COURT OF SESSION.

Friday, October 27.

FIRST DIVISION.

[Lord Young, Ordinary.

FORREST (SOUTER ROBERTSON'S TRUSTEE) *v.* JAMIESON AND OTHERS.

Bankrupt—Trust—Marriage-Contract—Provisions to Children—Husband and Wife.

A father disponed to his son two heritable estates, reserving his liferent in the first. Thereafter his son disponed the second in liferent to his father, and in fee along with the first to certain trustees, for the end that they should apply "the free income to the maintenance and education of the truster's eldest or only son, or of his eldest or only daughter," and should make over the trust-estate to the eldest or only son, or failing a son to the eldest or only daughter, when he or she attained the age of twenty-one years or was married. He reserved his own liferent and the fullest powers of management, and a power of burdening the estates to the extent of £100 a-year in favour of his wife, and it was provided that the trustees should enter upon the possession and management of the said estates only on the death of the truster. Under this trust-disposition the trustees made up a title to the estate. The truster thereafter married, executing a marriage-contract in which he exercised the power of burdening his estates reserved in the trust-deed and making provisions for the children of the marriage "other than the child who shall succeed to the" estates disponed in the trust-deed. The truster thereafter became bankrupt. In an action by his trustee in bankruptcy against the trustees appointed by his deed and the eldest child of the marriage—*held* that the trust-deed, being of a testamentary and gratuitous character, was not of itself good against creditors, and had not been so incorporated with the marriage contract as to make it so. *Diss.* Lord Deas, upon the ground that the trust-deed being *ex facie* an absolute conveyance, and the references to it in the contract of marriage being sufficient to incorporate it therewith, it must be held to be effectual against creditors.

On 2d December 1862 David Souter Robertson disponed to his eldest son Stewart Souter Robertson the lands of Lawhead-Tarbrax, and Easterhouse, in the county of Lanark, reserving to himself the liferent use of the lands of Lawhead-Tarbrax. By trust-disposition, dated 12th April 1862, Stewart Souter Robertson (the son) disponed both parcels of land to the defender George Auldjo Jamieson and other trustees, and the lands of Easterhouse to his father in liferent. He reserved also for himself the liferent use, possession and enjoyment of both parcels of lands, and the uncontrolled management thereof during all the days of his life from and after the death of his said father. He also reserved to himself a power of burdening the lands with an annuity in favour of any wife he might marry to an amount not exceeding £100 a-year. The trustees accepted and completed their title to the lands by notarial instrument, recorded 17th April 1872. They also, believing themselves vested in the fee of the estate, executed various deeds affecting it. The purposes of this trust-deed were—(1) Payment of the expenses of the trust-deed and of trust-management: (2) Payment out of income of public burdens, interest of debts affecting or payable out of the trust-estate, repairs, and any annuity to the truster's wife under his said reserved power: (3) Application of the free income to the maintenance, education, and advancement of the truster's eldest or only son, or of his eldest or only daughter failing a son, or in the event of such son's predecease before the period of conveying the trust-estate to him, any surplus of income, to be applied to reduction of any debts which might then affect the trust-estate or to be added to the trust-capital: (4) On the truster's eldest or only son attaining the age of twenty-one years, or failing sons, upon his eldest or only daughter attaining that age or being married, whichever event should first happen, his trustees were to convey and make over the trust-estate as then held by them, and subject to any debts or incumbrances which might affect the same, to such eldest or only son or eldest or only daughter, as the case might be, and to his or her heirs or assignees whomsoever.

On 29th April 1862 Stewart Souter Robertson was married to Ann Scrivenor Hamilton, and on 24th March 1863 a son, David J. Robertson, who was sisted as a defender in the action, was born. It was averred by the defender that the engagement on which this marriage followed took place in July 1861, and that the disposition by David Souter Robertson to Stewart Souter Robertson, and the disposition by the latter to his trustees, had reference to this marriage.

A marriage-contract was executed on April 26th 1862 between Stewart Souter Robertson and Miss Ann S. Hamilton, to which Miss Eliza Hamilton, her sister, was a party, binding and obliging herself in the event of her succeeding to the estates of Fairholm to pay over to the marriage-contract trustees the sum of £2000. In this contract reference was made to the trust-disposition in the following terms:—The marriage-contract provides an annuity of £300 to the wife in the event of her survivance, restrictable to £150 in the event of her entering into a second marriage; and in security so far of this personal obligation, and without prejudice thereto, "the said Stewart Souter Robertson, in virtue of a power to that effect reserved to him in a trust-disposition dated 12th April 1862, of the estates of Lawhead-Tarbrax, and Easterhouse, in favour of George Auldjo Jamieson, accountant in Edinburgh, and other trustees, for the purposes therein specified, hereby provides and dispones to the said Ann Scrivenor Hamilton in liferent during all the days of her lifetime after the death of his said father and him, in case she shall survive them," a free yearly annuity of £100 furth of the lands of Lawhead-Tarbrax, and others, and the lands of Easterhouse and others, which are all thereby disponed to her in security. Further, the contract binds the said Stewart Souter Robertson "to make payment to the child or children to be procreated of the marriage hereby contracted, who shall be alive at his death, other

than the child who shall succeed to the said estates of Lawhead-Tarbrax and Easterhouse under the directions with reference to the destination of these estates contained in the said trust-disposition thereof in favour of George Auldjo Jamieson and others, as trustees foresaid, and to the issue then alive of any such child or children who shall not succeed as aforesaid who shall have previously died leaving issue, of the sum of £5000 sterling, at the first term of Whitsunday or Martinmas after the death of the said Stewart Souter Robertson," &c. On 15th September 1874 Stewart Souter Robertson's estates were sequestrated, and the pursuer appointed trustee. Thereafter the pursuer brought an action of declarator to have it found and declared that the lands of Lawhead-Tarbrax, and of Easterhouse were transferred to him and vested in him by his election as trustee, or alternatively that the liferent use of the said lands, in so far as the defenders might be concerned in the management thereof, was transferred to the pursuer and vested in him as trustee. A supplementary summons was thereafter brought, concluding for reduction of the trust-disposition of 12th April 1862.

David Souter Robertson, eldest son of Stewart Souter Robertson, with his father the said Stewart Souter Robertson, as his administrator-in law, was afterwards sisted as a defender in the action, and Mr James Bruce, W.S., appointed his curator *ad litem*.

The pursuer pleaded—"3. The operation of the said trust-disposition being postponed to the bankrupt's death, the lands and others in question fall under the intervening sequestration of his estates. 4. The said trust-disposition not being a *de presenti* divestiture of the bankrupt *inter vivos*, and being expressly or by necessary implication subject to the bankrupt's debts, the defender's infeftment forms no bar to this action. 9. The marriage-contract forms no bar to this action, in respect—(1) It was subsequent in date and is extrinsic to the trust-disposition and the infeftment thereon; (2) It leaves the trust-disposition an independent deed, and subject to all the exceptions now pleaded against it; (3) It in any case contemplates only a possible succession at the bankrupt's death, defeasible by the bankrupt's creditors."

The defenders David J. Robertson and his administrator-in-law and curator *ad litem* pleaded —"4. The said trust-disposition was onerous, and cannot be set aside in respect it formed part of the matrimonial settlement aforesaid, on the faith of which marriage has ensued. 5. The settlement of the lands in favour of the eldest son of the marriage having been an onerous provision, cannot be recalled by the said Stewart Souter Robertson or by those deriving right from him, and the defender, the said David J. Robertson, is entitled to have decree accordingly."

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel, and considered the record and whole process, Finds that the trust-disposition in question is not valid againt the creditors in the sequestration of Stewart Souter Robertson represented by the pursuer; Therefore repels the defences, and finds and declares in terms of the first two conclusions of the original summons, and reduces, decerns, and declares in terms of the conclusions of the supplementary summons: Grants warrant to and ordains the Keeper of the Register of Sasines to record an extract of this decree in the Division of the General Register of Sasines applicable to the county of Lanark: Finds the defenders liable to the pursuer in expenses, and decerns.

"*Opinion.*—Three questions were argued in this case with much ability and a copious reference to authorities—1st. Whether the trust-deed of 12th April 1862 is, with respect to the fee of the property thereby conveyed, good against the creditors of the truster? 2d. Whether, although not originally good against creditors, it is rendered so by the references thereto in the truster's marriage-contract of 26th April 1862? And 3d, Whether, if neither originally good against creditors, nor rendered so referentially by the execution of the marriage-contract and the marriage following on it, it became good on the birth of a son of the marriage?

"My opinion is against the defenders on all these questions.

"(1) On the first question, the defenders contended that the truster having conveyed the fee to trustees by a delivered deed, on which infeftment followed, it was thereafter beyond his own power, and consequently beyond the power of his creditors. The pursuer answered, that having regard to the quality of the conveyance as voluntary and gratuitous, and the purpose of the trust which is to govern the truster's succession or the descent of his property after his death, the deed could have no effect against creditors; and I think the answer is good. The arguments *hinc inde* are too obvious to require expression. The gratuitous character of the deed is indisputable, but the defenders urged that its purpose was not to govern succession, because the granter was thereby immediately divested of the fee which he conveyed to his trustees, and in which they were infeft. But the validity of a deed to place property beyond the reach of creditors depends on considerations superior to the theory of conveyancing. A man may impoverish himself by improvident gifts as by reckless expenditure, without remedy to his subsequent creditors. But here was no *de presenti* gift, except in the form and style of the deed by which the maker designed to regulate his succession with respect to the property which he meant to retain for his own use and enjoyment as long as he lived. It is trite law that a gratuitous entail, however formal and strict, and with the fetters applied to the entailer himself as institute, is not good against the entailer's creditors; and although an institute (or heir) of entail is a fiar, yet a fee tail (or tailzied fee, if that be the preferable term) is substantially and radically different from a fee-simple, and is, in truth, undistinguishable for any practical purpose whatever from the life estate which the maker of the deed now in question thereby retained to himself. Now an entail is bad against the entailer's creditors, not upon any technical rules of conveyancing, but on the consideration that it is against public policy to allow a man gratuitously to put an estate, the enjoyment of which he retains while he lives, beyond the reach of his creditors by any device whatever for securing it to his heirs after his death. I am not prepared to hold that while this cannot be done by an entail, it may be accomplished by a

trust, having precisely the same end and object, whereby the trustees are immediately infeft in the fee for behoof of heirs to whom the estate is destined after the truster's death.

"(2) On the second question I am of opinion that the references made to the trust-deed in the marriage-contract do not affect the character of the prior deed, or its validity in a question with creditors. The trust-conveyance and purposes might, I assume, have been imported by reference into the contract in such manner as to make them part of the contract, and give them validity as onerous accordingly, but I think this has not been done. On the contrary, I agree with the pursuer's argument that the language of the reference is such as to show clearly that it was intended that the rights or prospects of succession referred to should stand on the deed that gave them, and upon it only.

"(3) The third question is not, in my opinion, even arguable on the part of the defenders, and at least I cannot assent to the proposition that the claim put forward by the pursuer is dependent on the circumstance whether or not there is a son of the marriage now in life?"

The defenders David Souter Robertson and his administrator-in-law and curator *ad litem* reclaimed, and argued—There are two questions here—1. Is the trust-disposition in itself good against creditors? 2. Is it so adopted by the marriage-contract as to give it the character of an antenuptial contract? (1) The estates of fee and liferent are very clearly separated, and there are no such reservations to the liferenter as to aggrandise his right to anything beyond a liferent. The entry is postponed, but the conveyance is *de præsenti*; it is not a general conveyance of all means and estate, or of something to be ascertained at death, but a conveyance of the fee of certain determinate lands for determinate purposes. The investiture of the trustees was completed and the divestiture of the truster also. The trustees hold for the son David J. Robertson, and the deed is irrevocable, for it is only where the deed is of a testamentary character or where the truster is himself beneficiary, that a trust-deed is irrevocable. A trust created by a deed not a marriage-contract is as habile a mode of constituting a *jus quæsitum* in children as a conveyance in a marriage-contract. (2) It is objected to the argument that we have here a *jus quæsitum* in the eldest son of the marriage, that at the date of the deed there is no beneficiary in existence, and that consequently the cases of *Turnbull, Smitton,* &c., do not apply; but the deed must be taken in connection with the marriage-contract that follows on it. Both on principle and authority a unilateral deed followed by a marriage and children of that marriage is presumed to be highly onerous, and is favoured by law, and therefore gives rights to the beneficiaries which are prior to the rights of any creditors.

Authorities—Bell's Comms. pp. 33, 34; *Dickson* v. *Cunningham and Others* (Kilbucho Case), 5 Wilson and Shaw, p. 657 (Lord Braxfield's opinion, p. 663); *Vans Agnew* v. *Lord Stair* (*Sheuchan* case), 1 Shaw's Appeals 333; *Leckie* v. *Leckie*, Morison 11581, and Appendix, *voce* Presumption, No. 1; *Somerville* v. *Somerville*, May 18, 1819, F.C.; *Turnbull* v. *Tawse*, 1 W. and S. 80; *Smitton* v. *Tod*, 2 Dunlop 225; *Spalding* v. *Spalding's Trs.*, 2 Rettie 237; *Howden* v. *Fleeming*, 1 Law Reports, Scotch and Divorce Appeals, p. 372 (Lord Westbury's opinion, p. 382).

The pursuers and respondents argued—The result of the authorities is that unless you have a deed that shews an intention to divest the granter at once, a deed creating a trust with certain purposes must be held to be merely regulative of succession, and cannot exclude creditors. The deed in question here is plainly a testamentary deed. The powers given to the trustees have all reference to a period after the truster's death. The entry of the trustees is postponed till after his death. It does not follow by any means that although an heir's right is protected against a posterior heir that therefore it is protected against creditors. Now, the presumption in the case of provisions to children *nascituri* is that a right of succession merely, not a *jus crediti*, exists in them where no right can be claimed during the father's lifetime. Here there was clearly no intention in the truster to divest himself; he was not even married at the date of the deed. To sustain such a deed as this against creditors would be to open the door to fraud. The marriage-contract cannot be said to incorporate this trust-deed. It only refers to it as an existing fact. It adds no strength to it, nor does it support any of its provisions.

Authorities—Bell's Comms. p. 46; *Goddard* v. *Stewart*, 6 Dunlop 10, 18; *Herries, Farquhar & Co.*, v. *Brown and Others*, 16 Shaw 948 (Lord Medwyn's opinion, p. 971); *Murison* v. *Dick*, 16 D. 529; *Grant* v. *Robertson*, 10 Macph. 804.

On behalf of Mrs Souter Robertson it was argued that the Lord Ordinary's interlocutor was too absolute, and asked that Mrs Souter Robertson's interest should be recognised and protected.

At advising—

Lord President—In this case two questions have been argued to us—First, Whether the trust-deed of the 12th of April 1862 is good against the creditors of the truster? and secondly, Whether, upon the assumption that that deed is not in itself effectual against creditors of the truster, it is rendered so by the references made to it in the subsequent marriage-contract of the truster of the 26th of April of the same year?

These are important questions, but the view which I take in regard to both of them is in accordance with the judgment of the Lord Ordinary.

The subjects conveyed by the trust-disposition of the 12th of April are, in the first place, the lands of Lawhead-Tarbrax and others; and, in the second place, the lands of Easterhouse and others. With regard to the first parcel of lands, the truster had acquired them from his father by a disposition made on the 2d December 1861, under which the father reserved his own liferent use and possession of these lands. The other parcel of lands—Easterhouse and others—were conveyed by the same disposition, but without any reservation of the father's liferent. The truster conveys both these subjects to certain gentlemen as trustees; and he reserves, with reference to the first parcel of lands, the liferent use and possession of his father, the said David Souter Robertson, as reserved in the disposition of the 2d of December; and with regard to the other parcel of lands, he dispones them to his father in liferent, "for his liferent use and enjoy-

ment, and subject to his uncontrolled management during all the days of his life, and to the said trustees in trust as aforesaid, and to their foresaids in fee, heritably and irredeemably." He then further specially reserves from the above-written conveyance of both parcels of lands his own "liferent use, possession, and enjoyment of the said lands and others, and the uncontrolled management thereof during all the days of my life from and after the death of my said father; and reserving also full power to me, either in contemplation of or after my marriage, to burden and affect the said several lands and others with an annuity or jointure in favour of any wife I may marry, not exceeding £100 per annum, to be made payable" at certain terms. And it is "expressly provided that, subject to the reserved liferent rights in favour of my said father and me, and my reserved right to burden and affect the said lands with an annuity or jointure as aforesaid, these presents are granted, and shall be accepted by the trustees acting in the trust hereby created, in trust, to the intent and purpose that they may and shall, immediately upon the death of my said father and me, enter upon the possession and management of the said lands and others above conveyed, and hold the same as a trust-estate, and apply the same and the proceeds thereof for the uses and purposes following." Now, before coming to a consideration of the uses and purposes of the trust, it is important to note what is the effect of the deed up to this point. The father being the original owner of the lands of Lawhead-Tarbrax and others, is liferenter by reservation of these lands, and he is liferenter by constitution of the other lands of Easterhouse and others, in virtue of the conveyance in liferent given to him by this deed. After the death of the father the liferent use and possession of both parcels of land devolves upon the son, the truster, and there is not only a full liferent use, possession, and enjoyment of the lands reserved, but there is also a reservation of the uncontrolled management thereof during all the days of the life of the truster after the death of his father; and it is only after the death of both these liferenters that this trust is to come into operation, for it is expressly provided in the passage that I last quoted that the disposition is granted and is to be accepted, in trust to this intent, that the trustees are to enter into possession of the lands and hold them as a trust estate only after the death of both the father and the truster. Now, for what purposes is this trust-estate to be taken possession of and administered by these trustees after the death of the truster? There is provision in the first and second purposes for payment of certain expenses; and then, "Thirdly, in the event of my dying survived by issue of my body, the said trustees shall hold the said lands and others, and shall apply the free balance or surplus of the annual income of the trust-estate" [after certain deductions], "for the maintenance, education, and advancement of my eldest or only son, or failing my having a son, or in the event of the decease of all my sons previous to the period hereinafter prescribed for conveying the said trust-estate, then for the maintenance and education of my eldest or only daughter," the trustees having a full discretion as to how to administer for her benefit; and "Fourthly, upon my eldest or only son attaining the age of twenty-one years, or failing sons upon my eldest or only daughter attaining that age or being married, whichever event shall first happen, my trustees shall convey and make over the trust-estate as then held by them, and subject to any debts or encumbrances which may affect the same, to such eldest or only son or eldest or only daughter, as the case may be, and to his or her heirs or assignees whomsoever." Then, failing the truster having children, it is provided, in the fifth place, that the estate shall devolve upon his younger brother and his family under certain provisions which it is needless to enter upon in detail, because they are not dissimilar to those that are provided with regard to his own family. And then, in the sixth place, in the event of both the brothers—both the truster and his younger brother—dying childless, or the children predeceasing the time of conveyance, "the trustees shall make over the said trust-estate, as held by them at the time, to the heirs and assignees whomsoever of my said father."

These seem to me to be the material parts of the deed, and with regard to its general character and purpose there is really no room for dispute. It is a voluntary deed, and it is a gratuitous deed; and except in so far as it provides a liferent to the truster's father and to the truster himself, the purposes of the deed are purely and entirely testamentary. Everything that follows the decease of the truster and his father is a regulation of the truster's succession. I think it is impossible to dispute that. But, then, during the truster's lifetime the trust does not come into operation at all. He remains in possession of his estate with the full liferent enjoyment of the estate, and with uncontrolled power of management and administration. In short, the description of the truster's position, as we find it upon the face of this deed, is very like in all practical effects to that of an heir of entail in possession with the full beneficial enjoyment of the estate and the uncontrolled management of the estate. The result of all this seems to me to be, that until the death of the truster this trust-deed is dormant in regard to the fee of the estate. It cannot come into operation till then. Indeed, it is said in express words that it is only upon that occurrence that the trustees are to take and hold the estate as a trust-estate for purposes to be then carried into effect. Now, what are the purposes? To provide the estate to the truster's eldest son, failing his having a son to his eldest daughter, and failing that then to provide the estate to certain other beneficiaries, being his younger brother and his children, and failing all that the estate is to revert and belong to the heirs and assignees whomsoever of the truster's father, from whom both parcels of lands originally came by disposition of a gratuitous character also in favour of the truster. The deed, therefore, it appears to me, so far as it is a trust-deed at all, and after the trust comes into operation, is simply a voluntary gratuitous testamentary deed, with a full reservation of the whole liferent enjoyment of the estate to the truster and uncontrolled powers of management.

Now, upon the authorities I am of opinion that that is not a deed that is effectual against creditors. It would be quite idle to go over all the cases that bear upon this subject, and still more all the cases that have been cited to us, whether

they bear upon the question or not. I content myself by saying that I think the result of all the authorities clearly is that such a deed as I have described this to be cannot be effectual against creditors.

That being so, the second question arises—Whether this deed, although not effectual in itself, has been made effectual against creditors by the way in which it is referred to and dealt with in the truster's marriage-contract? Now, I do not doubt that such a deed as this might be dealt with in a marriage-contract in such a way as to incorporate the deed with the contract and make it part of the stipulations of the onerous contract that the provisions of the prior deed receive effect; and if that were so, it is not necessary to dispute that the deed might thereby be rendered effectual against creditors, although not so in its original constitution. But has this been done in the marriage-contract? That is the important question.

Now, the marriage-contract provides an annuity of £300 a-year in favour of the truster's wife, then his promised spouse; and in part security of the personal obligation which he undertakes for the payment of this £300 annuity, he exercises the power conferred upon him by the trust-disposition, of settling an annuity of £100 per annum upon his wife, and making that a burden upon the lands conveyed by the trust-deed. There is a further security granted for the lady's annuity, which does not enter into the question we are now considering—a personal security granted by the truster's father. But this is the first reference in the marriage-contract to the trust-deed, and it amounts to no more than this, that the truster exercises the power reserved to him in the trust-deed of settling an annuity of £100 a-year upon his wife, and securing it upon the lands conveyed by the trust-deed. Then, further on, the truster, in contemplation of the marriage, "binds and obliges himself and his foresaids to make payment to the child or children to be procreated of the marriage hereby contracted, who shall be alive at his death, other than the child who shall succeed to the said estates of Lawhead-Tarbrax and Easterhouse under the directions with reference to the destination of these estates contained in the said trust-disposition thereof in favour of George Auldjo Jamieson and others as trustees foresaid, and to the issue then alive of any such child or children who shall not succeed as aforesaid who shall have previously died leaving issue, of the sum of £5000 sterling at the first term of Whitsunday or Martinmas after the death of the said Stewart Souter Robertson, with a fifth part more of penalty," and so forth. And then, further, the truster, without prejudice to the personal obligations undertaken by him, assigns to certain trustees his general estate, and that in security for payment of this sum of £5000 to the children of the marriage other than the child who shall succeed to the estates of Lawhead-Tarbrax and Easterhouse under the trust-disposition; and a clause follows declaring that the assignation is expressly restricted to the £5000, and that his general estate is not further bound, and that the assignation shall receive no further effect. Then, it is provided that in the event of the lady predeceasing her husband, and there being no child or children of the marriage, the trustees shall in that case make over and reconvey the whole trust-funds and estate then in their hands to the said Stewart Souter Robertson, or shall hold the same for his behoof and at his disposal, as he shall choose, and in the event of the lady surviving him, and there being no younger children other than the child or issue of the child entitled to succeed to the estates of Lawhead-Tarbrax and Easterhouse, the trustees are to pay over the same to such child or issue at such terms and on such conditions as the said Stewart Souter Robertson shall point out by any writing under his hand. And then follow the provisions on the part of the lady, which do not, so far as I can see, affect the question we are now considering at all.

Now, then, what is the nature and effect of the references in this marriage-contract on the trust-disposition? In the first place, the truster exercises the power reserved to him by that trust-disposition of settling an annuity of £100 a-year on his wife, secured on the lands conveyed by the trust-disposition, and the only other reference to the deed is this, that the provisions of £5000 made by the husband in the marriage-contract, and in consideration of the marriage which is to follow, are made in favour of the children of the marriage who do not succeed to the lands conveyed by the trust-disposition. If nobody succeeds to the lands conveyed by the trust-disposition, then that reference to the trust-disposition will really have no effect at all, and the children will all succeed equally to the £5000, or in such proportions as may be appointed under a power reserved. But if the eldest son succeeds under the trust-disposition, then the £5000 will go entirely to the younger children, excluding the eldest. But there is no provision in this marriage-contract that the lands shall descend to the eldest or any other son. In short, the provisions of the trust-deed are not made stipulations or conditions of this marriage-contract; and if the provisions of the trust-deed are not made stipulations or conditions of this marriage-contract, then I do not see how the trust-deed can receive any greater support or efficacy from the reference to it in the marriage-contract than it had in its own original conception. It is referred to as matter of fact that the lands of Tarbrax and Easterhouse are settled upon the eldest son of the truster, and failing him upon certain other parties. That is assumed as a matter of fact, but it is not made matter of contract. The fact that the trust-deed exists is no doubt a fact assumed; and just because that provision has been made in the trust-deed, certain provisions are made in the marriage-contract that if the trust-deed receives effect, and the lands thereby conveyed descend to the eldest son, then the eldest son is not to participate in the £5000. But that is all; and as it is not made matter of contract that the disposition of the fee in the trust-disposition shall receive effect, it appears to me that the trust-disposition derives no strength whatever from the reference in the marriage-contract.

I am therefore of opinion upon the whole matter that this trust-deed, whether taken by itself or taken in connection with the marriage-contract, is not good against creditors. Whether it is a revocable deed in the event of the truster remaining solvent is a totally different question, upon which I give no opinion. A purely gratuitous testamentary deed may be made irrevocable, and yet may be bad against creditors. The truster may be

personally bound, but for all that the estate may not be defended against the diligence of creditors. That is a distinction which runs through all the authorities, and a distinction, I think, perfectly sound on legal principle; but whether the deed in the present case is or is not a revocable deed I do not presume, nor do I think it necessary, to inquire, because I am quite clear upon the other point, which is the only point of any importance here in this case with the trustees of the truster's sequestration, that it is not good to exclude the diligence of creditors. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas—On 2d December 1861 Mr David Souter Robertson (whom I shall call Souter Robertson the first) conveyed one of several landed estates belonging to him to his eldest son, Stewart Souter Robertson (whom I shall call Souter Robertson the second), under reservation of his own "liferent use and possession thereof, and of the houses and others erected thereon during all the days" of his lifetime. This deed was completed by registration, in lieu of infeftment, in the Register of Sasines on 10th December 1861.

On 12th April 1862 Souter Robertson the second disponed the fee of the same estate, with the granter's "whole right, title, and interest therein," under the two reservations after mentioned, to trustees (who are defenders in this action), heritably and irredeemably, for the purpose, in the event, which has happened, of his being survived by issue of his body, of applying (under deduction of expenses and other outlays) such portion of the free income "as may be necessary for the maintenance, education, and advancement of my eldest or only son, or failing my having a son, or in the event of the decease of all my sons previous to the period hereinafter prescribed for conveying the said trust-estate, then for the maintenance and education of my eldest or only daughter," the trustees having full discretion as to the proportion to be so applied, and the surplus, if any, to "be applied in payment of any debt which might then affect the trust-estate, or be added to and form part of the capital of the trust-estate under the management of the trustees." The deed further provided—"Fourthly, Upon my eldest son attaining the age of twenty-one years, or failing sons, upon my eldest or only daughter attaining that age or being married, whichever event shall first happen, my trustees shall convey and make over the trust-estate as then held by them, and subject to any debts or incumbrances which may affect the same, to such eldest or only son, or eldest or only daughter, as the case may be, and to his or her heirs or assignees whomsoever." The fifth and sixth purposes provided for the event of the truster dying without issue, or of all his issue predeceasing the period at which the trust-estate was to be made over to them, and need not be here narrated. Nor need any notice be taken of a liferent of the lands of Easterhouse conveyed back to the truster's father, Souter Robertson the first, which is not challenged in this action, any more than the validity of the original conveyance by Souter Robertson the first to his son Souter Robertson the second.

The first of the two reservations which I have mentioned was thus expressed—"Reserving always, as I do hereby specially reserve, from the above written conveyance of the said several lands and others, in favour of the said trustees, my liferent use, possession, and enjoyment of the said lands and others, and the uncontrolled management thereof during all the days of my life from and after the death of my said father."

The second of the two reservations was in these terms—"Reserving also full power to me, either in contemplation of or after my marriage, to burden and affect the said several lands and others with an annuity or jointure in favour of any wife I may marry, not exceeding £100 per annum, to be made payable, the said annuity or jointure, to my wife should she survive my said father and me, out of the said lands and others, or any part thereof, at two terms in the year, Whitsunday and Martinmas, by equal portions, commencing the first payment of the said annuity at the first of these terms which shall happen after the death of my said father and me, for the subsequent half-year, and so forth half-yearly thereafter during the life of my said wife after the death of my said father and me, and which power of granting such annuity or jointure, hereby reserved by me, may be exercised by my granting a bond of annuity to be contained in any contract of marriage, or by a separate bond, to be executed by me in contemplation of or subsequent to my marriage."

The deed further bore—"Also I give full power to my trustees to make up and complete all proper titles in their persons to the lands and others hereby conveyed, with the fullest powers of administration and management of the trust-estate under their charge."

These full powers of administration and management could of course only commence on the cessation of the powers of administration and management reserved to the father and son, Souter Robertson the first and Souter Robertson the second, as successive liferenters. But the right conferred to the fee of the estate was immediate and absolute, and the power to complete titles, which was at anyrate incidental to and implied in the dispositive clause, was obviously intended to be also immediate. Accordingly, the title of the trustees and of Souter Robertson the first, "for their respective rights of fee and liferent as aforesaid," was forthwith completed by notarial instrument (in lieu of infeftment), duly recorded on 17th April 1862.

That the trust-deed was duly delivered to and forthwith acted on by the trustees is amply proved by the documents in process.

The record of sasines bears, under date 17th April 1862, that there was presented to the notary-public, on behalf of the trustees appointed by the trust-disposition of the 12th of that month, and on behalf of the liferenters for their respective interests, the notarial instrument which is engrossed in the new General Register of Sasines, and which is equivalent to infeftment in the old form, as of the first mentioned date. Four years afterwards the trustees became parties to a lease of the minerals in the lands, dated in March and April 1867. Afterwards they became parties to assignations of that lease, executed in December 1870 and January 1871. And in the interval, viz., in June 1867, they, in their avowed and express character of heritable proprietors of the "lands" disponed, with consent of the liferenters, a portion of the lands, "heritably and irredeem-

ably," to the Caledonian Railway Company by deed, which was recorded in the Register of Sasines on 19th July 1867.

I pause here to observe, that whatever may be said against the efficacy of this deed in a question with the granter's creditors, it is unquestionably in its terms an absolute and irrevocable conveyance of the fee of the estate. Upon the face of the deed and of the public records Souter Robertson the second stands feudally divested, and the trustees feudally invested, for the purposes of the trust, in the fee of that estate. A power is reserved to the truster to affect the estate with an eventual annuity to his wife of £100 per annum, but that power only suggests the observation that by the terms of the deed the truster reserved and retained no other power over the fee of the estate. The same remark applies to the reservation of his eventual liferent, which liferent is in no respect amplified by calling it a "liferent use, possession, and enjoyment." Every liferenter has "the use, possession, and enjoyment" of the estate for the time being. Nor is the nature of the right changed by adding "and the uncontrolled management thereof during all the days of my life from and after the death of my said father." Some liferenters are more ample than others with respect, for instance, to mines and minerals, the granting of leases, &c. How far the words "uncontrolled management" may explain or amplify the nature of this liferent it is unnecessary to inquire, because it is quite obvious that there remains, in any view, a right of fee in the trustees for behoof of the truster's eldest son (whom I shall call Souter Robertson the third), which by the terms of the deed and of the existing investiture cannot be disposed of or affected by Souter Robertson the second except in security of the £100 annuity; and the existence of this fee, whatever limitations may have been placed on its value, is sufficient to raise the present competition.

Now, I am not disposed to say that all this would be sufficient to exclude the granter's creditors if the trust-deed were gratuitous. But if the trust-deed be an antenuptial marriage deed, it is then undoubtedly an onerous deed, and that substantially resolves the present question into this —Is the trust-deed to be regarded as an antenuptial marriage deed or not?

I am prepared to answer that question in the affirmative.

To constitute an antenuptial marriage deed or marriage settlement it is not essential that the deed should be in its form a mutual deed. A unilateral deed followed by marriage may be quite enough. In the recent cases of *Smith Cunninghame*, and of *Mercer* v. *Anstruther*, amidst all the difference of opinion that arose both here and in the House of Lords on various points, nobody doubted that Mr Anstruther's unilateral trust-deed, followed by marriage, constituted a valid marriage settlement, securing to his widow all the provisions contained in it, so far as the funds he thereby dealt with were held to have been his own or at his disposal. Still less is it necessary that the marriage provisions should be all contained in one deed, or that each deed should bear expressly to import into it the contents of the other deed with the formality, which would be necessary to exclude the objection to an entail, that it had been attempted to be made by reference. It is quite enough that the marriage deed, although unilateral, was made by the one party in contemplation of the marriage which followed, and relied on by the other party.

In the present case there was not only the unilateral deed, delivered to trustees for behoof of the future heir of the marriage, but there was the bilateral marriage-contract, in which the unilateral deed is narrated and referred to in terms which, I think, make it impossible to say that the wife and her friends were not entitled to rely upon it as having secured to the heir of the marriage the only provision which the husband made for that heir in contemplation of the marriage. Marriage settlements are, of all deeds, to be construed according to good faith, and not to be defeated by defective expression or want of technicalities. It is not in the mouth of the husband, or of any one claiming in right of the husband, to say that, although the terms of the deed were such as might naturally lead the wife and her friends to believe that the heir of the intended marriage had been provided for, this belief must be held to have been delusive wherever the deed at all admits of being construed otherwise.

This contract of marriage provides an annuity or jointure of £300 to the wife in the event of her survivance, restrictable to £150 in the event of her entering into a second marriage; and in security so far of this personal obligation, and without prejudice thereto, "the said Stewart Souter Robertson, in virtue of a power to that effect reserved to him in a trust-disposition dated 12th April 1862, of the estates of Lawhead-Tarbrax, and Easterhouse, in favour of George Auldjo Jamieson, accountant in Edinburgh, and other trustees, for the purposes therein specified, hereby provides and dispones to the said Ann Scrivener Hamilton in liferent during all the days of her lifetime after the death of his said father and him, in case she shall survive them," a free yearly annuity of £100 furth of the lands of Lawhead-Tarbrax, and others, and the lands of Easterhouse and others, which are all thereby disponed to her in security.

Here there is a distinct and express recognition of the trust-deed as a valid and completed deed, by which the lands stood disponed to the trustees "for the purposes therein specified," and these purposes are, I think, referred to as purposes which the granter had no power to interfere with, except in virtue of and to the extent of heritably securing to his future wife a certain eventual annuity.

But if it could have been doubted that this reference to the trust-deed was sufficient to call attention to it as a deed executed in contemplation of the marriage, the doubt would, I think, be entirely removed by the exception which is made in it of the future heir of the marriage from all interest in the provisions made by the contract for the other children of the marriage. The contract binds the intended husband "to make payment to the child or children to be procreated of the marriage hereby contracted, who shall be alive at his death, other than the child who shall succeed to the said estates of Lawhead-Tarbrax, and Easterhouse, under the directions with reference to the destination of these estates contained in the said trust-disposition thereof in favour of George Auldjo Jamieson and others, as

trustees foresaid, and to the issue then alive of any such child or children who shall not succeed as aforesaid who shall have previously died leaving issue, of the sum of £5000 sterling, at the first term of Whitsunday or Martinmas after the death of the said Stewart Souter Robertson," &c.

Could it reasonably be supposed to occur to the other contracting party or parties that this means that the heir of the marriage was not to be provided for by the husband at all? On the contrary, I cannot look upon this as anything short of a representation that the estates of Lawhead-Tarbrax, and Easterhouse had been already secured to the heir of the marriage by a deed executed in contemplation of the marriage.

It is true that the trust-deed does not mention the particular marriage. But the proximity of dates is of itself sufficient to show, beyond all reasonable doubt, that the marriage in view was the marriage which afterwards took place on 29th April 1862. The trust-deed was executed on 12th April, probably in order that the conveyance contained in it might be completed by recording the notarial instrument before the contract should be presented for signature or the marriage celebrated. The notarial instrument was recorded on the 17th April, the marriage-contract was executed on the 26th, and the marriage was celebrated on the 29th, all of the same month and year. To suppose that the marriage contemplated by the trust-deed was any other than the marriage contemplated by the contract, dated only a fortnight afterwards, would be somewhat extravagant. The trust-deed was, in my opinion, just as much an antenuptial marriage deed as if it had been embodied in or expressly adopted by the marriage contract. The two deeds formed together the antenuptial marriage settlement, and if this were to be held questionable on the face of the deeds—which I think it is not—I could have no doubt at all of the relevancy of the averments contained in the defender's second statement in the record, nor of the competency of proving these averments either by writing or by the real evidence of facts and circumstances.

These averments are in substance—1st, That the engagement to marry, which resulted in the marriage, was made on July 1861; 2d, That the conveyance by Souter Robertson the first to his son Souter Robertson the second, in December 1861, was granted with the view of enabling the latter to settle the lands on entering into that particular marriage; 3d, That the trust-deed was executed in contemplation of, and by way of provision for, that same marriage; 4th, That the marriage took place on the faith of that deed as forming part of the marriage settlement.

Assuming it to be proved or admitted that the engagement to marry preceded the execution of the trust-deed, I should be disposed to hold that the third and fourth of the above heads were matter of presumption requiring no proof. The second head (namely, the object of the conveyance by Souter Robertson the first) if it stood alone, might be of doubtful relevancy; but it is much the least material of the four. Of the relevancy and competency of proving all the other three heads, either by writing or by the real evidence of facts and circumstances, I have no doubt at all. There has been no renunciation of probation on either side, and I do not mean to suggest that the pursuers are precluded from even yet joining issue upon the above averments if they chose to do so. But the case has been decided by the Lord Ordinary, and pleaded to us by the pursuers, upon the footing that the facts averred by the defenders are irrelevant, and so long as that is the shape of the case, the truth of the defender's averments, so far as relevant, must be assumed.

Taking the case so, it does not appear to me to matter whether there have been several deeds or only one deed executed before marriage. If executed with a view to that particular marriage, and marriage has followed, the deed or deeds must be regarded as in the highest sense onerous, and the obligations contained in them fulfilled accordingly.

In the present case, besides the onerous consideration of the marriage itself, there were important considerations given by the lady and her friends in return for the provisions made for her and her issue, among which provisions I think it impossible to suppose that they did not reckon the fee of the estate provided to the heir of the marriage. The marriage-contract bears, *inter alia*, that Miss Eliza Hamilton, sister of the bride, "in terms of an arrangement to the effect after specified, undertaken by her in the treaty for the said intended marriage, hereby binds and obliges herself, but only in the event of her succeeding to the entailed estates of Fairholm and others, in the counties of Lanark and Edinburgh, of which she is at present the presumptive heiress of entail, to make payment to the said Ann Scrivenor Hamilton, and her heirs and assignees whomsover, of the sum of £2000 sterling, with interest from the date when the succession might open to her." And by the immediately following clause, the bride herself conveyed to the trustees named in the deed the whole means and estates, heritable and moveable, then belonging to her, or to which she might acquire right during the subsistence of the marriage, including all sums to become due and payable under the said obligation undertaken by her sister Eliza Hamilton (excepting only her paraphernalia and sums she might acquire by bequest, gift, or otherwise, under the amount of £100); all to be held in trust for her liferent use, exclusive of the *jus mariti*, and for the liferent of her promised husband if he survived her, and for the issue of the marriage in fee. The eventual liferent of Miss Eliza Hamilton's £2000, and the eventual liferent of the bride's whole means and estates, thus stand irrevocably conveyed to Souter Robertson the second, and are of course attachable by his creditors. The treaty for the intended marriage, to which Miss Eliza Hamilton is said to have been a party, is obviously spoken of as a treaty which had preceded the execution of the marriage-contract. Miss Eliza Hamilton, so far as we see, had no interest to bind herself as she did, except to aid her sister to obtain under that treaty better terms for herself and her issue than she might otherwise have got; and if these terms are not to be fairly fulfilled, the considerations in respect of which the wife disposed of her whole means and estate by the contract, and prevailed on her sister to dispose of a portion of her means and estate, will not have been made good to either of the two.

The question is not one, as the Lord Ordinary seems to put it, between Souter Robertson the second on the one hand, and his creditors on the other, but between Souter Robertson the third,

the heir of the marriage, on the one hand, and Souter Robertson the second and those in his right, on the other.

The case has no analogy whatever to a gratuitous entail, to which it is likened by the Lord Ordinary, nor to a gratuitous deed of any kind, by which, as his Lordship rightly observes, it would be against the policy of the law to allow a man to put his estate beyond the reach of his creditors without putting it beyond his own reach. But it is not against the policy of the law to allow a man to put the fee of his estate beyond the reach both of himself and his creditors by an antenuptial marriage deed, completed by sasine (or its equivalent) in the public records, as the trust-deed was here; and if he reserves his own liferent, as is usually done in marriage-contracts or other antenuptial deeds, the effect of that simply is, that the creditors can attach the liferent which is his, but that will not enable them to attach the fee, which is not his.

The Lord Ordinary arrives at this result by putting and answering three questions. The first is, Whether the fee was at once put beyond the reach of the creditors by the trust-deed? He answers this in the negative, and then asks, second, Whether, although not originally good, the deed became good for that purpose (that is, for the exclusion of creditors) by the reference made to it in the marriage-contract? Having answered this also in the negative, his Lordship asks, third, Whether, although not good till then, it became good on the birth of a son of the marriage? and to this question also he gives a negative answer.

Now, with the greatest possible deference to his Lordship, this mode of reasoning is altogether fallacious. It ignores the only real question in the case, namely, Whether the trust-deed and the marriage-contract are, each of them, part and portion of what constituted the marriage-settlement? In my opinion they are so, just as much as if they had been embodied in one continuous paper, with one testing clause. Neither the trust-deed nor the marriage-contract would have been effectual for any purpose if marriage had not followed. But the effect of the trust-deed, the marriage-contract, and the marriage itself, are not to be separately met and overcome after the fashion of the *Horatii* and *Curatii*. They must all be taken together, and the question then put, What is their combined effect?

If they were to be separately considered at all, it would be a more apt illustration to ask whether there can be any doubt that the trust-deed would have taken effect as an antenuptial marriage deed if no other deed had been executed prior to the marriage? And if it would have done so, can the marriage-contract be regarded as intended to prevent the trust-deed from operating as it otherwise would have done? I am not able to take that view of the meaning of the contract. There is no inconsistency between the contract and the trust-deed. Separate trusts are created by the two deeds—the one for behoof of the liferenters of the heritable estate and the heir, and the other for behoof of the widow and younger children. But there is nothing inconsistent or even remarkable in that. The provisions of the trust-deed are to no extent superseded by the provisions of the contract. The younger children are not at all provided for by the trust-deed, and the heir is not at all provided for by the contract. The two deeds are not only capable of standing together, but the usual purposes of a marriage settlement, where there are landed estates and personal funds to settle, are not accomplished unless the two deeds do stand together. The contract neither supersedes nor recals anything in the trust-deed, either directly or by implication. On the contrary, the contract narrates and refers to the trust-deed as a good and subsisting deed, and on that assumption provides for the issue of the marriage in so far, and in so far only, as the issue had not been already provided for.

As regards the third question put and answered in the negative by the Lord Ordinary—Whether, if not previously good, the trust-deed became good by the birth of a son of the marriage?—it is really a mere question of words. There is a sense in which the trust-deed became effectual only by the birth of an heir of the marriage; for if there had been no heir of the marriage, male or female, there would have been no creditor in the obligation, whether contained in the trust-deed or in the marriage-contract, it being trite law that in marriage settlements there is no necessity as to such provisions beyond the issue of the marriage. But that does not prevent the trust-deed from being a good deed *ab initio*, to provide for the eventuality of there being an heir of the marriage, and this was done just as effectually by the conveyance of the fee of the estate to the trustees for behoof of the expectant heir as if there had been a direct conveyance in favour of an existing beneficiary.

Upon the assumption that the trust-deed is to be regarded as an antenuptial marriage deed, the whole law applicable to it is to be found in the important and authoritative case of *Herries, Farquhar & Co.* v. *Brown, &c.*, 9th March 1838, 16 D. 948.

In that case the husband, Mr Macdonald, bound himself by the marriage-contract to pay to the children of the contemplated marriage, if more than one besides the heir, on whom the estate of Clanranald was thereby entailed, £20,000, and if only one child besides the heir £10,000, payable at such times and in such proportions as he (Mr Macdonald) should appoint, and failing such appointment, then equally, within six months after his death, bearing interest in any event from the date of his death; and in security of this obligation he granted a precept of sasine, which was followed by infeftment in favour of trustees named in the contract in the said lands of Clanranald and others therein described. The contract further contained a precept of sasine, on which infeftment followed, for infefting Mr Macdonald himself and the heirs-male of the marriage, whom failing the other heirs therein mentioned, in the said lands and estate, under the fetters of a strict entail, subject always to the burden of the provisions to the younger children and a life annuity to his wife.

Thereafter Mr Macdonald contracted large debts, and his creditors brought a declarator and supplementary declarator to have it found that neither the provision to the younger children nor the entail in favour of the heir of the marriage could compete with, and still less could be preferrable to, the debts so contracted.

As regarded the provision to the younger children (five in number) Lord Fullarton, Ordi-

nary, found that these children were onerous creditors of their father to the amount of that provision, and therefore that the trustees infeft in security thereof were entitled to compete and interfere with the diligence of the creditors according to the right and preference legally conferred by such security.

After a hearing in presence before the whole Court, this judgment was unanimously adhered to. In the present case the trustees for the heir of the marriage are infeft as absolute fiars of the estate. In that case the trustees for the younger children were infeft in security only of their provision of £20,000, and for which provision they were held preferable to the father's subsequent creditors. In that respect therefore the judgment is *a fortiori* in favour of the preference claimed by the trustees for the heir over the creditors of the father in the present case.

It is unnecessary to follow out the other branch of the case of *Herries, Farquhar, & Co.*, which was resumed before the First Division of the Court, and argued in cases between the creditors of the father and heir-male of the marriage, further than to observe, that in respect of the obligation undertaken by the father in his marriage-contract to execute an entail of the Clanranald estate, subject to the burden of the provisions to the younger children, it was found that the subsequent creditors of the father were "not entitled to do any diligence against the said lands or the price thereof so as to affect the rights of the said heir or heirs therein," reserving to the creditors under their decree against the father "all competent diligence against him and his life-interest in the said estate, or any part of the same, or the price thereof"—a judgment in its terms very analogous to what, I should say, would be the appropriate judgment in the present case, varying it only because here the heir is entitled to the absolute fee, whereas there he had only a right to succeed after his father as heir of entail.

The judgment in the case of *Herries, Farquhar, & Co.* has ruled the law and practice of the country for now close upon forty years, and if your Lordships were to agree with me in thinking that the trust-deed in the present case was part and portion of the marriage settlements of Souter Robertson the second, I do not suppose you would hesitate in applying to the case the principles recognised in that judgment.

I have thought it right, however, thus briefly to refer to it, not only because it contains the law of this case on the assumption of the trust-deed being an antenuptial marriage deed, but likewise because I think the elaborate opinions then delivered by some of the ablest judges of recent times naturally suggest that such a deed as this trust-deed, executed in contemplation of marriage, ought not readily to be disconnected with the high onerosity of the marriage itself.

Lord Mure—With reference to the first question which was raised for our consideration, —viz., Whether this trust-deed, taken by itself, is sufficient to protect the estate against the diligence of the granter's creditors?—I have not had much difficulty in coming to the conclusion which your Lordship and the Lord Ordinary have come to, namely, that it is not sufficient. In that conclusion, as regards the deed itself, I do not understand that, taken by itself, Lord Deas differs in opinion. Upon the view of the deed itself, I think that it is a voluntary and a gratuitous deed, and that it is substantially a *mortis causa* deed made with a view to regulate the succession of the parties to that particular estate. There is no doubt that under it the trustees seem not only to have taken infeftment, as they were quite entitled to do, but to have been parties to certain leases and arrangements which took place under it. But looking to the terms of the trust-deed itself, by which the whole uncontrolled management is left to the two liferenters during their lives, and to the clause which your Lordship in the chair referred to, by which it is only after the death of the survivor of the liferenters that the trustees are to enter into the possession and management of the estate, I do not think it can be held that they have at this present moment the position of being trustees in the management and possession of that estate. I think therefore that, as it is substantially in its terms a *mortis causa* deed, it cannot be held to protect the estate against the diligence of the granter's creditors.

Upon the other part of the case, namely, the effect of the marriage-contract which is said to have been entered into a short time after the date of the deed, I confess that I have had more difficulty—I mean with reference to the decision in the case of *Herries, Farquhar & Co.* which Lord Deas has referred to. And that raises the question, Whether this trust-deed of Mr Stewart Souter Robertson was so dealt with in his marriage-contract as to make it part and parcel of that antenuptial contract, in the sense that it made the onerous obligations undertaken under that marriage-contract the consideration for the granting of the trust-deed? Now, no doubt the trust-deed is referred to in the contract—your Lordship has gone over the clauses, and I do not mean to repeat them,—but as I read that contract it is referred to simply with a view to enable the party to avail himself of the clause of reservation, by which he is entitled to settle an annuity upon his wife, and make that annuity a real burden upon the trust-estate. And then, having referred to it for that purpose, the marriage-contract proceeds to create a new trust,—a marriage-contract trust, separate and distinct altogether from the trust created by the original trust-deed. Different trustees are named; there is a conveyance to them of certain moveable estate to which Mr Souter Robertson was entitled under the marriage-contract between his father and his mother; and these trustees are made the trustees for carrying out the terms of that marriage-contract trust, and for dividing the property so put in trust amongst the children of the marriage. And then there is a provision—"For which causes, and on the other part," the sister of Mrs Souter Robertson settles a certain sum of money upon her, and conveys it to those marriage-contract trustees, with a view to division among the children of the marriage. That is substantially the nature of that trust. Now, I do not see that that counterpart by the wife and her sister is made in any degree dependent on the terms of the first trust-deed. It is granted in respect of the provision which Mr Souter Robertson settled upon his children,—the £5000 by the new trust-deed—and the provision by the relation of the lady is the counterpart for that, to make the provision of £2000 in favour of

these children in the same way. Now, then, is that a case in which the trust-deed is made part and parcel of the marriage-contract in the sense in which the trust-deed in *Herries, Farquhar & Co.* was held to be? I have come to the conclusion, after careful perusal of the case of *Herries, Farquhar & Co.*, that it is not,—that what has been done here does not bring this case within the provisions of the rules laid down in *Herries, Farquhar & Co.* I think the mere reference to the deed as an existing deed, or referring to the fact that that particular estate had been settled in a particular way, is not such a reference as wefind in the marriage-contract to the trust-deed in the case of *Herries, Farquhar, & Co.* I do not see that this estate was settled in consideration for anything done under the marriage-contract. Nor do I see it stated in the marriage-contract that anything was done in that marriage-contract in consideration of the existence of that trust-deed. Now, in the case of *Herries, Farquhar & Co.*, it was quite the contrary. There the trustee under the first trust-deed became a party to the marriage-contract expressly, and undertook to reconvey the estate held by him in trust for the purpose of paying off the debts to Clanranald and the other heirs of entail. And the ground on which the Court came to the conclusion with regard to this undertaking on the part of the trustee, and the consideration in respect of which that undertaking took place, was in respect of the peculiarly onerous terms of the marriage-contract itself. As I read the opinions of the Judges, the mere fact of the marriage having been entered into was not held to make the transaction of itself so onerous as some of the authorities might imply. But in the opinion of Lord Mackenzie on that second branch of the case, viz., whether the entail stood good, his Lordship distinctly alludes to the fact of its having proceeded on most onerous considerations. He says, "Macdonald subsequently entered into the marriage-contract, 1812, and the trustee, Brown, was made a party to it, in the express character of trustee infeft in the lands. On most onerous considerations various stipulations were undertaken by Macdonald, the truster, and him, the trustee; and in particular a sum of £10,000 was paid by the father of Lady Caroline to the trustee for the purposes of the trust. In consideration of this, Macdonald, with consent of the trustee, Brown, bound himself to execute a strict entail of the lands which should remain after satisfying the trust, 1811, in favour of himself and the heir-male of the marriage, now defender, and the other heirs there mentioned. It was expressly declared that the fetters of this entail should be laid on Macdonald himself as well as on the heirs of entail, and that it should be an irrevocable deed. The trustee, Brown, went along with this whole obligation as an express consenter, &c. This was an obligation which was clearly binding on the trustee, and which was undertaken for a full onerous consideration"—the full onerous consideration being the £10,000 that the marriage-contract bore was advanced by the lady's father.

Now, here we have no stipulation in this marriage-contract that this estate of Tarbrax shall go to the eldest son,—no provision that it is to be held by him. On the contrary, in the original trust-deed, as I read it, it is simply referred to with reference to the fact that an estate had been settled under which there was a power reserved to burden it with an annuity in favour of the widow of the truster, who was then entering into the marriage; but I can find nothing in the terms of that deed which entitles me to say that that was any such onerous consideration as that which occurred in the case of *Herries, Farquhar & Co.*, and in respect of which onerous consideration alone it was that the Court, as I read the judgment, came to the conclusion that the estate was protected against the creditors. On that ground I concur with your Lordship and the Lord Ordinary in holding that the marriage-contract, and what was done at the time of the marriage-contract, does not place this estate in the position of being protected against the creditors.

The Court adhered.

Counsel for David J. Robertson—Balfour—Robertson. Agents—Bruce and Kerr, W.S.

Counsel for Pursuer—Dean of Faculty (Watson)—R. V. Campbell. Agent—Alexander Wylie, W.S.

Counsel for Souter Robertson's Trustees—Adam — Kinnear. Agents — Tods, Murray, & Jamieson, W.S.

Friday, November 17.

FIRST DIVISION.

[Lord Young, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* HENDERSON AND OTHERS.

Railway—Sale—Preservation of Minerals—Acts 7 *and* 8 *Vict. cap.* 87 *and* 8 *and* 9 *Vict. cap.* 33 (*Railways Clauses Act*).

Subsequently to the passing of a private Act (7 and 8 Vict. cap. 87), which contained mineral clauses similar to those of the Railways Clauses Act (to the effect that the company shall not be entitled to the mines or minerals under lands purchased by them unless the same shall have been expressly purchased), a railway company purchased from a proprietor "the perpetual servitude and right to use and occupy so much of the ground above described as is at present used and occupied by the piers or pillars of their viaducts."—*Held*, in a question with the railway company, that the proprietor was in the same position with regard to his right to work minerals as if the company had actually purchased the land.

This was an action at the instance of the Caledonian Railway Company, pursuers, against Robert Henderson, heritable proprietor of the lands of Dundyvan, and the Drumpellier Coal Company, and the said Robert Henderson and Richard Dimmack, its individual partners, lessees of the coal and other minerals in the said lands of Dundyvan. The summons concluded for declarator "that by disposition, dated the 7th, and recorded in the New and General Register of Sasines, &c., at Edinburgh, the 8th days of November 1845 years, granted by the late John Wilson, then heritable proprietor of the said lands of Dundy-