not adverse to this view. On the contrary, it appears to him to be supported by the reasoning on which these decisions proceeded.

"He does not think that if the pursuer's author did originally acquire such a right, it can be held to have fallen on the ground that he and the author of the defenders Dixon's trustees were taken bound, 'within three years,' each to make their half of the street. There appears to him to be no ground for holding that this was meant to be a limitation of the obligation, so that the pursuer could not be called upon to fulfil it after the lapse of three years.

"But the question remains, whether the superiors, the Trades' House, having imposed the proper counterpart of the pursuer's obligation upon the feuar of the opposite ground, the superiors can now be decerned against as debtors in the obligation. The Lord Ordinary thinks that is not their position. Any *jus crediti* in the pursuer's author was only acquired by implication from the nature of the transaction; and the implied obligation of the superiors must, it is thought, be held to have been of such a kind that it was fulfilled by their taking the opposite feuar bound to make his half of the street, that being a liability imposed for the mutual benefit of the feuars, and prestable by them. Accordingly, the decree now pronounced in terms of the first declaratory conclusion is, in so far as regards the Trades' House, merely a decerniture against them for any interest they may have in the matter, the Lord Ordinary being of opinion that they cannot be called upon to do anything towards making or opening upthe street. The late Mr Dixon obtained a reconstitution of the feu now held by his trustees, without any obligation to make the street. But it was conceived in such terms that admittedly it does not affect the present question.

"Another question between the parties in reference to the first declaratory conclusion is, whether the pursuer is entitled to have the street opened up as a public street. In the titles to both feus, the pursuer's and that of Dixon's trustees, the streets by which they are bounded are spoken of as public streets. The Lord Ordinary is of opinion that the pursuer is entitled to have the street now in question opened as a public street, in the sense of the feu charters, *i.e.*, in the ordinary legal sense of that expression. It is not *hujus loci* to inquire what effect that may have with reference to the provisions of the Glasgow Police Act as to the custody and maintenance of streets.

"By the second conclusion the pursuer seeks to have it declared that the superiors and Dixon's trustees are, one or other or both of them, bound to open up and form the street, the expense of forming and causewaying the eastmost half of it being borne by the pursuer. The Lord Ordinary has already said that he does not think any such obligation lies upon the superiors. And as to Dixon's trustees, he does not see his way to give decree against them in terms of this conclusion, as it is framed. They can only be liable to do that which the superiors took them bound to do, viz., to causeway the half of the breadth of the street, and maintain and uphold the causeway in all time thereafter, and to keep in conformity, as to level, to the scale laid down in the plan. The Lord Ordinary is of opinion that the pursuer would have been entitled to decree to that effect against Dixon's trustees if the conclusion had been so framed. But there is no obligation upon them to make the entire street, partly at their own expense and partly at the expense of the pursuer, as concluded for. While the Lord Ordinary thinks that Dixon's trustees must be assoilzied from this conclusion, as it is framed, he thinks that it is only fair to the parties that he should express his opinion upon the point that was discussed at the bar on this part of the case, viz., whether the pursuer is entitled to insist upon Dixon's trustees implementing the obligations as to forming and maintaining the street which are contained in their feu-charter.

"The remaining conclusions are directed against Allan's trustees and Messrs Allan & Mann, to have them prevented occupying the *solum* of the street forming the western boundary of the pursuer's ground, and also the crossing of the continuation southward of the line of that street, with the continuation westward of the line of the street which forms the pursuer's southern boundary. These defenders hold their property under Dixon's trustees, who are bound to relieve them of any obligation which may be held to exist as to making the street. They did not maintain in argument that they are entitled to occupy any part of the street directly opposite the western side of the pursuer's feu. But they contend that he has no right to object to the ground which would form the crossing of the two streets forming his western and southern boundaries at the south west corner of his feu, being enclosed and occupied by them. The Lord Ordinary is of opinion that this is much too strict a reading of the description of the subjects and the provision as to streets in the feu-charters. If applied to all the four corners of the pursuer's feu, it would make these provisions practically useless. He thinks it is excluded by a fair interpretation of the deeds on which the reference to streets in the description of the subject, and in the obligation on the feuar in regard to them, must be held to imply that there is ish and entry by them to and from the subject feued. The provision for having the streets formed on one level aids this interpretation. The Lord Ordinary also thinks that on this matter reference may legitimately be made to the plan, as showing the nature of the streets in this respect."

Dixon's Trustees and Allan's Trustees reclaimed.

GORDON, Q.C., and A. MONCRIEFF for Dixon's Trustees.

FRASER and MACLEAN for Allan's Trustees.

CLARK and LEE for Trades' House.

WATSON and LAMOND for pursuer.

The Court adhered with a qualification, declaring that they did not mean by *public* street that it was to be so in the sense of the Glasgow Public Act, or to any other effect than that the public were to have the full right to use it.

Agents for Pursuer—W. & J. Burness, W.S.

Agents for Trades' House—Hamilton, Kinnear, & Beatson, W.S.

Agents for Dixon's Trustees—Melville & Lindesay, W.S.

Agent for Allan's Trustees—J. Galletly, S.S.C.

Friday, June 11.

FIRST DIVISION.

KNOX'S TRUSTEES *v.* KNOX AND OTHERS.

Trust—Power of Apportionment—Annuity—Marriage-contract—Special Legacy. In a marriage-

contract £4000 was provided to the children of the marriage, the husband reserving a power of apportionment. In a subsequent testamentary deed, the husband apportioned that sum, giving a certain share to one of his children. This share he afterwards, on the death of the child, revoked by a codicil, in which he gave a certain annuity to his granddaughter until she attained twenty-one years of age, when his trustees were to pay her one-half of the residue of his estate, and to hold the other half for her in liferent and her children in fee. He provided other annuities. After his death, *held* (1) that the granddaughter, now the only party in right of the £4000 in the marriage-contract, was entitled to that sum and also to the annuity; and (2) that payment of the annuities must be made out of the capital of the trust-estate, in so far as the annual income was insufficient to pay them.

By antenuptial contract of marriage, dated January 1831, Robert Knox, *inter alia*, bound and obliged himself and his heirs, executors, and successors, to pay to the child or children of his then intended marriage the sum of £4000 sterling, payable at the first term of Whitsunday or Martinmas after his death. The contract of marriage declared that it should be in the power of Knox to divide and apportion, as he should think proper, among the children of the marriage the provisions in their favour therein contained, and, failing such division, that the said provisions should belong to and be divided among the said children equally, share and share alike. The contract also declared that the provisions in the said contract of marriage, conceived in favour of the child or children of the said intended marriage, should be in full satisfaction to them of all bairns' part of gear, legitim, portion-natural, executry, and everything else that they could ask or claim by and through the decease of Knox excepting what he might think fit to bestow of his own good will only. The marriage in reference to which the said contract was entered into took place shortly thereafter, and was dissolved by the death of Mrs Knox in 1846. The following children were born of the marriage, viz., (1st) Bruce Ellis Knox, afterwards married to John Gilmer, now residing in London; (2d) Robert Knox junior; (3d) James Dunlop Knox. The said Bruce Ellis Knox, then Mrs Gilmer, died in Mauritius, intestate, in the year 1858; the said James Dunlop Knox died intestate in the month of April 1864, and the said Robert Knox junior, died on the 16th day of March 1865. All of them predeceased the said Robert Knox, and none of them left issue except the said James Dunlop Knox, whose widow gave birth, on 29th November 1864, to a posthumous child, Miss Elizabeth Bruce Gordon Knox.

Robert Knox died on 18th December 1865, leaving a trust-disposition and settlement dated the 27th day of June 1864, and two codicils, both dated 1st May 1865. By the trust-disposition and settlement Knox directed his trustees, *inter alia*, to pay to the present claimant, Masterton Ure Knox, brother of the truster and Miss Christian Knox, his sister, a certain annuity, commencing the first half-yearly payment thereof at the first term of Whitsunday or Martinmas that should occur after his death for the half-year preceding, and so on thereafter while the same was payable. The annuity was increased by a subsequent codicil. He further directed his trustees to pay to Mrs Victoria Knox, widow of his son, the said James Dunlop Knox, such a sum as, along with interest at the rate of five per centum per annum on such sum as she might have right to under the contract of marriage of herself and her husband, or any will made by him, or as his widow, and any annuity she might be entitled to under these deeds, as should make up an amount of £150 per annum. The trust-disposition and settlement proceeds to narrate the terms of the said contract of marriage between the truster and his wife, and of a contract of marriage between the said John Gilmer and Bruce Ellis Knox, and an obligation thereby incurred by him in favour of Bruce Ellis Knox, and further mentions that the truster had made advances to Mrs Gilmer during her life, and also to the said James Dunlop Knox for his commission in the army, and thereafter, greatly exceeding their proportions of the sum of £4000 provided to the truster's children by his said marriage-contract, had it been equally divided among his whole children. The deed then continues: "Therefore, and in virtue of the powers contained in my said contract of marriage, I do hereby divide and apportion the foresaid sum of £4000 as follows, viz.:—£5 thereof to the heirs and representatives of the said Bruce Ellis Knox or Gilmer, as coming in her place; the like sum of £5 to any child or children that may be born to the said James Dunlop Knox as coming in his place, whom failing to his heirs and representatives, and the balance of the said sum of £4000 to the said Robert Knox junior, his heirs and representatives; and lastly, and with regard to the residue and remainder of any estates generally above disponed, I direct my said trustees to pay, assign, or dispone the same, or the price and produce thereof, to and in favour of my said son, Robert Knox junior, and his heirs and assignees whomsoever, which provisions in favour of my said children or their issue, or heirs and representatives, shall be and are hereby declared to be in full of all claims for legitim, share of executry, or otherwise, by and through the death of their late mother, or my death, or under the trust-disposition and settlement of their late grandfather James Dunlop, or the contract of marriage between me and their late mother." The first of the foresaid codicils contains the following bequest in favour of the claimant, Masterton Ure Knox and his sister the said Christian Knox:—"I, Robert Knox, within named and designed, hereby instruct my trustees, in place of the annuity provided to them, to pay to Christian Knox and Masterton Ure Knox, my brother and sister, and the survivor of them, an annuity of £200 sterling per annum; and that during the whole term of their natural lives, with corresponding interest and penalty thereto." By the second codicil Robert Knox revoked and recalled the whole provisions in favour of the said Robert Knox junior, and his heirs, contained in the trust-deed, Robert Knox junior being then dead. Further, he directed his trustees to pay to the said Elizabeth Bruce Gordon Knox an annuity of £200 until she should attain the age of twenty-one years or be married; and, on her attaining the said age, he directed his trustees to pay and dispone to her one-half of the free residue and remainder of his means and estate; and, as regards the other half thereof, he directed his trustees to hold the same in trust for behoof of the said Miss Elizabeth Bruce Gordon Knox in liferent and her children in fee, the fee to be paid, assigned, or disponed at her death to her children in such proportions as she might appoint by any writing under her hand,

which failing, equally share and share alike. The trustees of Robert Knox, pursuers of the present process, stated that in the event of the sum of £4000 provided in the marriage-contract of the said Robert Knox, being held to be claimable out of the trust-estate, the estate left in their hands would be insufficient to pay out of the revenue derivable therefrom the annuities provided by the truster, including the annuity of £200 provided to the said Miss Elizabeth Bruce Gordon Knox.

In this action Miss E. B. G. Knox claimed the sum of £4000 under the marriage-contract of 1831, and also the annuity of £200 under the trust-disposition and relative codicil; or otherwise, and in the event of the free revenue of the estate being insufficient to pay in full the annuities thereby bequeathed, she claimed that the free revenue be divided between herself and the other annuitants in shares proportional to the amount of the annuities under the conditions and provisions set forth in the trust-disposition. On the other hand, it was pleaded by the claimants that Miss E. B. G. Knox was not entitled to the £4000 and also to the testamentary provision, and that payment of the annuities must be made out of the capital of the trust-estate in so far as the annual proceeds were insufficient to pay them.

The Lord Ordinary (JERVISWOODE), on 3d March 1869, sustained the claim of Miss E. B. G. Knox to the £4000, and also to the annuity of £200, and on 25th March sustained that claimant's objection to payment of the annuities out of capital.

A reclaiming note was presented.

CLARK and GLOAG for Masterton Ure Knox.

GORDON and MARSHALL for Elizabeth B. G. Knox.

SHAND for Knox's Trustees.

At advising—

LORD PRESIDENT—I think the Lord Ordinary is right in one of the points which he has decided, and wrong in the other. The first point depends on the construction of Knox's settlement, taken in connection with the position of Knox as a debtor under his marriage contract, and that, I think, has not been sufficiently appreciated either by the Lord Ordinary or the reclaimer. Under that marriage contract Knox became bound to pay to the child or children of the marriage the sum of £4000 at the first term of Whitsunday or Martinmas after his death, and then the deed contained a power of apportionment which Knox undoubtedly was in a position to exercise in any way he pleased. Lastly, the deed declared that these provisions were to be in full satisfaction to the children of all bairns' part of gear, *legitim*, and so on. I need not say that this is as completely a debt of Knox as any other debt, whether it be preferable or not, in competition with other creditors.

Knox did propose in his testamentary deed to exercise this power of apportionment vested in him by the marriage contract; and, in the first place, it must be observed that in the first purpose of his trust-deed he provides for the payment of all his debts, and of course, among others, he directs his trustees to pay this £4000; and the exercise of this power of apportionment is only a direction to these trustees to pay that debt in certain proportions. What he says is this:—"Therefore, and in virtue of the powers contained in my said contract of marriage, I do hereby divide and apportion the foresaid sum of £4000 as follows, viz.;—£5 thereof to the heirs and representatives of the said Bruce Ellis Knox or Gilmor, as coming in her place; the like sum of £5 to any child or children that may be born to the said James Dunlop Knox, as coming in his place, whom failing to his heirs and representatives; and the balance of the said sum of £4000 to the said Robert Knox junior, his heirs and representatives." Whether this was a good exercise of the power may admit of doubt. We don't know what his intention was in giving any part to the heirs of Mrs Gilmer, being her children or descendants, and whether that made the apportionment bad, or whether it was illusory altogether; but it is not necessary to consider that, for the codicil, revoking the settlement in part, put an end to this exercise of the power of apportionment. It removed that exercise of the power out of the deed altogether, and left the provision of £4000 to stand in the marriage contract as formerly. Then, on his death, Miss Elizabeth Knox being the only one in a position to claim this debt, was entitled to the whole sum. It is said that the provisions made in the codicil for Miss Elizabeth Knox are such that she cannot at once claim the provision in the marriage contract and also the provision in the codicil; that she is barred from claiming the £4000, because that is inconsistent with the settlement. The principle of that argument is no doubt well established and just, but it does not apply. In the first place, there is no sufficient evidence that the testator intended to deprive Elizabeth Knox of her legal rights as a creditor under the marriage contract as a condition of her taking the provision under the codicil. If Mr Knox had any such intention he might very easily have expressed it; for, while recalling the provision to Robert Knox, if he did not mean the necessary legal effect to follow he might have said so, but all he said was this:—"I recall the whole provisions in favour of him and his heirs contained in the foregoing settlement: Farther, I do hereby direct my trustees to pay to my granddaughter, Elizabeth Bruce Knox, an annuity of £200 until she attains the age of twenty-one years or is married; and, on her attaining the said age, I direct my trustees to pay, assign, and dispone to her one-half of the free residue and remainder of my means and estate; and, as regards the other half thereof, my said trustees shall hold the same in trust for behoof of my said granddaughter in liferent and her children in fee." I can see nothing in that inconsistent with her taking, in the first place, that provision to which she was entitled as a creditor under the marriage contract—*i.e.*, to the £4000. If mere conjecture were admissible, Knox may be supposed to have thought himself entitled not to consider the marriage contract at all, but we cannot give effect to such conjectures of probable intention, and must take the settlement as we find it. I have therefore no doubt that Elizabeth Knox is entitled to the £4000 without prejudice to her right to the provision secured to her by the codicil.

Then as to the question of the annuities, dealt with by the interlocutor of 25th March, I think the Lord Ordinary is clearly wrong. The proposition which was pressed upon us was, that the annuities are payable out of income, and if there be not income sufficient to pay them in full, they must suffer abatement. The general rule, I think, as between annuitants and the residuary legatee, is just the reverse; an annuitant is a special legatee, and not the less so because the legacy is payable annually, instead of all at once. The rule is that special legacies do not suffer abatement as

in a question with the residuary legatee, and that the residuary legatee takes only what is left after all the special legacies are paid. All this is so clear, that there is perhaps no direct authority for it. But as in most such cases, though the principle is well settled, we often find that in England there are many authorities, and accordingly we find in English books that the rule is stated in the same way (Williams on Executors, i., 2, 61). That is Scotch as well as English law, and applying that principle here, I think the annuities must be paid in full, though the residuary legatee may be made to suffer thereby.

The other Judges concurred.

Agents for Pursuer—Hill, Reid, & Drummond, W.S.

Agents for M. U. Knox—Tods, Murray, & Jameson, W.S.

Agent for E. B. G. Knox—Lockhart Thomson, S.S.C.

Friday, June 11.

PENNEL *v.* MALCOLM.

Teinds — Parish — Disjunction and Annexation. Circumstances in which *held* that a decree of disjunction and annexation was *quoad omnia.*

In 1865 Pennell, the minister of Ballingry, obtained an augmentation of stipend. To the locality following thereon it was *inter alia* objected by the minister as follows:—

"The lands and barony of Balbedie, consisting of the lands or farms of Easter and Wester Balbedie and Craigend, now belonging to the respondent Sir James Malcolm, as heir of entail, and to Lady Mary Malcolm to the extent of the rents of Wester Balbedie, to which she has right under a bond of locality in her favour, lying in the parish of Ballingry, have been omitted from the said state and scheme of locality. These lands of Balbedie originally formed a detached portion of the parish of Auchterderran; but after John Malcolm, the proprietor thereof, acquired the estate of Lochore or Inchgall, in the parish of Ballingry, with the patronage of that parish, he wished to get them disjoined from Auchterderran and annexed to Ballingry, so that the whole of his lands might be in the parish of which he was patron; and he accordingly applied, with concurrence of the Presbytery of Kirkcaldy, to the Lords Commissioners for Plantation of Kirks and Valuation of Teinds, to disjoin the said lands of Balbedie from the parish of Auchterderran, and to annex them to the parish of Ballingry, under reservation of the interest of all parties, especially of the minister of Auchterderran, in what was then payable from the said lands; and their Lordships, on or about the 21st July 1669, granted the desire of the application, and disjoined the said lands of Balbedie from the parish of Auchterderran, and annexed them to the parish of Ballingry, under said reservation."

"The disjunction and annexation above mentioned was a disjunction and annexation *quoad omnia* under the foresaid reservation, and was at the time, and has ever since been, acted on as such. In a charter of the lands and estate of Balbedie, granted by the said John Malcolm in favour of Michael Malcolm, his son, immediately after the disjunction and annexation took place, he describes these lands as 'Nupir infra parochiam de Auchterderran, nunc vero in parochia de Ballingrie jacen,' and they have ever since been described in all the title-deeds and tacks thereof as lying in the parish of Ballingry. They have also been inserted in all the valuation rolls of the county, old and new, as in the parish of Ballingry, and have been assessed for and paid all public taxes and parochial burdens as in that parish. They have likewise been delineated in the Ordnance Survey and other maps as in that parish. Since the date of the said disjunction and annexation, the tenants and inhabitants of the said lands have resorted to the church of Ballingry as their own parish church, for hearing the word and receiving the sacraments. The ministers of Ballingry have visited them as their parishioners. Elders in the parish of Ballingry have sometimes been elected from among them. Births, marriages, and deaths among them have been entered in the register of Ballingry. On occasion of marriages among them the banns have been proclaimed in the parish church of Ballingry, and the poor among them have been supported out of the poor's funds of the parish of Ballingry."

The respondent maintained that those lands of Easter and Wester Balbedie and Craigend, forming part of the lands and barony of Balbedie, have been omitted from the state of tiends and interim scheme of locality, because they were not situated in the parish of Ballingry, but in the adjoining parish of Auchterderran, and alleged that these lands pay stipend to the minister of Auchterderran, and have done so from time immemorial.

A proof was allowed, and thereafter the Lord Ordinary (MURE) pronounced this interlocutor:—

"*5th March* 1869.—The Lord Ordinary having heard parties' procurators, and considered the closed record in the question between the minister and the respondent Sir James Malcolm, proof adduced, and whole process, Finds that the lands of Easter and Wester Balbedie and Craigend, belonging to the respondent, are situated in the parish of Ballingry, and that the teinds thereof fall to be localled on for stipend in that parish, under reservation of the right of the minister of Auchterderran to payment out of the teinds of the said lands of the stipend in use to be paid out of the same to the minister of Auchterderran at the date of the decree of disjunction and annexation in 1669: Sustains the objections to the scheme of locality in so far as they relate to the said lands of Easter and Wester Balbedie and Craigend, and remits to the clerk to rectify the scheme, in terms of the above finding: finds the respondents liable in expenses, of which allows an account to be given in, and remits the same when lodged to the auditor to tax and report, and decerns.

"*Note.*—It does not, in the opinion of the Lord Ordinary, admit of doubt that in the year 1669 the lands of Balbedie, belonging to the respondent, were disjoined from the parish of Auchterderran by a decree of the High Commission of Teinds, and annexed to the parish of Ballingry, and the principal question raised for decision is, whether they were so disjoined and annexed *quoad omnia* or *quoad sacra* only?

"No decree of annexation has been recovered; and as it appears that there are no books in the Teind Office containing original decrees of disjunction and annexation of an earlier date than 1700, no extract decree can now be obtained. But the fact that proceedings were taken before the High Commission in 1669, relative to the