire, no such revocation having been executed.

Then, with reference to the principal sum, the several provisions of the eighth purpose of the trust must be carefully noticed. During the subsistence of the marriage this sum is placed under the joint administration of the husband and wife, to the effect that the trustees were to apply the sum as they should direct, but this provision certainly can have no effect by itself, either to divest the husband of right to the sum or to confer any right thereto on the wife. Then, by the second part of this purpose of the deed the absolute fee to the principal sum is appointed to belong to the husband in the event of his wife's predecease, so that, even if the wife had any right secured to her, this contingent interest would be within the sequestration, and some means might be required to secure to the creditors, in one way or other, their ultimate right to the sum. Thus the inquiry resolves into the character and extent of the right and interest conferred by the third or remaining part of the deed upon the wife. For unless it can be held that some irrevocable present or contingent interest in the principal sum has been indefeasibly given to her, the creditors of the husband will be entitled to attach the fee as truly his property at the date of the sequestration. But as regards this part of the case I have been unable to arrive at any other result than that the character of the right given to the wife, or intended to be conferred by the contract, is merely a right of succession to the whole estate, heritable and moveable, (including the £1000 remaining of the £1200) which should belong to the husband at the time of his death.

The express provision of the deed, in the event of the husband's predecease, is that the sum in question, or such part thereof as shall remain, "shall form part of his (the husband's) estate, hereinafter assigned and conveyed," *i.e.*, of his estate, the succession to which is regulated by the subsequent part of the deed. There is no special provision in reference to this specific sum, while there is an assignation, to take effect at his death, to and in favour of his wife, in case of her survivance, in liferent, and to the children in fee, and failing children to her, her heirs, and executors, in absolute fee, of his whole estate of every description, real and personal. It is in the character of the husband's disponee and executrix to his general estate existing at his death that any right or interest is given to the wife. There is absolutely no right or interest conferred on the wife, excepting one of succession. But such a right can be of no avail in a question with onerous creditors. It cannot be held to divest the husband of any part of his property. The whole estate remains vested in him until his death, and there is no principle or authority for holding that in that state of matters the rights of creditors have been excluded. It may be that because of the onerosity of the deed in which this settlement of his estate *mortis causa* occurs, the husband could not at his own will and pleasure disappoint his wife and children by executing a new settlement of his affairs, to take effect at his death, in favour of another. But whether it is revocable or not, the exclusive character of this provision is that of succession, a kind of provision which has no effect on the husband's right during his lifetime, and powerless to exclude his property from the diligence of his creditors.

LORD BENHOLME—The words of the settlement in the contract are "at his death such part thereof as shall remain shall form part of his estate, hereinafter assigned and conveyed." I think these words ascertain that the wife takes truly as successor to her husband, in consequence of the testament which follows.

This view is strengthened by the fact that the fund comes from the husband. I think there is no such protected interest in the wife as to enable her to claim the succession, but not to be liable for her husband's debts.

LORD NEAVES—This is an unsuccessful attempt to make the wife a fiar. Had the fund been invested in a farm, as originally intended, the stock would have been liable for the husband's debts. The husband cannot be left in the ostensible fee of the subjects without being liable for debts. I think the wife here just took her chance of getting more than her £1200 if her husband should die a rich man.

Agent for Reclaimer—Charles S. Taylor, S.S.C.
Agents for Defenders—Adam & Sang, W.S.

Tuesday, June 18.

FIRST DIVISION.

CAMERON *v.* MORTIMER.

(Ante, p. 285.*)*

Process—Jury Trial—Bill of Exceptions—Agent and Client—Implied Authority.

On the trial of an issue, whether the defender wrongfully apprehended the pursuer after having agreed to delay diligence, the pursuer put in evidence an admission by the defender on record, that "A. M. is a solicitor, and acted as the agent of the defender in raising and enforcing the diligence." The pursuer excepted (1) to a direction by the presiding Judge that they were the sole judges upon the evidence as to whether A. M. had express authority to grant delay, but that, in law, he had no implied authority to delay enforcing diligence in the circumstances so stated; and (2) to his refusal to direct that the question as to whether A. M. had implied authority to grant the delay, was one on the evidence for the jury. Exceptions *disallowed.*

A new trial having been granted, the case was tried before Lord Neaves at Inverness, on the 1st, 2d, and 3d May 1872, on the following issue:—

"Whether, on or about the 29th July 1871, the defender, John Mortimer, wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July 1871, to the loss, injury, and damage of the pursuer?"

In addition to other evidence led by him, the pursuer put in evidence articles 2, 3, 4, and 5 of the condescendence, with relative answers for the defender. Article 2 was as follows:—"The defender, John Mortimer, resides at Applegrove, Forres, and is a traveller for Messrs Usher & Com-

pany, brewers in Edinburgh. The defender, Alexander Morrison, is a solicitor in Elgin, and acted as the agent of the defender Mortimer, in raising and enforcing diligence—the diligence after mentioned."—*Answer for defender Mortimer* — "Admitted."

The jury unanimously found for the defender.

The case now came up on a bill of exceptions for the pursuer, which set forth that

"Lord Neaves charged the jury, and directed them that they were the sole judges upon the evidence as to whether Alexander Morrison, writer in Elgin, had express authority from the defender to grant delay, but that in law he had no implied authority to delay enforcing the diligence in the circumstances stated by the pursuer on record.

"Mr Fraser (for the pursuer) excepted to this direction, and asked Lord Neaves to direct the jury that the question as to whether Morrison had implied authority to grant the delay was one on the evidence for the jury.

"Which direction Lord Neaves declined to give.

"Whereto Mr Fraser excepted.

"Mr Fraser further asked Lord Neaves to direct the jury that if the jury are satisfied on the evidence that Morrison was agent of the defender Mortimer in raising and enforcing the diligence against the pursuer, and that Morrison, as such agent, did give delay to the pursuer, then any instructions by the defender not to give delay, not communicated to the pursuer, will not control the implied authority of the agent to give delay, if the jury are satisfied that if there were no such instructions, the agent Morrison had power to give delay.

"Which direction Lord Neaves declined to give.

"Whereto Mr Fraser excepted."

Fraser and Strachan for the pursuer.

Millar, Q.C., and J. A. Reid for the defender.

At advising—

Lord President—The issue sent to be tried in this case was—"Whether, on or about the 29th July 1871, the defender, John Mortimer, wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July 1871, to the loss, injury, and damage of the pursuer?" The important question of fact was, Whether the defender had agreed to delay diligence till Monday, 31st July 1871? It was not contended, either at the first trial or the second, that the defender had personally come under such an agreement. It was represented that he had done so through his agent, Mr Alexander Morrison. The answer of the defender is that not only did Morrison not agree to give delay, but that if he had done so, it would have been without authority, either express or implied, from the defender. The pursuer, in addition to his other evidence, put in evidence certain admissions contained in the defender's answers to the condescendence for the pursuer, and, in particular, the second article of the condescendence, with relative answer. These were put in for the purpose of proving agency on the part of Morrison. The presiding Judge directed the jury that they were the sole judges upon the evidence as to whether Morrison had express authority from the defender to grant delay, but he gave them the further direction that in law he had no implied authority to delay diligence in the circumstances stated by the pursuer on record, manifestly referring to article 2. I shall only say that I regard this as a good direction. It is represented to be an ambiguous direction, and as one taking the whole case out of the hands of the jury—in fact, directing them to find for the defender. I do not think so. It has reference to those parts of the record put in evidence, and what the Judge does is, to direct the jury (1) that they are the sole judges whether there was express authority; and (2) that the mere fact of Morrison being a solicitor in Elgin, and acting as the agent of the defender in raising and enforcing the diligence, was not sufficient in law to raise any implication of authority to grant delay. The direction was perfectly sound.

The counsel for the pursuer not only excepted to this direction, but asked the Judge to direct the jury that the question as to whether Morrison had implied authority to grant delay was one on the evidence for the jury. I have no doubt as to the meaning of the direction asked, viz., that in judging whether there was any implied authority, the jury had no occasion for assistance from the Court at all, but were entitled to draw their own inference from the facts. An inference from facts may be of a purely legal character, or it may be entirely an inference of fact—the mere establishment of a general fact necessarily resulting from certain external facts proved. The first is clearly for the Court; the second as clearly for the jury. There are, however, cases of extreme nicety, where the inference is partly of fact and partly of law. These require the most delicate handling by the presiding Judge. I do not think that any such delicate question is raised here. In the course of the evidence facts might be proved which would raise inference of facts, but it is not alleged that the presiding Judge did not leave such inference to the jury. But the ultimate inference in this case, viz., the implication of authority, was a legal inference. The object of the pursuer was to establish the legal liability of the defender for his agent. That is not fact at all, but law. To say, that the question, whether Morrison had implied authority to grant delay, was one on the evidence for the jury, is plainly unsound; it would amount to saying that the jury were to decide for themselves whether the relation of the parties and the circumstances of the case were sufficient to raise an implication of authority. It has been suggested that the direction asked does not mean that the question was one for the jury only, but I cannot read it otherwise. If it is open to another interpretation, then it would be objectionable from ambiguity, the most fatal of all objections.

The third exception has not been insisted on. I am therefore for disallowing the bill of exceptions.

Lord Deas—The general facts of this case are very simple. The defender employed Mr Alexander Mackenzie, Forres, to do diligence on a bill due by the pursuer. Mackenzie employed Morrison, who resided at Elgin, to procure the necessary warrants. Captain Cameron lived at Forres. So far the position of parties is not favourable to the pursuer's plea that Mortimer was liable for what Morrison did; at the same time, it does not exclude the plea. I desire to make it clear that, as far as I am concerned, I am of opinion—*first*, that an agent or a sub-agent, employed with a view to the execution of personal diligence, may have implied authority to grant delay; *secondly*, that in a case of this kind the question whether there was implied authority is to a very considerable extent a question for the jury. I am clear that, neither with regard to an agent

nor a sub-agent, is express authority to give delay necessary. But I cannot hold that the first exception is well founded. Of the articles of the condescendence put in evidence, No. 2 is the most material. The question is, whether the admission by the defender of the pursuer's statements implies liability for the delay said to have been granted by Morrison. I am of opinion, with your Lordship, that there is not enough admitted on record to infer liability. I do not understand that anything contained in the direction given by the presiding Judge means that an agent or a sub-agent must have express authority to grant delay.

The next exception is a more difficult one to dispose of. I do not hold that the liability of the defender for the agent Morrison is a question of law only, and not of fact. We do not know enough of the circumstances to come to that conclusion. I read the direction asked as meaning that the question as to whether Morrison had implied authority to grant delay was one *solely* upon the evidence. I cannot say that we have enough before us to say that this was a question solely for the jury upon the evidence. There may have been much for the jury to determine, but I cannot say that the bare direction asked to be given, without any explanation, would have been a safe one; and all the more so, because the direction asked is put as the counterpart of the direction excepted to. That it is certainly not.

Lord Neaves concurred.

Lord Ardmillan—We have at this final stage of the case no duty to discharge but to dispose of the bill of exceptions.

There is no motion for a new trial on the ground that the verdict is contrary to evidence.

One passage only in the charge of the Judge is excepted to. Then Mr Fraser, for the pursuer, requested the Judge to give a certain direction. That direction the Judge declined to give, and a second exception was accordingly taken.

I think it necessary to explain in the outset that a Judge's charge must be presumed to have been in all respects correct and complete, unless in so far as it has been excepted to.

The question whether Morrison had express authority from the defender to grant delay was distinctly left to the jury. Plainly there was no express authority. But, in the circumstances stated by the pursuer on record,—that is, taking the pursuer's case as alleged by himself, in those parts of the record which he put in evidence,—the learned Judge stated to the jury that, in law, Morrison had no implied authority to give delay. The 2d article of the condescendence for the pursuer is what the Judge referred to. It seems to me that there has been some misapprehension in regard to this direction. Rightly understood, it is quite correct.

If the true meaning of this statement of law by the presiding Judge had been, that the implication or inference of authority from the whole facts and circumstances of the case as proved is exclusively matter of law for the Judge, and not to any extent within the province of the jury, I could not accept that as a correct statement. Where the inference or implication is to be reached by considering the facts proved with reference to such legal principle as the Judge thinks it right to explain, then I am of opinion that the duty of drawing the inference or implication ought not to be withdrawn from the jury. Assuming the jury to have ascertained the facts, and to have been, as I doubt not they were, rightly instructed in regard to the law, then the drawing of the inference or implication from the facts so ascertained, is, in my opinion, within their province—not so absolutely or exclusively theirs as to shut out judicial direction, but still so far within the power and duty of the jury that the withdrawing of the question from the jury could not be right.

But I am satisfied that the meaning of the passage excepted to in the charge is not what I now supposed. I understand that all that was really meant is, that the statements of the pursuer, as placed on record and put in evidence, do not sustain the legal implication of Morrison's authority, so that, under the circumstances stated and put in evidence by the pursuer, there is no implied authority.

Assuming, as I have already explained, that the remainder of the charge is not liable to objection, and that the jury were rightly told that they should judge of the evidence, I cannot say that this exception is well founded.

I am anxious to preserve intact the recognition of the right and duty of the jury to draw from the facts which they deem to be instructed by proof the inference or implication of authority, so far as that is an inference in point of fact.

I do not think that that right and duty was meant to be withdrawn from the jury in this case. I cannot assume that it was so withdawn. The observation of the Judge related to the statements of the pursuer on record, and not to the facts as appearing on the proof. Viewing the passage complained of in that limited aspect, I am not prepared to sustain the first exception.

The 2d exception relates to the refusal to give a certain direction in certain absolute and unqualified terms. The direction asked by Mr Fraser is very broad and very absolute, and unqualified. It is not there specified what evidence, or whether any evidence, was led before the jury, tending to instruct authority, or sustaining the implication of authority, and it is not now maintained that the verdict is against evidence.

I again repeat, that I could not concur in withdrawing from the jury entirely the right and duty of drawing the inference or implication of authority from the facts and circumstances proved. But I am not prepared to hold the rights and duty of the jury to be so absolute and paramount as to exclude judicial direction in a case of mingled fact and law. Accordingly, taking for granted that the credibility of witnesses, and the force and value of conflicting testimony and the value of the real evidence arising from the facts and circumstances proved, were all left to the jury, I do not think that the refusal to give a special direction in the absolute terms demanded, affords good ground for complaint. I therefore concur with your Lordships in refusing these exceptions.

I add no more. The defender's case, successfully maintained by him, is, that Morrison had no authority, and no discretion, because he was employed, not to recover the debt, but to raise and enforce the diligence, to put the debtor in prison. In other words, Morrison was employed, not to procure payment, but to gratify revenge. As Lord Jeffrey once said, "I shall chastise the *rising* indignation within me," and say not one word of the

motive and the spirit in which these unfortunate proceedings plainly originated.

LORD KINLOCH—I am of opinion that this bill of exceptions should be disallowed. The question raised was whether the defender had gone on with diligence against the pursuer's person, after having, through his agent, agreed to give delay for payment of the debt. The Judge was clearly right in laying down that express authority to the agent formed entirely a question for the jury. In proceeding to say that "in law he had no implied authority to delay enforcing the diligence in the circumstances stated by the pursuer on record," I think the Judge must be held to have referred to those articles of the condescendence which, with the answers admitting the statements, were put in evidence by the pursuer, for these were the only parts of the record within the cognizance of the jury. In this view, I think the direction was entirely right, for the matter proved by these articles and their answers simply brought out that Mr Morrison was employed to raise and enforce diligence, which, without something else occurring, clearly implied no authority to grant delay. This undoubtedly did not conclude the case; for the authority might be implied from other circumstances. But these circumstances required to exist and be founded on. I cannot find them in the evidence; and the Judge being, I must presume, in the same predicament with myself, was not called on to give any additional direction on the subject. If the counsel for the pursuer conceived that such circumstances existed, it was his duty to bring them before the notice of the Judge, and to ask a special direction regarding them. In place of doing so, what the pursuer's counsel did, was to ask the Judge to send the whole case on implied authority to the jury for their exclusive determination—for such I consider to be the meaning of the request for a direction "that the question as to whether Morrison had implied authority to grant the delay was one on the evidence for the jury." This request, I think, was wholly without warrant; for implied authority was a mixed question of law and fact, in which the proper course was to lay down the law for the guidance of the jury, and leave them to apply this law to the facts as they should find them. I am of opinion that the Judge rightly refused to leave the whole case to the jury, as requested. And if this be so, the whole matter raised by the bill of exceptions is exhausted.

The Court disallowed the exceptions.

Agent for Pursuer—W. R. Skinner, S.S.C.
Agents for Defender—Philip Laing & Monro, W.S.

Tuesday, June 18.

DOBBIE *v.* DUNCANSON.

Sale—Fraud—Proof—Damages—Purchaser—Rental—Slump Sum.

Previous to the sale of a property, consisting of 67 subjects, the purchaser received from the seller a rental of £1201, 18s., in which three subjects were entered as "let on lease," and the rents specified, but the highest rent entered in the column for summation instead of the rent payable that year. Some time after the sale, the purchaser, in order to collect his rents, received a rental of £1159, 18s. as the rent actually payable that year. He nevertheless proceeded to complete his title to the property, made no offer to return it, and raised an action in which he claimed return of a sum proportioned to the difference between the two rentals, alleging that the sale had been effected by the fraud, concealment, and misrepresentation of the seller. Each party alleged that one Morrison, who had brought about the transaction, was the agent of the other; and several other points of fact were at issue between the parties. After argument on the relevancy, the Court thought it best "in the circumstances" to allow a proof before answer. *Held*, in fact, that Morrison was the agent of the purchaser, and that the property was of greater value than the price paid for it; and, in law, (1) that as no rental was mentioned in the deeds of sale, the sale was for a slump sum, and not by rental; (2) that the pursuer having qualified no damage, and made no offer of returning the property, was not entitled to claim damage on the allegation he would have offered a less price; (3) that the terms of the rental sufficiently warned the purchaser of the progression of the rentals; and (4) that it was the duty of a purchaser to make inquiries as to the property he was purchasing.

Actio quanti minoris—*Reparation.*

Opinion by Lord Kinloch that a defrauded purchaser is entitled to claim reparation on the principle of the *actio quanti minoris.*

Arrestment—Inhibition—Recal—Expenses—Interim Extract.

A pursuer having used arrestment and inhibition on the dependence of an action, the defender got them recalled by petition on caution, but the interlocutor made no reservation of expenses, and did not authorise interim extract. The petition process was extracted, and the defender proved successful on the merits. *Held* the defender was not entitled to ask in the principal action the expenses of having the arrestment and inhibition recalled; and that the Outer House interlocutor, having made no reservation of expenses, was final on the subject.

Observations on interim extract by the Lord President.

In October 1870 the pursuer purchased from the defender a tenement of shops and houses in Garscube Road, Glasgow, for the sum of £16,000. This sale, the pursuer alleged, was brought about through the agency of a Mr Morrison, acting for the defender in the transaction. The bargain was completed by missive offer, which bore to be written by Morrison for the pursuer, and by missive acceptance, written for the defender by his ordinary law agents. Neither in the missives nor in the disposition from the defender to the pursuer was there any mention of rental; but the pursuer alleged that the sale had taken place on a rental (A) of £1220, 18s., supplied by the defender to Morrison for him a few days previous to the sale. Shortly after the transaction was settled, the pursuer said he discovered that the rental was false in respect of over-statements of rent as regarded several of the subjects sold; and in respect that three shops were let on lease for a term of years, and that the rent payable at the end of the lease was entered on the said rental (A), instead of