the creditors of the merchant, whether the packer has a general or continuing lien for his account or not.

It seems to be settled in England under the cases quoted at the bar that a packer in England has a general lien for his account—that is, that he may retain, in the case of the bankruptcy of the merchant, the goods which happen to be in his hands, in security not only of the expense of packing these particular goods, but also of the expense of packing previous goods which he had packed and despatched by the merchant's order. It is needless to inquire into the history of the English decisions, or of the law as so fixed in England. Whether it arose from the circumstance that in former times packers also acted as agents or factors for the merchant, and were in the habit of advancing money on the goods consigned for packing, and so were held entitled to an agent or factor's general lien. However this may be, the rule seems now established in England that a packer has a general or continuing lien.

This precise point does not appear to be determined in Scotland by any decision, or even by any authoritative dictum. But in a question of the merchant law, when any point of practice or any rule of trade is established as the law of England, especially in modern times, and when the reason of the rule is the same in both parts of the island, there is the very strongest presumption that the practice or rule will prevail in Scotland also, unless the contrary be clearly established. At all events—and perhaps this is sufficient for the decision of the present case—comparatively slight proof of the practice of trade in Scotland will be sufficient to establish a rule of trade which is recognised and in full force in England. It is very undesirable in matters of mercantile law and in precisely the same circumstances that different rules should prevail or be fixed for England and for Scotland when no reason whatever can be given for such variance.

In the present case I am satisfied with the evidence relied upon by Messrs M'Murray & Co., the packers and hot pressers, and by their assignees. Indeed, I may say it is all one way, for although Mr Strong, who is the sole witness for himself, explains that the alleged right of lien has often been made the subject of dispute and of compromise, he admits that in general the packers have succeeded in making it good and securing their preference, although he explains that this was not by reason of the law being admitted, but because the packers would otherwise have withheld their consent to composition arrangements. The result is, however, that, so far as we can see in evidence, in Glasgow the packers' right to a general lien has not only always been asserted, but has always or almost always been made good.

I am therefore of opinion that the interlocutor of Sheriff Dickson appealed against is well founded, and that the appeal ought to be dismissed.

The Court dismissed the appeal and found the respondent entitled to expenses.

Counsel for Petitioner (Appellant) — Scott. Agent—A. Kelly Morison, S.S.C.

Counsel for Respondents — Guthrie Smith. Agent—John Gill, S.S.C.

Tuesday, March 19.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

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

Succession—Parent and Child—Power to Revoke— Jus quæsitum tertio.

A father and son entered into a deed of agreement by which the father agreed to pay his son £7000 as the price of his consent to the disentail of an estate. £4000 was to be paid absolutely, the remaining £3000 was to be paid to trustees, "to be held by them in trust for the use and behoof of the son, but under the declaration that it should be lawful for the father to limit the power and control of the son over the said sum to such extent and in such way as he should think proper, and in particular to direct the trustees to hold the sum for behoof of the son in liferent only, and for the issue of his body in fee, whom failing to his nearest heirs and assignees." The father thereafter executed a deed of declaration of trust, which was also signed by the son, who therein expressly declared his concurrence and acquiescence, providing *inter alia* that in the event of the son dying without issue the trustees should hold the £3000 for the father's sister and her heirs.—*Held* (*alt.* Lord Curriehill, Ordinary, and *diss.* Lord Ormidale) that, as the sum in question belonged solely to the son, and his father had merely reserved to himself a power to protect his son against his creditors by limiting his right to a liferent—(1) any destination other than that provided in the deed of agreement was *ultra vires* of the father, and (2) the destination contained in the deed of trust was truly a testamentary destination by the son, and therefore revocable by him, and no *jus quæsitum* arose under it to the father's sister and her heirs.

In the year 1870 the deceased John Costine senior was heir of entail in possession of the entailed estate of Glensone and others, and in consideration of the obligations in favour of John Costine junior, his eldest son, contained in a minute of agreement entered into between them on 20th October 1870, he obtained the consent of his son to the disentail of the estate. By this minute of agreement John Costine senior became bound, in the first place, to pay to John Costine junior the sum of £4000 sterling at the first term of Whitsunday or Martinmas after the completion of the disentail, and, if so required, to execute and deliver to John Costine junior, immediately on the authority to disentail being granted by the Court, a bond and disposition in security over the lands of Glensone for this sum of £4000 payable to John Costine junior, his executors or assignees, at such term of Whitsunday or Martinmas, with interest at the rate of four per cent. per annum; and, in the second place, to pay at such term of Whitsunday or Martinmas to certain parties as trustees, of whom the pursuers are the survivors and acceptors, the further sum of £3000 sterling,

to be held by them in trust for the use and behoof of John Costine junior, but under the declaration that it should be lawful to John Costine senior to limit the power and control of John Costine junior over this sum of £3000 to such extent and in such way as he should think proper, and in particular to direct the trustees to hold this sum for behoof of John Costine junior in liferent only, and for the issue of his body in fee, whom failing to his nearest heirs and assignees, and also to limit the interest of John Costine junior in said sum to that of a liferent alimentary provision, which he should have no power to assign, and which should not be liable to be attached by the diligence of his creditors; and John Costine senior also became bound, immediately on the authority of the Court to disentail being granted, to execute and deliver to the trustees a bond and disposition in security over the estate for the sum of £3000, payable to them at such term of Whitsunday or Martinmas, with interest at the rate foresaid; and John Costine junior thereby accepted of the provisions in his favour as full compensation for giving his consent to the disentail of said estate, and signed the minute of agreement.

The estate was disentailed, and the instrument of disentail was recorded on 26th December 1870, and on 31st January 1871 John Costine senior, in pursuance and implement of the minute of agreement above narrated, executed, *unico contextu*, the three deeds after mentioned, namely—(1) A bond and disposition in security over the said estate for £4000, payable to John Costine junior, his executors or assignees whomsoever, which was recorded in the Register of Sasines on 3d February 1870; (2) a bond and disposition in security over the estate for £3000, payable to trustees (the pursuers), which bond was recorded on 3d February 1870; (3) a deed of declaration of trusts relative to the last-mentioned bond and disposition in security, dated 31st January 1871, and registered 10th April 1877. In the last-mentioned bond and disposition in security it was declared that the same was granted in trust only, and for the ends, uses, and purposes expressed in the deed of declaration of trusts, and it was subscribed by John Costine junior, who therein expressly declared his concurrence and acquiescence in the same, and in the deed of declaration of trusts. The deed of declaration of trusts proceeded on the narrative of the disentail and of the minute of agreement and bonds and dispositions in security, and it was thereby declared that the trustees should hold the sum of £3000 in trust for the following ends, uses, and purposes, viz.—(1) That they should invest the said sum in their own names as trustees foresaid, and pay the interest or annual produce thereof to John Costine junior during his life, at such times and in such sums as they might think proper, it being declared by John Costine senior, in virtue of the power reserved to him in the minute of agreement, that the interest or annual produce should be a liferent alimentary provision in favour of John Costine junior, which shall not be assignable by him nor affectable by his debts or deeds, nor subject to the diligence of his creditors; (2) that upon the death of his son the trustees should hold the principal sum in trust for the lawful issue of his son, and the heirs of their respective bodies, and should pay and divide the same equally among them and the survivors *per stirpes;* (3) that in the event of his son dying without issue, or failing such issue, the trustees should hold the sum of £3000 in trust for behoof of John Costine senior's sister Isabella Costine or Wightman (who was one of the claimants), spouse of Robert Wightman, in liferent for her liferent use allenarly, free from the legal rights of her husband, whose *jus mariti* was thereby expressly excluded, and for behoof of her lawful issue and the heirs of their respective bodies equally among them, and the survivors of them *per stirpes* in fee, it being declared that in all cases in which a share of the £3000 should become payable to females such shares should not be subject to the control of any husband they had married or might marry, but should be payable to such females on their own receipts alone, the *jus mariti* of their husbands being thereby expressly excluded. This deed of declaration of trusts was subscribed by John Costine junior, who therein declared his acquiescence and concurrence in all the provisions therein contained, and consented to its registration in the Books of Council and Session for preservation. The bond and disposition in security for £3000 and the deed of declaration of trusts were delivered to the trustees at or shortly after the date they bear, and were held by them for behoof of the parties therein specified for their respective interests of liferent and fee. On the same date—the 31st January 1871—and *unico contextu* with the execution of the several deeds already referred to, John Costine junior executed and delivered to John Costine senior a discharge, whereby, on the narrative, *inter alia*, that John Costine senior had, in fulfilment of the obligations contained in the minute of agreement, executed and delivered to him John Costine junior the bond and disposition in security for £4000, and had executed and delivered to the trustees the bond and disposition in security for £3000 for the purposes set forth in the separate deed of declaration of trusts, he, John Costine junior, exonered and discharged John Costine senior, his heirs, executors, and representatives whomsoever, of the respective sums of £4000 and £3000, and of the whole obligations undertaken by him in the minute of agreement, and of all claims whatsoever which he had or could make against John Costine senior in respect of his consent to the disentail or in relation thereto.

The estate of Glensone was sold by John Costine senior at Whitsunday 1871, and the sum of £3000 contained in the bond and disposition in security therefor was then paid to the trustees, who still hold the same for the ends and purposes set forth in the deed of declaration of trusts. The trustees, in terms of the directions contained in the deed of declaration of trusts, paid the interest to the said John Costine junior from Whitsunday 1871 until his death on 17th March 1877. This sum of £3000, with the interest thereof since the death of John Costine junior, formed the fund *in medio* in the action.

John Costine senior died on 15th August 1871, and the said John Costine junior was married to Catherine Hay Crichton or Costine (a claimant) in 1874, but died without lawful issue on 17th March 1877. On 4th March 1877, a few days before his death, he executed a deed, which bore that he thereby revoked the deed of declaration

of trusts narrated above, and all other deeds and writings whereby the sum of £3000 was placed beyond his control or destined after his death, and that he bequeathed this sum to his wife, and directed the trustees to assign and convey to her after his death.

John Costine junior having died very soon after executing this deed, the question arose whether he was entitled to test upon this sum of £3000, or whether under the deeds narrated he had merely a liferent, the fee going to Isabella Costine or Wightman and her children.

The parties in the multiplepoinding were—(1) The trustees under the bond and disposition in security for £3000; (2) Mrs K. H. Crichton or Costine, widow of John Costine junior; (3) Mrs Isabella Costine or Wightman and four of her children; (4) Mrs Agnes Wightman or Ellis, another of the last party's children, and her husband. The interests of the last parties (three and four) were identical as opposed to that of the second party.

The pleas-in-laws for the second party were as follows:—"(1) The £3000 having been from the date of the disentail arrangements, and thereafter during his life, the property of the said John Costine junior, and the deeds of 1871 having constituted a revocable disposal of the said sum by him, which was effectually revoked by the deed of 1877 in favour of the claimant, she is entitled to be ranked and preferred in terms of her claim. (2) The third purpose of the deed of declaration of trust of 1871 was a testamentary and revocable settlement by the said John Costine junior, and it was effectually revoked in favour of the claimant by the deed of revocation of 1877."

The second plea-in-law for the third parties was as follows:—"(2) The said John Costine junior had no power to revoke the conveyance of the said sum to the pursuers, or to alter the purposes of the trust as contained in the said deed of declaration, in respect (1) that the said sum of £3000 was not his property, and he had no right or interest therein other than that specified in the said deeds; (2) that the constitution of the said trust for the purposes specified in the said deed of declaration was part of an onerous and irrevocable contract; and (3) that a *jus quæsitum* in the said sum was thereby constituted in favour of the claimants."

The Lord Ordinary (CURRIEHILL) on 15th November 1877 pronounced the following interlocutor:—[*After various findings in fact*]—"Finds that according to the sound construction of the said minute of agreement, deed of declaration of trusts, bonds and dispositions in security and discharge, and separately that by the execution and delivery of the said bond and disposition in security and deed of declaration of trusts, and by the registration of said bond in the Register of Sasines, the said sum of £3000 was, with the acquiescence and concurrence of the said John Costine junior, irrevocably destined after his death in the event—which happened—of his leaving no lawful issue, to the claimant Mrs Isabella Costine or Wightman, in liferent allenarly, and her children, the claimants William Wightman, Isabella Jane Wightman, Clara Constance Wightman, John Wightman, and Agnes Wightman or Ellis, equally among them in fee, in the terms contained in the said deed of declaration of trusts above set forth, and that the said deed of revocation and bequest executed by the said John Costine junior was *ultra vires* of him, and is ineffectual to confer upon the claimant Mrs Catherine Hay Crichton or Costine any right or interest in the said sum of £3000: Therefore repels the claim for the said Catherine Hay Crichton or Costine, and decerns: Sustains the claims for the other claimants as amended, and ranks and prefers them upon the fund *in medio* for their respective rights of liferent and fee in terms of their respective claims, and decerns: Finds all the claimants entitled to expenses out of the fund *in medio:* Appoints accounts to be lodged, and remits the same to the Auditor of Court to tax and to report."

His Lordship added the following note:—

"*Note.*—The only question at issue between the parties is, Whether the destination of the sum of £3000 contained in the deed of declaration of trusts was irrevocable by the late John Costine junior, or was testamentary so far as he was concerned and therefore revocable by him? The findings of the foregoing interlocutor narrate the terms of the various deeds so fully that it is unnecessary to repeat them here, or to do more than to say that while a good deal might have been said in favour of John Costine junior's power to revoke or set aside the destination in the deed of declaration of trusts had he not been a party thereto, I think that by his acquiescence and concurrence in that deed he precluded himself from raising such questions or from challenging that destination. The original minute of agreement is somewhat ambiguously expressed. The sum of £3000 is, by the second head of the agreement, to be held by the trustees for the use and behoof of John Costine junior, but his father, who by the agreement became bound to pay that sum to the trustees 'for the use and behoof of his son,' expressly reserved power 'to limit the power and control of the said John Costine junior over the said sum to such extent and in such way and manner as he should think proper.' Had the reservation stopped there the case would have presented no difficulty. John Costine senior would have had full power to direct the disposal of the fund, but the reservation goes on as follows—'And in particular, it shall be in the power of the said John Costine senior to direct the said trustees to hold the said sum of £3000 for behoof of the said John Costine junior in liferent only, and for the issue of his body in fee, whom failing to his nearest heirs or assignees, and it shall also be in the power of the said John Costine senior to limit the interest of the said John Costine junior in the said sum of £3000 to that of a liferent alimentary provision, which he shall have no power to assign, and which shall not be liable to be attached by the diligence of his creditors.'

"Now, two questions arise as to the construction of this qualification—(1) Whether, by the use of the words 'in particular' the general power reserved by the father was restricted to the exercise of that power in one or other of the two particular modes specified; and (2) whether the true meaning of the language in which the second of these modes is expressed is, or is not, that the whole 'interest' which John Costine junior was to have in the said sum was to be a bare liferent—alimentary and inalienable—and

that the 'interest' which he might otherwise have had to dispose of the sum by a deed to take effect after his death was excluded.

"These are questions which it might have been difficult to answer had the deed of declaration of trusts and the other deeds referred to in the interlocutor not been granted. But I think that by these deeds, and particularly by the deed of declaration of trusts, to which John Costine junior was a party, and gave his full and deliberate consent, he and his father have virtually interpreted the second head of the minute of agreement as conferring upon or as reserving to the father full power, failing issue of his son, to deal with the fee of the £3000 as he should deem right. And as the destination of the fee to Mrs Wightman and her children failing issue of John Costine junior was made by John Costine senior expressly as an exercise of the power reserved by him in the minute of agreement, and as John Costine junior deliberately expressed his concurrence in that act, he and his father must be held as concurring in the interpretation which I have put upon the minute of agreement.

"Separately, I should be inclined to think that the delivery of the deeds to the trustees and the registration of the bond for £3000 in the Register of Sasines, and the consent by John Costine junior to the registration of the deed of declaration of trusts in the Books of Council and Session, must in the circumstances be held as amounting to *jus quæsitum* in favour of Mrs Wightman and her children.

"In either view of the case, John Costine junior had no power to revoke the destination of the fee contained in the deed of declaration of trusts, and the claim of his widow must therefore be repelled, and that of the other claimants sustained.

"As I think the question was a fair one to try, and has been caused by the ambiguity of the terms employed by the granters of the deeds, the expenses of both parties should be defrayed out of the fund *in medio*, and in this view I understand that all the parties concur."

The second party reclaimed, and argued—The sum of £7000 was given to Costine junior as the price of his consent to the disentail. There was no reason why any of it should adhere to the father, and the right he retained did not include a right to destine the money after the son's death. The limitation was introduced for the benefit of the son and his heirs—to protect him against his own deeds and against creditors. The introduction of the aunt's name was *ultra vires* of the father, and was merely a testamentary direction by the son, he not then being married, and she the person who would succeed *ab intestato*. The destination to her was therefore one alterable by Costine junior. It could not be said that this was wholly a mutual deed between father and son, for although the son consented to it, this could not convert a testamentary deed into a contract. The parts of the deed which were testamentary and those which were contract were quite clearly indicated, and no *jus quæsitum tertio* could arise except out of that which was contract. If this was so, delivery of the deeds would not alter the quality of the right. It was quite possible that a deed could be recalled although put upon record—*Forrest* v. *Robertson's Trustees*, October 27, 1876, 4 R. 22.

Authorities—*Lang* v. *Brown and Others*, May 24, 1867, 5 Macph. 789; *Kippen* v. *Kippen's Trustees*, Nov. 24, 1871, 10 Macph. 134; *Traquair* v. *Martin*, Nov. 1, 1872, 11 Macph. 22; *Hill* v. *Hill*, July 2, 1755, M. 11,580; *Balvaird* v. *Latimer*, Dec. 5, 1816, F.C.; *Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 14 Scot. Law Rep. 515; Bell's Lect. on Convey. i. 106, and ii. 962-3.

Argued for third parties (respondents)—The £3000 in dispute was never the property of Costine junior. [Q. *per cur.*—Who then was the fiar of this sum—to whom would it go if there were no other destination of it than the clause in the deed of agreement?] In the deed there was nothing testamentary at all. It was entirely a contract, and there was therefore a *jus quæsitum* by the aunt. When a deed of this sort was put upon record, it was at once beyond the power of both father and son, it being *inter vivos*. The case here was very similar to the case of an entail, where it was beyond the power of the entailer and institute to recal it when once recorded, there being a *jus quæsitum* in the substitutes—*Gordon* v. *Dewar &c.*, Jan. 25 and Aug. 2, 1771, M. 15,579. Similarly with a marriage contract—*M'Gowan* v. *Robb, &c.*, Dec. 14, 1862, 1 Macph. 141; *Tait* v. *Pollocks*, July 20, 1738, M. 7728; *Warnoch* v. *Murdoch*, Jan. 8, 1759, M. 7730; *Hamilton* v. *Hamilton*, Jan. 9, 1741, M. 11,576; Stair i. (More's Notes) 62.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts*]—The first question to determine—for its solution probably will be found conclusive—is, What interest the father had in this family arrangement—had he any personal or patrimonial right in this sum of £3000, or was his power under the arrangement of a purely fiduciary or administrative character? I am very clearly of opinion that he was debtor in this sum, and retained the property of no part of it.

It is stated in the record—and there seems no reason to doubt the fact, with which all the subsequent deeds are entirely consistent—that the son's interest in the entailed estate had been valued on ordinary principles at £7000. I cannot assume this, for no proof of it has been allowed; but as no other footing is suggested on which the sum in question—£3000—was arrived at, it is not unreasonable to conclude that such was probably the fact. At all events, it is certain that the son's interest in the entailed estate was the subject-matter of the agreement of 20th October 1870. It was of course open to the son to take less than his life-interest, but I see no indication in these deeds that any part of the amount was renounced in favour of the debtor in the obligation. Accordingly the agreement, after setting out that John Costine junior had given his consent to the disentail of the lands in consideration of the obligations in his favour underwritten, proceeds to deal with the whole sum of £7000. Of this the father undertakes to deliver to his son a bond and disposition in security for £4000 over the lands of Glensone, and the balance—£3000—he binds himself to pay over to the trustees therein named, to be held by them in trust for the use and behoof of John Costine junior. On that being done he was entitled to demand a discharge, and not otherwise.

Now, passing over in the meantime the re-

served power in the agreement, we find the obligation to pay this sum of £3000 for behoof of the son carried out in terms of the subsequent deeds. The bond and disposition in security, dated 31st January 1871, sets out that John Costine junior had consented to the disentail on the consideration that his father had bound himself to pay to certain trustees for his behoof the sum of £3000 sterling; and the discharge and the deed of declaration of trust proceed on precisely the same narrative. These three deeds were executed on the same day, three months after the deed of agreement. *Prima facie* therefore this sum of £3000 was a debt of the father's, and after it was paid and discharged he had no right of property in it whatever.

It only remains to consider whether the powers reserved to the father in the agreement of October 1870 reserved to or conferred on John Costine senior any right of property in this fund. I think it impossible so to read them. They are as follows —[*reads*]. There is nothing in this which gives the father any right to alienate this fund from John Costine or his issue or his heirs and assigns. His power was entirely limited to placing restrictions on John Costine's individual power and control over a fund the fee of which was held for his behoof, and the utmost extent to which he was entitled to go was to limit his son's right to an alimentary liferent, the trustees being directed to hold the fee for his issue, whom failing for his heirs and assigns. It was a trust reposed in the father, to be exercised, not for his own benefit, but for that of his son on the one hand, and his possible issue on the other. It was meant to provide against the son's creditors and the son's extravagance, but the father's right was only to impose restrictions. He had no power directly or indirectly to alienate or divert the fund from his son to strangers, and no power, as I read it, to exclude the son's assignees in favour of any nominee of his own. Probably the agreement created a *jus crediti* in the possible issue, but in no one else.

If, therefore, this agreement gave the father no power to control the ultimate destination of a fee in which he had no patrimonial right, the substitution of his father's sister failing his own issue in the declaration of trust was purely gratuitous, and therefore purely testamentary on the part of the son. Even if the reserved power would have authorised the father to prohibit the son from testing on this fund, which I greatly doubt, it could not authorise him to dictate the testament he should make. He had no power in that matter whatever. If this be so, this provision, although assented to by the son, formed no part of any contract for an onerous consideration; no *jus quæsitum* could arise out of it; and as it was testamentary he might alter it, as he did. It may be said that the declaration of trust construes the contract. But we must look to the substance of the thing done, and I think it plain that the son never meant to place his right of testamentary disposal in his father's hands without the power of resuming it.

Lord Ormidale—I regret that the views which have been expressed by your Lordship are not in accordance with the only conclusion I have been able to come to in this case.

I agree with the Lord Ordinary in thinking that all the three deeds referred to in his Lordship's note which relate to the sum of £3000, which alone is now in dispute, require to be considered in connection with each other in order to arrive at a sound result on the question which has to be determined. They are indeed connected in such a way that it is impossible to ascertain satisfactorily the true meaning and effect of any one of them apart from the others. It is only by taking them all into view that anything that might otherwise appear to be doubtful or ambiguous can be cleared up.

It is important also that it should be borne in mind that the object of all the deeds was to carry into effect a mutual contract or arrangement which was entered into by the now deceased Mr Costine senior and his son, the also now deceased Mr Costine junior, whereby the latter, as an heir of entail to the landed estate of Glensone, belonging to the former, for certain onerous considerations gave his consent to the estate being disentailed.

By the first of the three deeds—the agreement between father and son—it appears that the sum of £7000 was to be given for the consent. But in regard to £4000 of that sum there has been no dispute. The present question relates exclusively to the remaining £3000. This sum, as the deed bears in its second head, was to be held by certain trustees therein named for the use and behoof of Mr Costine junior, but that it should be lawful for Mr Costine senior to limit the power and control of Mr Costine junior over it "to such an extent and in such way and manner as he shall think proper." If the agreement had stopped here there could have been no doubt, I think, that Mr Costine senior might have limited the right and interest of his son as regards the capital as well as income of the £3000 just as he pleased; but as the agreement goes on to add that "in particular, it will be in the power of the said John Costine senior to direct the said trustees to hold the said sum of £3000 for behoof of the said John Costine junior in liferent only, and for the issue of his body in fee, whom failing to his nearest heirs and assignees," it was argued that, in accordance with the principle *generalibus specialia derogant*, the precise destination specified as regards the fee or capital could not be varied or altered. But the principle referred to is not so rigid or inflexible as that would make it. It may raise a presumption, but, like all presumptions, it may be displaced or rebutted by circumstances plainly leading to a different result. That this must be so in the present instance I cannot doubt, keeping in view the deeds which follow upon and in furtherance, as they expressly bear, of the agreement—deeds to which both Mr Costine senior and Mr Costine junior were parties.

There is the bond and disposition in security by Mr Costine senior, with concurrence of Mr Costine junior, in favour of the trustees, dated 3d February 1871, which bears to be granted, on the narrative and in pursuance of the agreement, and "for the ends, uses, and purposes expressed in a deed of declaration of trusts executed by me" (Mr Costine senior) "of even date herewith." And this bond also bears that Mr Costine junior thereby declares his "concurrence and acquiescence in the above-written bond and disposition in security, and in the said deed of de-

claration of trusts, which is also subscribed by me of even date herewith." The deed of declaration of trusts again thus referred to also proceeds on the narrative of the agreement, and of the powers thereby reserved to Mr Costine senior, and declares that the trustees shall pay the interest of the £3000 to his son John Costine junior during his lifetime, and that upon his death they should hold the principal sum in trust for behoof of his lawful issue, and in the event of his dying without lawful issue, or upon the failure of his issue, for behoof of the father's sister Isabella Costine or Wightman and her issue. It appears to me that all this is in accordance with the powers reserved by the agreement to the father, and gives to it a construction which cannot be resisted. It must, I think, be held that Isabella Costine or Wightman was in reality the assignee of Mr Costine junior failing his own issue. And I think that at anyrate this cannot be disputed by anyone in the right and place of John Costine junior, who was a party to the deed of declaration of trusts, and who *in grœmio* of that deed expresses in so many words his "acquiescence and concurrence" in all its provisions. The application of the principle *generalibus specialia derogant* in the construction of the agreement is thus, I think, entirely excluded; and at anyrate that neither Mr Costine junior, nor anyone in his right or place, can be allowed to found upon it to the effect of maintaining that the destination of the fee or capital of the £3000 and relative bond and disposition in security were *ultra vires* of Mr Costine senior, and might therefore be altered or revoked by himself without the concurrence of his father, the trustees, or any of the other parties interested.

Not only do I think that Mr Costine junior was, in the circumstances to which I have adverted, precluded from altering or revoking the destination referred to, but there is the additional circumstance, which adds great weight to the others, that infeftment was taken on the bond and disposition in security in favour of the trustees so far back as 31st January 1870, and the instrument of sasine recorded in the appropriate register on 3d February of that year. And it was not disputed that all the deeds were on their execution delivered to the trustees, and have ever since been held by them for behoof of the parties interested.

In addition to all this, there is the deed of discharge by Mr Costine junior, of 31st January 1871, proceeding on the narrative of the other deeds and whole transaction, and then bearing that—"Therefore I" (Mr Costine junior) "have exonered and discharged, and hereby exoner, acquit, and simpliciter discharge, the said John Costine senior, his heirs, executors, and representatives whomsoever, of the said respective sums of £4000 and £3000, and of the whole obligations undertaken by him on the foresaid minute of agreement, and of all claims whatsoever which I could make against him in respect of my having consented to the disentail of the said estate, or in relation thereto in any manner of way." Nothing could be more explicit and absolute. But notwithstanding the present claim is insisted in by parties professing to be in the right and place of Mr Costine junior, in respect of his revocation, dated 4th March 1877—not only six years after the execution and delivery of all the other deeds by which the transaction had been closed, but also nearly six years after Mr Costine senior had died, in the belief and faith, it must be presumed, that the whole matter had been settled to the satisfaction of all interested.

In these circumstances, it was, in my opinion, beyond the power of Mr Costine junior to revoke to any extent the deed of declaration of trusts, or to dispute that it should not be given effect to according to its fair and legal import, there being no reduction or challenge of it on the head of fraud or any other ground.

I have hitherto dealt with the transaction and deeds in question as if the interests alone of Mr Costine senior and Mr Costine junior, or those in their immediate right and place, were alone involved; but it must not be overlooked that there is also the interest of a third party—Isabella Costine or Wightman—which cannot be disregarded, and which I am disposed to think with the Lord Ordinary would of itself, on the principle of *jus quæsitum tertio*, be sufficient to bar the alleged revocation by Mr Costine junior. I think it clear that under the deed of declaration of trusts and relative bond and disposition in security, delivered and registered as they were in the public records, Isabella Costine or Wightman acquired a right of which she could not be deprived, and which could not be revoked by Mr Costine junior. This I think is clear on the authority of Lord Stair (i. 10, 5), and the cases which he cites in relation to contracts, obligations, and promises. And I hold it to be also established law that mutual settlements, partaking as they do of the element of paction or contract, cannot be revoked after delivery, especially where the interests of third parties in whom there has been created a *jus quæsitum tertio* interpose, as is illustrated by the cases of *Hogg, &c.* v. *Campbell and Others*, February 24, 1863, 1 Macph. 647, and *Kidd* v. *Kidd*, December 10, 1863, 2 Macph. 227. Nor is it of any consequence that Mr Costine junior received no consideration—if that could be assumed, which I do not think it can—for allowing the destination of the fee or capital of the £3000 to be taken as it was in the deed of declaration of trusts, for by the law of Scotland, as explained by Professor Bell in his Principles, p. 63, a gratuitous or free gift is perfectly good unless in a question with creditors, the party making it being at the time insolvent. But here the whole matter, including the deed of declaration of trusts, and the destination therein, must, in the view I take of it, be considered and dealt with as of the nature of an *inter vivos*, onerous, mutual contract or arrangement by and between two parties which could not be revoked or altered by one of them merely without the consent or concurrence of the other.

These are the grounds on which, in my opinion, the interlocutor which has been pronounced by the Lord Ordinary is right.

Lord Gifford—This is a peculiar and a difficult case, but after a good deal of consideration I have formed an opinion contrary to the view taken by the Lord Ordinary. I think that the ultimate destination contained in the deed of declaration of trust of 31st January 1871, whereby the sum of £3000 was destined, failing John Costine junior and his issue, to Mrs Wightman and her issue, was a mere testamentary des-

tination, dependent solely on the will of the said John Costine junior, that it was revocable by him at any time of his life, and that it was effectually revoked by him by his deed of revocation of 4th March 1877.

In order to determine whether the ultimate destination of the money to Mrs Wightman and her children was merely testamentary, and therefore revocable, or whether it was onerous and irrevocable, I think it is necessary first to consider to whom the sum of money in question—the £3000—really belonged. Whose money was it? Was it the property of John Costine junior, and at his disposal originally, or was it in whole or in part the property of his father, the late John Costine senior? This is always a most important point in considering the effect of the deeds by which the money in question bears to be settled.

Now, looking to the whole deeds in process, I am of opinion that the £3000 in question was originally the property of John Costine junior, and at his absolute disposal. It formed part of a sum of £7000, which was the price payable to John Costine junior for consent to the disentail of the entailed estate of Glensone, in Kirkcudbrightshire, in which estate John Costine junior was the next immediate heir, as the only son of John Costine senior, the heir of entail in possession. There are no materials for showing that the father John Costine senior gave or intended to give to his son a larger sum than the true value of his son's interest as next immediate heir of entail—the heir-apparent in the succession. If it could have been shown that the value of the heir's succession was only £4000, the sum contained in the bond and disposition in security, and that the additional £3000 was given gratuitously by the father, and was in any way dependent upon the father's will, the case would be quite different, and it would have lain upon the son to show that there had been conferred upon him a right of testing on the amount. Nothing of this kind, however, can be gathered from any of the deeds. On the contrary, in the deed of agreement of October 1870, being the agreement to disentail, the father binds himself to pay to certain trustees the further sum of £3000 sterling, which sum it is expressly declared "shall be held by them in trust for the use and behoof of the said John Costine junior." Pausing here, I think this conclusively fixes that the sum so to be paid in trust was the property of John Costine junior. It was to be held for "his use and behoof." No doubt there follows a power reserved to the father "to limit the power and control of the said John Costine junior over the said sum," but this is a power not giving the father any right to the money, but solely giving him a power for the son's benefit, or for the benefit of the son's issue, to restrain the son from dissipating or squandering the fund. It was a power apparently for the son's benefit—a fiduciary right to protect the son against his own acts or against his own creditors—and accordingly I think the father, under pretence of executing this power, could never have appropriated the money to himself in whole or in part, or secured to him any pecuniary benefit at the expense of the son or of the son's heirs. Accordingly, in exercising the power, I think the father could only act in a trust or fiduciary capacity. He reserved no patrimonial rights for himself.

It is true the power reserved to the father is expressed in very ample terms. He may limit his son's "power and control" in any way he may think proper. But these words must receive a fair construction, and I think they are controlled by the specification which follows, the leading specification being that the father may limit his son's right to a mere liferent, reserving the fee for his issue; but then it is immediately added—and the words are very important, as showing that the money belonged to the son, and to the son alone—that failing the son's issue the money should go to his, the son's, "nearest heirs and assignees." This is the only ultimate destination contained in the deed of agreement. I think it was the only ultimate destination which the father, acting merely under the powers of the deed of agreement, could insert as the ultimate destination of the £3000 in question. I think it is quite clear that the father, acting solely under the reserved power, and without any further consent from the son, could not against his son's will have constituted himself the ultimate destinee of the fund, or could have inserted the name of some third party with whom the son had no concern, and whom the son did not wish in any way to favour.

Accordingly, I understand the Lord Ordinary rather to be of opinion that if the son John Costine junior had not been a party consenter to the deed of declaration of trust of 31st January 1871, then the insertion by the father of Mrs Wightman and her issue as the ultimate destinees of the fund would have been *ultra vires* of the father, and would not have been a legitimate exercise of the reserved power contained in the deed of agreement. I cannot say that I have any difficulty in holding this. The reserved power was not intended to give the father any right to the money or to its disposal, and I think that he could neither insert his own name as ultimate devisee or the name of any person he chose. If it had been the sole act of the father to call his own sister Mrs Wightman and her children, and if this had been done without the consent or against the will of John Costine junior, I would have had little hesitation in holding that this was *ultra vires* of the reserved power, and was null and void. The only ultimate devisees whom the father could call under the reserved power were, I think, the heirs and assignees of John Costine junior himself.

This brings us to consider what is the effect of John Costine junior having consented to the deed of declaration of trust. The words in which his consent are given are these—"And I, the said John Costine junior, hereby declare my acquiescence and concurrence in all the provisions herein contained." The real question is, Whether by this assent John Costine junior barred himself from interfering with or altering the ultimate destination in favour of Mrs Wightman and her children? I have come to be pretty decidedly of opinion that it did not.

Why was it necessary that John Costine junior should consent to or acquiesce in the declaration of trust at all? I think it was just because the ultimate destination to Mrs Wightman was not within the reserved power at all, but was really a testamentary act of the son alone, which was dependent upon his sole pleasure. It was therefore he concurred, because he was the person alone entitled to dictate the ultimate destination. What was done was this—to substitute for the son's

"heirs and assignees whomsoever," which was the only destination which the father by himself could have written, a destination to Mrs Wightman and her children as the son's assignees. But this in a *mortis causa* provision by a young man then unmarried was plainly just a mode of making the son's testament. It was a testamentary provision by the son, and like all such testamentary provisions it must be ambulatory during the son's life. When the son came to be married three years afterwards—in January 1874—could he not have revoked this testamentary provision in favour of Mrs Wightman either in his own marriage contract or in any other deed? I think he could. Mrs Wightman had no *jus quæsitum* in the succession; she had no onerous right to the reversion of the money; she was nothing but a gratuitous legatee whose interest was dependent, and dependent solely, on the *ultima voluntas* of the true testator.

It was strongly urged that although Mrs Wightman was no party to any of the deeds—and for aught that appears was not cognisant of their terms in any way—yet a *jus quæsitum tertio* emerged in her favour the moment the declaration of trust was executed, or at least the moment it was delivered to the trustees. I think this is a mistake. *Jus quæsitum tertio* only arises to a stranger or third party when one of the contracting parties or parties to the deed stipulates or contracts on behalf of the stranger. Now, it cannot be said that there was any contract between the father and son relative to Mrs Wightman or for her behoof. The declaration of trust is not a contract at all, but a mere carrying out the reserved power contained in the deed of agreement. There is no place for *jus quæsitum tertio*, for no person whatever was making any contract or stipulation on Mrs Wightman's behalf, and the insertion of her name was merely the gratuitous and, as I think, the testamentary act of her nephew, the said John Costine junior, who at that time was unmarried, and apparently had then no nearer relative.

Nor can I ascribe any finality in Mrs Wightman's favour to the circumstance that the declaration of trust was delivered to the trustees. This was necessary to give effect to the restriction of John Costine junior's right to a liferent, but the mere delivery of such a deed or of a marriage contract or of any similar deed for interim purposes does not alter the testamentary nature and character of any testamentary provisions which it may contain. The declaration of trust was not recorded till after the death of John Costine junior. But this would have made no difference either.

On the whole, then, and while not disguising that the case is attended with nicety, I am of opinion that the interlocutor of the Lord Ordinary should be recalled, that the claimant Mrs Catherine Hay Crichton or Costine, the widow of the late John Costine junior, as assignee of her late husband, should be preferred to the whole fund *in medio*—that is, to the said sum of £3000, and that the claims of the other claimants should be repelled.

Interlocutor reversed, and second party held entitled to fund *in medio*.

Counsel for Trustees—J. G. Maitland; and for Second Party (Reclaimer)—Balfour—J. P. B. Robertson. Agent—James Somerville, S.S.C.

Counsel for Third Parties (Respondents)—Scott—Strachan. Agent—John Walls, S.S.C.

Tuesday, March 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

BEATTIE (INSPECTOR OF BARONY PARISH, GLASGOW) *v.* NISH (INSPECTOR OF PARISH OF OLD LUCE).

Pauper—Birth Settlement—Register of Baptisms.

In a question as to the birth parish of a foundling, evidence *held* (after an interval of forty-seven years) insufficient to establish that it was born in a particular parish, in spite of an entry to that effect in the register of baptisms of a neighbouring parish, where it was found and baptised—*diss.* Lord Shand, who was of opinion with the Lord Ordinary (Adam) that the evidence was sufficient for the purpose of the case, although not such as would be necessary in a question of succession.

This was an action brought by the Inspector of the Barony parish, Glasgow, against the Inspector of the parish of Old Luce, in Wigtonshire, claiming to be reimbursed for certain payments made in relief of Mrs Mackenzie and her three pupil children. The inspector of the Barony parish claimed that he should be repaid these sums, because the settlement of the paupers, in respect of the birth of their husband and father John Mackenzie in the parish of Old Luce, was in that parish.

The question that arose was this—Was John Mackenzie born in that parish? It appeared from a proof led before the Lord Ordinary that John Mackenzie was found in 1831 in a wood in the parish of Portpatrick by the daughters of the Rev. Dr Mackenzie, minister of that parish, was taken home by them, brough up in the manse, and maintained and educated as one of the minister's family. His mother was a woman named Margaret Hamilton, who was tried at Wigton on 19th October 1831 for the exposure and desertion of this child, and received sentence of a month's imprisonment. The evidence as to the residence of this woman at the time of the birth of the child was not very distinct. It will be found recapitulated in the opinion of the Lord President. She seems to have been wandering from place to place, and from parish to parish, at the time of the birth, both immediately before it and immediately after it. She was apprehended in Glenluce, which was in the parish of Old Luce.

There was an entry in the register of baptisms of the parish of Portpatrick, where the child was found, of its baptism, which bore that it had been born at Glenluce; there was also an entry in Dr Mackenzie's family Bible of its baptism on that day, but no mention of the place of birth. Upon this it was contended by the pursuer, the entry in the register must have been made with Dr Mackenzie's knowledge,