having been brought before us by way of appeal, we must quash that part which allows proof, and that must be done *ante omnia*. Had the Sheriff-Substitute not fallen into this mistake the interlocutor would have ended in the usual way with the appointment of the trustee, and I think we must send back the case to the Sheriff-Substitute to complete his interlocutor. When that is done it will be final. In following this course we are not affirming the competency of the appeal. But it is the duty of this Court when any irregularity of this kind is brought before us, where the Sheriff-Substitute has acted beyond the statute and *ultra vires*, to put that right, and send the case back to the Sheriff-Substitute.

LORD MURE concurred.

LORD SHAND—In very recent cases the Court have expressed clear opinions that such proof was incompetent. Where an objection such as this is stated it admits of instant verification by the production of documents, or even by a diligence which might be granted for their recovery. No such course was followed here, and the proof allowed is plainly incompetent.

LORD ADAM was absent on circuit.

The Court pronounced this interlocutor :—

"Recal as incompetent that part of the Sheriff-Substitute's interlocutor, of date 19th May 1887, which allows a proof of the objection to the vote of Mr Thomas Anderson, and grants diligence: Remit to the Sheriff to complete his interlocutor in terms of the 70th section of the Bankruptcy (Scotland) Act 1856: Find the respondent entitled to expenses, modify the same to the sum of Five pounds five shillings, for which sum decern against the appellant for payment to the respondent."

Counsel for Appellant — Guthrie. Agent — Boyd, Jameson, & Kelly, W.S.

Counsel for Respondent—Ure. Agent—George Andrew, S.S.C.

Thursday, June 30.

FIRST DIVISION.

CAMPBELL AND OTHERS (RUSSELL'S TRUSTEES) *v.* RUSSELL OR GARDINER AND OTHERS.

Marriage-Contract—Whether Conveyance included Property Acquired by Wife Subsequent to Dissolution of Marriage.

Held, on the construction of an antenuptial marriage-contract, that money to which the wife succeeded after the dissolution of the marriage, was not carried by a clause in the marriage-contract conveying to her husband, "and his heirs and assignees whomsoever, all and sundry the whole means and effects, heritable and moveable, real and personal, now belonging or indebted and owing to her, . . . and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour."

By antenuptial contract of marriage dated 17th March 1857, entered into between William Russell, merchant in Glasgow, and Marion Paterson, daughter of the late John Paterson, merchant in Glasgow, Mr Russell assigned a life policy for £1000 to the trustees therein named for the purposes therein mentioned, viz.—"That the said trustees shall hold the said certificate or policy of assurance for behoof of the said Marion Paterson, in case she shall survive the said William Russell, but in case she shall predecease him, then for behoof of the children, if any, of the said intended marriage; and after the sums of money therein contained shall have become exigible, shall pay over the said sums and the bonuses that may be due thereon to the said Marion Paterson, whom failing to the child or children of the said intended marriage, equally among them, or the survivors of them." Mr Russell became bound duly to pay and report to the trustees the payment of the premiums. He further made over to "the said Marion Paterson, his promised spouse, in case she shall survive him, the whole household furniture, books, plate, and other household plenishing and effects of every description which now belong or shall at the time of his death belong to him, and that as her own absolute property."

The conveyance of Mrs Marion Paterson or Russell was as follows, viz.—"For which causes, and on the other part, the said Marion Paterson hereby assigns, dispones, conveys, and makes over from her, to and in favour of the said William Russell, her promised husband, and his heirs and assignees whomsoever, all and sundry the whole means and effects, heritable and moveable, real and personal, now belonging or indebted and owing to her, . . . and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour, and that as fully and effectually as if every particular of the said estate were herein particularly enumerated."

Mr Russell died on 29th August 1884, survived by his wife and by a son and three daughters. He left a trust-disposition and settlement dated 29th August 1879, by which he conveyed his whole estate to trustees for the purposes therein mentioned. Upon the death of Mr Russell Mrs Russell obtained payment and delivery of the provisions in her favour in the said marriage-contract. By an agreement dated 7th and 10th November 1885 Mrs Russell agreed "that all her separate estate belonging to her at the date of her marriage with the said deceased William Russell, or acquired during the subsistence thereof, and estimated, so far as hitherto realised and invested, at the sum of £2000 or thereby, conform to detailed statement of investments submitted by her to the first party, should be held as forming part of the testamentary estate of the said deceased William Russell."

On 28th August 1886 Mrs Russell died intestate, and her daughter Mrs Marion Agnes Russell or Gardiner was duly confirmed her executrix. A question arose as to the construction of the marriage-contract, and a Special Case was presented to the First Division of the Court of Ses-

sion, to which William Russell's testamentary trustees were the first parties; Mrs Marion Agnes Russell or Gardiner as executrix of her mother was the second party; John James Russell, the only son of the marriage, was the third party; and the daughters of the marriage were the fourth parties.

The parties of the first part claimed that they, as trustees and general disponees of the deceased William Russell, were entitled to the whole estate of which Mrs Russell died possessed (excepting the said provisions in her favour contained in the antenuptial contract), and that in virtue of the conveyance by her to her husband and his heirs and assignees contained in the said antenuptial contract, of all that should be belonging, owing, and indebted to her at the time of her death. The whole other parties maintained that Mrs Marion Paterson or Russell's estate fell either to be divided as intestate estate, and that her children as next-of-kin were entitled to the same, or alternatively that they were conditional institutes to their father under the destination in the said antenuptial contract, and as such entitled in their own right to the estate of their mother.

The judgment of the Court was craved on the following questions—"(1) Are the parties of the first part entitled to receive the estate of the said Mrs Marion Paterson or Russell (with the exception of the provisions in her favour in the said marriage-contract), and to administer the same as part of the estate of the deceased William Russell? (2) Does the estate of the deceased Mrs Marion Paterson or Russell fall to be administered as intestate estate, and to be divided accordingly among her children as her next-of-kin? Or (3) Are the third party and his three sisters conditional institutes under the destination in the said antenuptial contract, and as such entitled in their own right to the estate of their mother?"

It was argued for the first parties that the words of conveyance by the wife were quite distinct, and made clear her intention to make over three sorts of property to her husband—(1) all that she had at the date of the marriage; (2) all that she might acquire during the subsistence of the marriage; (3) all that should be belonging to her at the time of her death. The exception of the wife's provisions in the last case could have no meaning if her intention was to make over merely the *acquirenda* during the subsistence of the marriage. Cases where such a provision was sustained had occurred—*Grant* v. *Grant*, January 10, 1579, M. 3596. The case of *Wardlaw* v. *Wardlaw's Trustees*, July 7, 1880, 7 R. 1066, was distinguishable from the present case by the fact that in the conveyance by the husband, corresponding to the wife's conveyance, he made over to his wife one half of the *acquirenda*, and that what the wife conveyed was conveyed as outwith the *jus mariti*.

It was argued for all the other parties—(1) That the estate fell to be administered as intestate succession. In framing this deed a clause had evidently been omitted. In the conveyance by the husband the words "in case she shall survive him" were always inserted, and a clause similarly expressed had evidently been omitted *per incuriam* from the conveyance by the wife. There were a number of English cases in which the Courts had interpreted the language of the deed as indicating that the framer had intended that certain words which were absent should have been present—*Dickinson* v. *Dillwyn*, July 26, 1869, L.R., 8 Eq. 546; *Carter* v. *Carter*, July 31, 1869, L.R., 8 Eq. 551; *approved* in *Edwards*, December 6, 1873, L.R., Ch. App. 97. These views were adopted in *Wardlaw* v. *Wardlaw's Trustees*, *supra*. But at any rate, where such clauses were counterparts of each other, with the exception of a survivorship clause, that exception would not give a different meaning to the one clause from the other—*Earl of Fife* v. *Mackenzie*, March 14, 1795, Bell's Fol. Cas. 165; 6th March, 1797, 3 Pat. App. 549. Juridical Styles, ii., 204. (2) Further, it was argued that if the estate was not to be treated as intestate succession it went to William Russell's heirs and not to his assignees—*Graham* v. *Hope*, February 17, 1807, M. App. *voce* Legacy, No. 3; *Bell* v. *Cheape*, May 21, 1845, 7 D. 614; *Morris* v. *Anderson*, June 16, 1882, 9 R. 952; *Halliburton*, June 26, 1884, 11 R. 979.

At advising—

Lord President—This is a case of some delicacy, and that delicacy has been caused by bad conveyancing. It seems as if the clause in the marriage-contract had been framed so as to create the difficulty. In deciding between the competing constructions we must be influenced by general considerations as well as by the words of the deed itself. By this deed the husband conveys a policy of assurance for the sum of £1000, effected on his own life, to the marriage-contract trustees, and undertakes duly and regularly to pay and report to the trustees the payment of the premiums, and that is the only trust here.

The next provision is one by which the husband conveys and makes over to and in favour of Marion Paterson, his intended spouse, directly, the furniture and other household plenishing, and that as her own absolute property, but that conveyance is qualified by the words "in case she shall survive him." When we come to the counter obligation it is in these words—"The said Marion Paterson hereby assigns, dispones, conveys, and makes over from her, to and in favour of William Russell, her promised husband, and his heirs and assignees whomsoever, all and sundry, the whole means and effects, heritable and moveable, real and personal, now belonging or indebted and owing to her, . . . and all that she may acquire or succeed to during the subsistence of the said intended marriage or that shall be belonging, owing and indebted to her at the time of her death, with the exception of the provisions above made in her favour, and that as fully and effectually as if every particular of the said estate were herein particularly enumerated."

Now, the husband's trustees contend that there are here three different branches or parts in this conveyance by the wife to the husband. They say that there is conveyed, first, all the means and effects then belonging or indebted and owing to her; second, all that she might acquire or succeed to during the subsistence of the intended marriage; and third, what shall be belonging, owing and indebted to her at the time of her death, acquired by her between the dissolution of the marriage and her death. I do not think that that is a sound construction. There is doubtless a distinction be-

tween the first and second parts of the conveyance. The property of the wife at the time of the marriage is one distinct subject of conveyance, and her *acquirenda* during the subsistence of the marriage another distinct subject of conveyance, but there is no direct conveyance of her *acquirenda* between the dissolution of the marriage and her death.

The words used are "or that shall be belonging, owing and indebted to her at the time of her death." These are not words of conveyance, but merely explain that it is only what is still belonging to her at the time of her own death that is conveyed, and this will include both what was hers at the time of the marriage, and also what may have been acquired by her during its subsistence.

Therefore when the contract speaks of things "belonging to her at the time of her death" it does not necessarily mean subjects separate and distinct from what were hers at the date of the marriage and during its subsistence.

I think the natural construction of the deed is that the words "belonging to her at the time of her death" are only applicable to the things actually conveyed, and that the condition of her husband getting them is that they shall have remained hers until her death.

Another point is that the conveyance of the furniture and other household plenishing in her favour is qualified by the words "in case she shall survive" and that these words are not in the conveyance by the wife to the husband. Now, I think these words are to be implied because of the relationship between husband and wife, and in view of the events contemplated.

If the case had been put to the parties by their legal advisers—Suppose the husband dies in a year, and there is no child of the marriage, is it your wish that even in that case the wife, twenty years after the dissolution of the marriage, is never to have anything of her own, but that everything she may acquire even after her husband's death is to go to her husband's heirs and assignees? I apprehend their answer would have been that they never contemplated such a thing. I consider it would be monstrous to say that this lady if she had been left a young widow would have been penniless for life, and such a construction is repugnant to common sense, and only to be adopted if the plainest words had been used.

Badly as it is expressed, the clear meaning of the parties here evidently was that the husband was to get the provisions in his favour in case he survived her, or, in other words, in the event of her predeceasing him.

There is not much light to be got from the cases, but the considerations which influenced us in the case of *Wardlaw* v. *Wardlaw's Trustees*, July 7, 1880, 7 R. 1066, apply very strongly here. There the conveyance by the wife was in these terms—"In trust for behoof of the said William Wardlaw and Margaret Richardson, in conjunct fee and liferent, for the liferent use allenarly of the said William Wardlaw, and exclusive of the *jus mariti* or right of administration of the said William Wardlaw, and for the use and behoof of the children to be procreated betwixt the said William Wardlaw and Margaret Richardson, in fee, and that in such proportions as the said William Wardlaw shall appoint by a writing under his hand, which failing equally among them, the said children, share and share alike, all and sundry whatsoever lands, heritages, sums of money, and other funds or effects, heritable and moveable, presently owing or belonging to or which she, the said Margaret Richardson, may succeed to or acquire in any manner of way, with the whole rents," &c. Now, these words are quite as general and comprehensive as anything here, and yet we held they were limited, and that the *acquirenda* by the wife after the husband's death were not included. The considerations which guided us there were the same general considerations which should influence us here, though it would not be correct to say that the one case rules the other.

In the last century, in the case of the *Earl of Fife* v. *Mackenzie*, March 14, 1795, Bell's Fol. Cas. 165, and March 6, 1797, 3 Pat. App. 549, there was the very same contrast between the clauses in a marriage-contract as we have here. The words in the husband's conveyance were—"Assigns and dispones to and in favour of the said Mrs Margaret Duff, in case she shall happen to survive him, and to her heirs, executors, and assignees, the whole moveable goods, gear, and effects which shall belong to him at the time of his death, including heirship moveables, household furniture, outsight and insight plenishing, silver plate, jewels, and linen, and in general, all moveable goods and effects of whatever kind and denomination that shall belong to him at the time of his death, and that free of all debts and deductions whatever." Those in the wife's were —"To convey to her husband, his heirs and assigns, her whole heritable and moveable estate which presently do belong to her, or which may fall, accresce, or belong to her at anytime hereafter during the subsistence of the marriage." . . . She further "assigns and dispones to and in favour of the said Alexander Udny, Esquire, her husband, his heirs and assignees, the whole moveable goods, gear, and effects which shall belong to her at the time of her death, including heirship moveables, household furniture, outsight and insight plenishing, silver plate, jewels, and linens, and in general all moveable goods and effects of whatever kind or denomination which shall belong to her at the time of her death." Notwithstanding the contrast, the Court, in pronouncing judgment, found that "the clause in the said contract giving to Alexander Udny Duff, his heirs and assignees, the moveable effects that should belong to Mrs Udny Duff at the time of her death, does not entitle the heirs or executors of Mr Udny Duff to make any claim to these effects." . . . So the Court must have disregarded the contrast, and read the clauses as if they had both contained the same qualification.

I am therefore for answering the first question in the negative, the second question in the affirmative, and the third question in the negative.

LORD MURE—I am of the same opinion. There is no doubt that if this clause is to be construed as the first parties maintain, the effect will be to make over to the husband's representatives everything which the wife acquired even after the death of her husband, and in one reading of the clause we may put that construction upon it. But it is settled in the cases to which your Lordship referred, and especially in that of *Wardlaw* v. *Wardlaw's Trustees*, *supra cit.*, that where a

clause admitting of that construction may be construed in favour of the wife, the more equitable construction is to be preferred. This is borne out not only by the case of *Wardlaw* in this Court, but also by the case of *Edwards*, 9 Ch. App. 97, in England. I think your Lordship's construction is consistent with the intention of the parties, and that this is a correlative clause to that in which the husband provides for the wife. I do not see how else the wife could live during her viduity. I also think the principle which ruled in *Lord Fife's* case, *supra*, entitles us to decide as your Lordship proposes.

LORD SHAND—It appears to me clear upon general considerations that nothing short of the most explicit and express words should lead us to prefer the heirs and assignees of the predeceasing spouse to the surviving spouse, who might long survive and marry again.

In this case the spouses were married in 1857, and both survived the marriage for twenty-seven years, and the survivor—the wife—for twenty-nine years, but the case may be figured, and ought to be taken into view, of a husband dying a year after marriage. His heirs and assignees might in such a case, on the first party's construction, succeed to an estate largely acquired after his death. The propriety of the thing would lead the Court to reject such a claim on the part of the husband's trustees if it can. No doubt such a conveyance might be made, or might be gathered from such words as are used here, if there were special reasons assigned in the conveyance for such a provision, but if there is the possibility of the other construction being the correct one we should give effect to it. It was so held in the cases in England cited to us, and so also in the Scotch cases of *Wardlaw* and the *Earl of Fife*, *supra cit.* Taking the deed in that view there is not much difficulty in reading it as your Lordship proposes. No doubt it is possible to read it as if the first, second, and third parts of the clause in dispute were all three different alternatives, as the husband's trustees contend; but I think the clause may quite reasonably be read in the other way, viz., that the third branch is only descriptive of the property conveyed. There is no conveyance of the *acquirenda* between the dissolution of the marriage and the wife's death, and I prefer to read the words "belonging to her at the time of her death" as only an amplification of what is conveyed in branches one and two. The third branch sweeps up what has gone before to avoid mistake as to what is really conveyed, and I read after the words "at the time of her death" the words "in case she predecease." In that view of the case I agree with your Lordship that we should answer the second question in the affirmative.

The words "with the exception of the provisions above made in her favour" do create a difficulty, but it was well met by Mr Murray. They may be taken, as he suggests, as words of style merely, and they are even found in the form in the Juridical Styles which he read. They are to be taken as qualifying the words in the second branch of the conveyance, and not as implying a conveyance of what is specified in the third branch.

The Court answered the first question in the negative, the second question in the affirmative, and the third question in the negative.

LORD ADAM was absent on Circuit.

Counsel for the First Parties—D.-F. Mackintosh—Low. Agent—Donald Mackenzie, W.S.

Counsel for the Second Parties—James Clark. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Third and Fourth Parties—Jameson—Graham Murray. Agents — Fraser, Stodart, & Ballingall, W.S.

COURT OF JUSTICIARY.

Thursday, June 30.

PERTH CIRCUIT.

(Before Lord Craighill.)

H.M. ADVOCATE *v.* SMYTH.

Justiciary Cases—Embezzlement—Theft—Alternative Charge—Relevancy.

Held relevant to charge a person in a position of trust with breach of trust and embezzlement, or alternatively with theft.

John Smyth was charged before the Circuit Court of Justiciary at Perth with (1) breach of trust and embezzlement, or alternatively (2) with theft.

The subsumption contained the following narrative:—"You having, during the period between the 12th day of February 1883 and the 31st day of March 1887, or part thereof, been in the employment of the Errol Chemical Company, manufacturing chemists, having their head office in or near Port Dundas Road, Glasgow, as manager of their works, at or near Errol Railway Station, in the parish of Errol, and county of Perth, or in some similar capacity, and you having while so employed been entrusted and authorised by the said company, . . . to receive payment of accounts due to the said company by their customers, and to grant discharges therefor, and it being your duty, and in accordance with the trust reposed in you as aforesaid, on receiving payment of said accounts from customers of the said company, forthwith, or soon after receiving payment, to pay over, or faithfully account for, to the said company, or apply in connection with the business of the said company, the sums of money so received by you, and you having in the course of your said employment (1), on or about the 26th day of March 1886, in or near Perth, the place more particularly being to the prosecutor unknown, received and collected from Patrick Constable, farmer, then and now or lately residing at or near Balledgarno, in the parish of Inchture, and county of Perth, the sum of £50 sterling or thereby . . . in payment of two accounts . . . due by the said Patrick Constable to the said company, you did fail to pay over or faithfully account for the said sum of £50 sterling or thereby to the said company, or apply the same in connection with the business of the said company, and did, time last above libelled, . . . at or near the office or