the objection, and that therefore the Sheriff has come to a wrong decision.

Lord Mure and Lord Craighill concurred.

Appeal sustained.

Counsel for Appellant—Balfour—J. J. Reid. Agents—White-Millar, Robson, & Innes, S.S.C.

Counsel for Respondent—J. P. B. Robertson. Agents—Maitland & Lyon, W.S.

November 1879.

No. 28.] [County of Perth.

SKEETE *v.* TURNBULL.

Election Law — County Franchise — Holograph Unstamped Letter—Feu-Charter.

A party in 1876 obtained from a proprietor a holograph unstamped letter accepting an offer to feu certain property. For 1877 and 1878 his name appeared on the valuation roll as proprietor, and he held a receipt, dated May 1879, for the past feu-duties from 1876. In June 1879 he obtained a feu-charter. *Held*—(*reversing* the Sheriff (Lee)—that as the Court could not look at the unstamped document of 1876, there was nothing to instruct the contract prior to or at 31st January 1879, and appeal *sustained.*

COURT OF SESSION.

Tuesday, December 2.

FIRST DIVISION.

[Lord Young, Ordinary.

DOUGLAS AND OTHERS (DOUGLAS' TRUSTEES) *v.* KAY AND OTHERS (KAY'S TRUSTEES) AND OTHERS.

Husband and Wife—Antenuptial Marriage-Contract — Conveyance of Acquirenda *— Protected Succession.*

By antenuptial marriage-contract a wife disponed to trustees the whole estate belonging to her or which should accrue and belong to her during the subsistence of the marriage. Her father, who was a consenting party to the marriage-contract, she being a minor, in his trust-disposition and settlement declared *inter alia* that the shares of his daughters who had attained majority or had been married should vest at his death, and be payable as soon thereafter as the state of the trust permitted; but with reference to this particular daughter he added the further declaration "that the share of my estate (both as regards capital and income) falling to my daughter [*names her*] shall not fall under the conveyance granted by her in the antenuptial marriage-contract . . . but the said share shall belong to her exclusive of the said marriage-contract trustees; and I authorise my trustees to take such steps as they may think necessary or proper for giving effect to the provision and declaration last expressed regarding the share of the said" [daughter]. The daughter survived her father for six months, and was survived by her husband. She left a trust-disposition and settlement whereby she excluded her marriage-contract trustees from all share in her estate, and in particular from all share in what she had inherited from her father. In a question between the marriage-contract trustees on the one hand, and the wife's trustees and those of her father on the other, *held* (*rev.* Lord Young, and *diss.* Lord Deas) that as her father had not effectually imposed any condition on his daughter's share of his succession to the effect of enabling her to defeat the onerous obligations which she had undertaken in her marriage-contract, her trust disposition was ineffectual to prevent her share of her father's succession from falling under the marriage-contract.

Observations on the case of *Thurburn's Trustees* v. *Maclaine*, Nov. 30, 1864, 3 Macph. 134.

Observations on the effect, with reference to his own estate, of a father's consent to the antenuptial marriage-contract of a daughter in minority which contained a provision that all property belonging to her or which should accrue to her during marriage should fall under the trust thereby created.

Mr James Earl Douglas was married in 1868 to Miss Wilhelmina Kay, daughter of Mr John Zuill Kay, ironfounder, Glasgow. Miss Kay was then in minority, and in the antenuptial contract of marriage, which she entered into with the special advice and consent of her father, her intended husband made certain provisions for his wife and the children of the marriage, and bound and obliged himself to make over to the trustees certain securities for these provisions, and further renounced his *jus mariti* and right of administration over any estate, heritable or moveable, real and personal, then belonging to Miss Kay, or to which she might succeed during the marriage. These provisions Miss Kay, on the other hand, accepted as in full of her legal claims, and she, "with consent of her said father, hereby assigns, dispones, and conveys and makes over to and in favour of the said [trustees], and the accepting survivors and survivor of them, all and sundry the whole heritable and moveable, real and personal, estates and effects now belonging or that should accrue and belong to her during the subsistence of the said intended marriage," in trust for the purposes therein mentioned. These purposes, *inter alia*, were for payment of the annual produce of the estate so conveyed as an alimentary provision to the spouses during the subsistence of the marriage, and in the event of the husband's survivance, for payment of the said annual produce in like manner to him as an alimentary provision for himself and his children. The fee was destined to such of the children of the marriage or their issue as should survive the dissolution thereof, with a power of appointment to the spouses jointly or the survivor, failing which the division was to be made equally on the children or their issue attaining majority.

In terms of the marriage-contract Mr Douglas senior, father of Mr James Earl Douglas, trans-

ferred to the marriage-contract trustees an assignment by the Dundee Harbour Trustees for £1000 as security for an annuity of £150 which Mr J. E. Douglas undertook to pay his wife during their marriage and until her death; and down to her death Mrs Douglas drew the interest thereof half-yearly. Mr Douglas senior conveyed to Mrs Douglas in liferent, and the pursuer James Earl Douglas in fee, a villa in Broughty Ferry, where the spouses continued to reside till May 1875.

Differences having arisen between Mr and Mrs Douglas, it was ultimately agreed on 3d January 1876 that they should live separate, and a minute was signed by the spouses and by Mr Douglas' father embodying the terms of the agreement, which did not interfere with the provisions of the antenuptial contract so far as related to the present dispute.

Mrs Douglas' father, Mr Kay, died on 16th April 1878 survived by his daughter. By his trust-disposition and settlement, with respect to the residue of his estate, he directed his trustees "to hold and apply the said residue for behoof of my whole lawful children now alive, or hereafter to be born, in equal shares, and their respective lawful issue *per stirpes*, as after mentioned: And it is hereby declared that the shares of sons who have then attained majority shall vest at my death, and the shares of sons then in minority shall vest on their attaining majority, and that the shares of daughters who have attained majority or been married shall vest at my death, and the shares of daughters then in minority and unmarried shall vest on their attaining majority or being married, whichever of these events shall first happen, but with power to my trustees to alter and regulate, as they shall think proper, the period of vesting of any of the shares which shall not vest at my death, and to declare the same to be at such time and under such conditions, limitations, burdens, or restrictions as they shall think proper: And it is hereby declared that if any of my said children shall die before the period at which his or her share would in terms of these presents vest, leaving lawful issue, the said share shall belong to such issue equally *per stirpes* if more than one," &c. . . . It was further provided that "all property and funds, heritable and moveable, whether consisting of capital or income (including the said two legacies of £500 each) falling in virtue of these presents to females, shall belong to them, exclusive of the *jus mariti* and right of courtesy and every other right of any husband whom they may have, and shall be unaffectable or liable by or for the debts or deeds of such husband;" and further, it was expressly provided and declared "that the share of my estate (both as regards capital and income) falling to my daughter Mrs Wilhelmina Kay or Douglas, wife of James Earl Douglas, merchant, Dundee, shall not fall under the conveyance granted by her in the antenuptial marriage-contract entered into between her and the said James Earl Douglas, to the trustees therein mentioned, but the said share shall belong to her exclusive of the said marriage-contract trustees; and I authorise my trustees to take such steps as they may think necessary or proper for giving effect to the provision and declaration last expressed regarding the shares of females and the share of the said Mrs Wilhelmina Kay or Douglas;" and further, that "the provisions hereinbefore granted by me to my said wife and two children respectively shall be accepted of by her and them respectively as in full satisfaction of all terce of land, half or third of moveables, legitim portion, natural bairn's part of gear, executry, or others whatsoever which she or they or any of them can ask or demand by or through my death."

Mrs Douglas survived her father only a few months. She died on the 9th September 1878 leaving a trust-disposition and settlement dated 9th August 1878, which proceeding on the narrative of her marriage-contract and her father's trust-deed, bore to assign, dispone, and convey to trustees her whole estate, means, and effects belonging or addebted to her, or which should belong or be addebted to her at her death, and particularly, and without prejudice to the said generality, her share of her father's estate. The trust purposes were—(1) for payment of deathbed and funeral charges and the expenses of the trust; (2) for payment and performance of her debts and obligations; (3) a direction to trustees to hold and apply the residue of her estate for behoof of her whole lawful children in equal shares, and their respective lawful issue *per stirpes*, whom failing, for her own nearest heirs and executors, to the exclusion always of her husband and the marriage-contract trustees, who were not in any event to be entitled to any part or portion of the means and estate thereby conveyed.

The pursuers in this action were the two sole surviving and accepting and acting trustees under the marriage-contract (a third having resigned), together with Mr James Earl Douglas, who was assumed on the 4th October 1878. The defenders were the trustees under Mr Kay's trust-disposition, and also those under Mrs Douglas' trust-disposition. The objects of the action were (1) to have it declared that the whole of Mrs Kay's estate belonging or accruing to her during marriage, and in particular her whole right and interest under her father's trust-disposition and settlement, fell within and were carried by the antenuptial contract of marriage, and ought to be made over to the trustees therein; (2) for count and reckoning against Mr Kay's trustees with reference to Mrs Douglas' share of her father's estate; and (3) for reduction of Mrs Kay's trust-disposition.

The pursuers pleaded—"1. The pursuers are entitled to decree in terms of the conclusions for declarator and count and reckoning in respect (1) that it was *ultra vires* of Mr Kay, and contrary to the good faith of the marriage-contract to which he was a party, to exclude the share of his estate provided to Mrs Douglas from the operation of the said marriage-contract; (2) that it was *ultra vires* of Mrs Douglas, and contrary to the good faith of the said marriage-contract, to attempt to convey to testamentary trustees what she had already conveyed to her marriage-contract trustees; and (3) that in any view the same has not been effectually done, and the defenders Mr Kay's trustees are bound to count and reckon with the pursuers for Mrs Douglas' share of her father's estate. 2. Mr Kay having bequeathed a share of his estate to his daughter Mrs Douglas in fee, in such terms as entitled her to dispose of it by a deed taking effect after her death, Mrs Douglas was bound in implement of her contract of marriage to grant a liferent interest therein to the pursuer, the said James Earl Douglas, for the

support of himself and his children during the period of his survivance. 3. In the event of Mrs Douglas' alleged trust-deed being founded on by the defenders in bar of the pursuers' claims under the conclusions for declarator and count and reckoning, the same ought to be reduced as *in fraudem* of the conveyance of Mrs Douglas' *acquirenda* contained in the marriage-contract."

The defenders Mr Kay's trustees pleaded, *inter alia*—"2. In respect of the terms of Mr Kay's trust-disposition and settlement the pursuers are excluded from all interest in his estate, and have no title to sue this action. 3. In respect of the terms of the trust-deed under which they act, the present defenders are not entitled to pay any portion of the trust-estate under their charge to the pursuers, but, on the contrary, are bound to take all necessary and proper steps to exclude the pursuers from any interference with the said trust-estate. 4. Mrs Douglas having conveyed her share of her father's estate to the other defenders, her testamentary trustees, the present defenders are entitled and bound to pay over the said share to them, in respect that by so doing they will be complying with the directions of the trust-deed under which they act."

The defenders Mrs Douglas' trustees pleaded, *inter alia*—"3. The deceased Mr Kay having become a party to the marriage-contract of his daughter Mrs Douglas merely as her curator on account of her being in minority, and having thereby come under no obligation with reference to the disposal of his own estate, he was entitled to dispose of the said estate as he pleased, and subject to such conditions and provisions as he might see fit. 4. The provisions in Mr Kay's trust-disposition excluding the pursuers from his estate being such as he was entitled to make, the other defenders, his trustees, are bound to give effect to them, and are not entitled to pay over any part of the said estate to the pursuers. 5. By the terms of Mr Kay's trust-disposition and settlement the other defenders were not bound or entitled to pay over to Mrs Douglas or her assignees the bequest thereby made to her except in such a way as to give effect to the provisions excluding the pursuers therefrom, subject to which alone the said bequest was made. 6. The trust-disposition and settlement of Mrs Douglas, so far as it conveys to the defenders the bequest made to her by her father, is not *in fraudem* of the rights of the pursuers, in respect that it deals with a bequest from all interest in which they were otherwise effectually excluded."

The Lord Ordinary (YOUNG) sustained the defences and repelled the reasons of reduction. He added this note—

"*Note.*—The pursuers are trustees under the marriage-contract of Mr and Mrs Douglas, and they claim Mrs Douglas' share of her deceased father's estate on the ground that it is transferred to them by the conveyance in the marriage-contract referred to in the condescendence. Mrs Douglas died in September 1878, surviving her father, who died in April preceding, and by his trust-settlement had at the time of her death right to a share (a fifth) of the residue of his estate.

"It is clear, and was admitted, that the marriage-contract conveyance would have operated on this share but for a declaration in the trust-settlement by which it is given, to the effect that it should not fall under that conveyance, but should belong to Mrs Douglas exclusive of her marriage-contract trustees, this declaration being fortified, so far as it might be, by authority conferred on the testamentary trustees to take such steps as they might think necessary or proper for giving effect to it. The father's (Mr Kay's) estate is (at least as regards Mrs Douglas' share) still in the hands of his testamentary trustees undistributed, and the question is whether, notwithstanding the declaration and authority to which I have referred, this share passes to the pursuers by the marriage-contract conveyance. Assuming that it did not, Mrs Douglas before her death settled it on her children by a trust-settlement, the trustees of which are made defenders along with Mr Kay's trustees. The competition is between the pursuers (the marriage-contract trustees) and Mrs Douglas' testamentary trustees, and the real interest regards only the life income to which Mr Douglas will have right if the pursuers prevail, and which will otherwise be lost to him.

"It was conceded that Mr Kay came under no obligation by his daughter's marriage-contract to bestow anything on her or her husband, and that he was, for anything therein contained, at liberty to deal with his property as he pleased. But the pursuers contend, that having by his settlement conferred on his daughter the property of a share of his estate, the declaration that her marriage-contract conveyance should not operate upon it is void for repugnancy—that it would have been so even in the case of a stranger giver, and is more especially so in his case, because being himself a consenting party to the conveyance, he was not entitled to defeat it by a gratuitous declaration, even though that regarded property which he might have withheld. The defenders, on the other hand, contend that the declaration is lawful, and effectually gratifies the trust directions, on which alone the claim of Mrs Douglas, or any others in her right, stands; that Mr Kay's testamentary trustees are accordingly bound to give effect to it, and will do so by transferring to Mrs Douglas' testamentary trustees. The considerations and arguments *hinc inde* are obvious, and I think it is unnecessary to summarise them. My opinion is in favour of the defenders, the ground of it, stated in the most comprehensive manner, being that Mr Kay's will being clearly expressed with respect to property at his absolute disposal, must prevail, and that effect is given to it by rejecting the claim of the pursuers and preferring that of Mrs Douglas' testamentary trustees.

"I notice that by Mr Kay's will legitim is excluded in respect of the provisions given in lieu of it. I doubt if any argument adverse to the validity of the declaration in question could have been stated on this ground, and none was stated. Legitim coming to Mrs Douglas on her father's death would probably or certainly have fallen under her marriage-contract conveyance. Whether or not Mr Douglas may have any right in this direction I have no occasion to consider. I only decide that Mr Kay's will is valid, and must have effect according to its true meaning and import, and that the reasons of reduction directed against it and Mrs Douglas' settlement cannot be sustained."

The pursuers reclaimed, and argued—(1) Mr

Kay's consent to his daughter's marriage-contract barred him from adjecting such a condition to his daughter's legacy as he had done in his trust-deed. (2) Assuming that he was not so barred, he had not effectually fenced the condition which he desired to impose. He ought to have created a trust, but, on the contrary, he had left his daughter absolute proprietor of what he left to her. He gave his trustees certain directions no doubt, but he had not given them the means of making these directions effectual either through their own trust or by creating a subordinate trust, and they could not create a subordinate trust without authority. And Mrs Douglas being absolute proprietor, was bound to implement her obligations in her marriage-contract.

Authorities — *Lady Massy* v. *Scott's Trustees*, Dec. 5, 1872, 11 Macph. 173; *Allan's Trustees* v. *Allan and Others*, Dec. 12, 1872, 11 Macph. 216; *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786; *Gibson's Trustees* v. *Ross*, July 12, 1877, 4. R. 1038.

Argued for the respondents—(1) Mr Kay came under no obligation by consenting to his daughter's marriage-contract, as he consented as her curator simply, she herself being in minority. (2) The purpose of Mr Kay was to confer an absolute right of fee on his daughter, freed from her obligation in the marriage-contract. He was not bound to give her anything, and his gift must consequently be taken, if at all, under what conditions he chose to impose. Here he imposed no conditions except that his trustees were to see that his daughter got the money under no condition. The case was ruled by *Thurburn's Trustees* v. *Maclaine*, Nov. 30, 1864, 3 Macph. 134.

At advising—

Lord President—The pursuers in this action are the trustees under the marriage-contract of Mr James Douglas and his spouse, a Miss Wilhelmina Kay, who were married in the year 1868. The object of the action is to vindicate for the purposes of the marriage-contract trust a certain fund which came to Mrs Douglas during the subsistence of the marriage under her father's settlement. She has disponed this fund by her testamentary disposition on the footing that it does not fall under the marriage-contract, and she is now dead. The defenders are, in the first place, the trustees under her father's trust-disposition and settlement, and, in the second place, her own testamentary trustees. The question is, whether this fund which she professed to dispone truly fell under her testamentary disposition, or whether it does not rather fall under the provisions of the marriage-contract.

She was a minor when the marriage took place, and therefore her father was a consenting party to the marriage-contract. The provisions by her intended husband in her favour under this contract were, in the first place, that he undertook to pay her an annuity of £150, together with one or two other small provisions which it is needless to mention; and secondly, he undertook to pay a certain sum of money in the event of there being one or more children of the marriage. The obligations so undertaken were secured by certain policies of insurance which he assigned to the trustees. Then Miss Kay on her part, "with consent of her said father, hereby assigns, dispones, and conveys and makes over to and in favour of the said trustees, and the accepting survivors and survivor of them, all and sundry the whole heritable and moveable, real and personal, estates and effects now belonging or that shall accrue and belong to her during the subsistence of the said intended marriage, with the whole vouchers and instructions thereof, but that always in trust for the ends and purposes following;" and her estate, whatever it may be held to include, is settled upon herself and her husband in liferent, and the survivor, and upon the children in fee.

Now, the settlement here is one familiar enough in this branch of the law, and it means that whatever comes to the lady during marriage falls within the obligation, unless it has been so tied up by the person from whom it has come as to prevent it from falling under the provisions of the contract. But in regard to what it does include, such an obligation is onerous in the highest degree. It is on the faith of it that the marriage takes place. It is intended by it to provide for the *onera matrimonii*, and for the children who may be born of the marriage.

It would appear that the only expectations which this lady had were from her father, who was a man of some substance; and it is not unimportant to observe that though not an obligant he was a consenting party to the marriage-contract, and consequently in full knowledge of its provisions. It appears that the marriage did not prove a happy one, and the parties latterly had to live separately. A consequence of this was that the lady's father made a provision in his settlement which was intended to have the effect of securing his daughter in an income independent of her husband, and independent also of the obligation she had undertaken in favour of the marriage-contract trustees. The question is, whether he so arranged this provision as to prevent the money which he gave to his daughter from falling into the hands of the marriage-contract trustees?

Now, I do not doubt that he might have so dealt with his estate as to prevent it from falling under the operation of such a trust. But it can hardly be done by a mere expression of desire, and I doubt whether a right of fee can be conveyed to another, situated as Mrs Douglas was, except through the medium of a trust. I hold it to be impossible to convey a fee, a full right of *dominium* in which shall be vested in a party, and yet from which the creditors of the same party shall be excluded. And if it is impossible to exclude creditors, it is equally impossible to exclude the operation of an onerous obligation such as that in this contract of marriage, because these trustees are neither more nor less than creditors. They are not creditors in a definite sum of money indeed, but they are creditors in the obligation by Mrs Douglas to convey to them everything that came to her during the marriage. It is therefore necessary to see in what way Mr Kay actually settled this money upon his daughter.

It is not necessary to examine the other portions of Mr Kay's settlement, but merely that part which relates to the residue, and in particular the provision he makes for his daughter. [*His Lordship here quoted the provision as above*]. Now, when we look at that provision two things are to be observed before proceeding further. The first is, that the fee vested in Mrs Douglas

at the death of the testator, because she was at that date in majority, or at all events she was married. And secondly, the trustees are directed to pay her share to herself directly. It is then provided and declared that "all property and funds, heritable and moveable, whether consisting of capital or income (including the said two legacies of £500 each), falling in virtue of these presents to females, shall belong to them exclusive of the *jus mariti* and right of courtesy and every other right of any husband whom they may have, and shall be unaffectable or liable by or for the deeds or debts of such husband." And then follows this provision—"That the share of my estate (both as regards capital and income) falling to my daughter Mrs Wilhelmina Kay or Douglas, wife of James Earl Douglas, merchant, Dundee, shall not fall under the conveyance granted by her in the antenuptial marriage-contract entered into between her and the said James Earl Douglas, to the trustees therein mentioned, but the said share shall belong to her exclusive of the said marriage-contract trustees. And I authorise my trustees to take such steps as they may think necessary or proper for giving effect to the provision and declaration last expressed regarding the shares of females and the share of the said Mrs Wilhelmina Kay or Douglas." And lastly, it is declared that acceptance of these provisions shall be held as in full of legitim and all other rights which his children might demand through the truster's death.

Now, no doubt Mr Kay desired that Mrs Douglas should have complete command over the property which he left to her. It was to be paid to her at his death, and she was to have the full right and power of disposal of it, but under this condition, that it was not to fall under the operation of the marriage-contract trust. He says to his trustees—"Do all you can to prevent the fund from falling under the marriage-contract trust, but do so in a way consistent with giving Mrs Douglas an absolute fee and full power of disposal of the fund." Now, the question is whether that could effectually be done — Whether he could give her a full power of disposal and yet exclude the operation of the marriage-contract trust? I do not doubt that it might have been done by creating a trust with a direction to pay the income to Mrs Douglas during her marriage for her alimentary use only, or by some provision of that kind. But then the fee would not be in Mrs Douglas, but in the trustees, and whether Mrs Douglas and her marriage-contract trustees would have been inclined to accept such a provision in lieu of her legal rights would have been for them to consider. But in the case here which we have actually to consider there is nothing more than a declaration of will and intention by the testator. He does not give any power, and does not give any authority by which his trustees can do what he wishes. They could not create a subordinate trust at their own hand. That is well settled by the case of *Allan's Trustees*, December 12, 1872, 11 Macph. 216. Nor could they continue to hold the money themselves, for they are directed to pay it over to Mrs Douglas as soon as the state of the trust permitted. The father desired that the money should not pass into the hands of the marriage-contract trustees. But what has that to do with the question? Could it be said for one moment that he could by a mere expression of intention exclude the diligence of his daughter's creditors? As I said before, this is a most onerous obligation by Mrs Douglas. She is personally bound, just as if she had contracted a debt by borrowing so much money. Therefore I think that there is no answer to the demand of the marriage-contract trustees.

I may put the question in this way. Was Mrs Douglas not entitled if she chose to give the money to the marriage-contract trustees? It would be very difficult to answer that question in the negative. She had full power of disposal; she could give the money to whom she pleased, including these trustees. And if she had the power, was she not also under an obligation to give it?

I have therefore not much difficulty in coming to an opposite conclusion from that of the Lord Ordinary. My only doubt had reference to the case of *Thurburn's Trustees*, 3 Macph. 134. I will only say of that case that there were specialties in it which caused it to be dealt with by the learned Judges who decided it upon very various considerations. And if it had not been for these specialties, I do not think that the Court would have altered the interlocutor of the Lord Ordinary, who proceeded upon grounds in substance the same as those upon which I have based my opinion in this case.

Lord Mure—Under the marriage-contract here both Mr and Mrs Douglas came under very distinct onerous obligations. There were certain obligations in favour of Mrs Douglas, and some in favour of the children of the marriage, and a trust was created for the purpose of carrying out these provisions. As the counterpart of these obligations Mrs Douglas conveys to the trustees all the estate belonging to her at the time of the marriage or which should accrue to her during its subsistence. On the death of Mrs Douglas in 1878 it appeared that she had created a trust-deed of a totally different character from that in the marriage-contract. On the narrative that her father had left her a provision which he declared should not fall under the conveyance in her marriage contract, she conveys to her own trustees "the whole estate, means, and effects now belonging or addebted to me, or which shall belong or be addebted to me at my death." This was directly contrary to what she had done in her marriage-contract, by which she had conveyed her whole estate to the marriage-contract trustees. She then goes on—"and particularly, and without prejudice to the said generality, my share of the estate of my said deceased father which was settled by him on me exclusive of my said husband and of the said marriage-contract trustees as aforesaid." Now, there can be no doubt that this too was a direct violation of the obligation in the marriage-contract. And accordingly the marriage-contract trustees bring this action to have it declared that Mrs Douglas has gone beyond her powers, and to have the deed reduced as *in fraudem* of the marriage-contract. I think the action is well founded, for having already made over the property to the marriage-contract trustees I think she had no power to make this second conveyance.

But then arises the more difficult question as to whether the condition which Mr Kay has attached to his bequest to his daughter can receive effect. Are the defenders entitled to say that they must

carry out Mr Kay's settlement only under its conditions? Now, Mr Kay came under no express obligation in the marriage-contract to settle anything on his daughter. That is quite clear. But he knew what his daughter was doing, for he was a consenting party to the deed, and he reiterates that consent in the clause in question by which she conveyed her estate to the trustees. He was therefore a consenting party to the creation of the trust. Now, although in the ordinary case undoubtedly a man's consent does not place him under an obligation, yet I think that in the special circumstances here there was an implied obligation that the consenting party would do nothing to put it into the power of the principal party to defeat the contract she had entered into. I doubt whether he could do so even by means of a trust. But that is not the case here. I concur with your Lordship that the absolute fee vested in Mrs Douglas at her father's death, and must consequently be held to have passed to the marriage-contract trustees. My only difficulty arose from the case of *Thurburn*, but I have looked into that case, and I find it sufficiently plain that the Court there proceeded on the special circumstances which there existed. I think therefore that we are free to decide on general principles, and I think that the views expressed by Lord Barcaple in the case of *Thurburn's Trs.* contain the sound view of the law, and that the interlocutor of the Lord Ordinary ought to be recalled.

Lord Deas—This case involves a question of great general importance.

It arises upon an antenuptial marriage-contract entered into in 1868 between the pursuer, whose name is James Earl Douglas, a merchant in Dundee, on the one part, and Miss Wilhelmina Kay, daughter of John Zuill Kay, residing in Glasgow, on the other part.

By the contract the provisions made by Mr Douglas for his wife in the event of her surviving him were abundantly moderate—viz., £30 for mournings, and an annuity of £150 payable half-yearly, but to cease in the event of her entering into a second marriage. To the issue of the marriage he became bound to pay at the first Whitsunday or Martinmas occurring six months after his death, if one child £500, if two £750, and if three or more £1000. In security of these provisions to the wife and children he assigned to trustees therein named a bond or assignment by the Dundee Harbour Trustees for £1000, and bound himself to effect policies of insurance on his life to the extent of an additional £1000, these securities to form part of his own estate if there should be no issue of the marriage alive at the dissolution thereof, and to be reconveyed to him or his representatives at his wife's death. The provisions to the wife and children were declared to be in full to them respectively of their legal rights. The deed bore that Mr Douglas renounced "his *jus mariti* and right of administration over any estate, heritable and moveable, real and personal, now belonging or that shall accrue to or to which the said Wilhelmina Kay shall succeed during the said intended marriage."

The deed further bore—"For which causes, and on the second part, the said Wilhelmina Kay, with consent of her said father, hereby assigns, dispones, conveys, and makes over" to Benjamin Lindsay Cowan and other trustees therein named "All and sundry the whole heritable and moveable, real and personal, estates and effects now belonging or that shall accrue and belong to her during the subsistence of the said intended marriage, with the whole vouchers and instructions thereof," in trust for the following purposes:—First, To pay expenses. Second, The annual produce during the subsistence of the marriage to be paid over by the trustees to Mr Douglas, the husband, and the said Wilhelmina Kay as an alimentary provision, not attachable or assignable, but to be payable to them for the maintenance of themselves and their family, and that at Whitsunday and Martinmas in equal portions. Third, "In case the said first party shall survive the said Wilhelmina Kay, the said annual produce of the said trust estate shall be paid over to him in like manner during all the days of his life as an alimentary provision for behoof of himself and his children who shall remain in family with him. Fourth, In case he is survived by the said Wilhelmina Kay, the said annual produce of the said trust estate shall be paid over to her in like manner at the said terms of Whitsunday and Martinmas in equal portions during all the days of her life." Fifth, In case of a child being born and surviving the dissolution of the marriage or leaving issue, the trust estate should be divided in such shares or proportions as the parents or the survivor of them should direct, and failing thereof among the children and their issue equally *per stirpes* of the children, and failing such issue then to go to the heirs of the said Wilhelmina Kay.

There is no dispute that under the third of the above purposes whatever falls to be in the hands of the trustees appointed by Mrs Douglas under the contract belongs in liferent to her surviving husband, and the fee to the children of the marriage. But the question is, whether the share of Mr Kay's residuary estate bequeathed by him to his daughter Mrs Douglas under his deed of settlement, estimated at £18,000 or £20,000, and not mentioned or dealt with in the marriage-contract at all, accrues under her conveyance of *acquirenda* in that contract to the trustees therein named by her, notwithstanding the express provision and declaration in Mr Kay's deed of settlement that it shall not do so, but shall belong to Mrs Douglas absolutely, exclusive of her husband's rights, and be at her own sole disposal?

The contract, it has been seen, was entered into in Autumn 1868. It is not said that at that time Mr Kay had executed any *mortis causa* deed of settlement. No allusion to any such deed as either executed or contemplated is made in the contract. Neither Mr Kay's general estate nor his residuary succession are mentioned in it at all. His daughter at the time of her marriage had not attained majority, and he was of course her legal guardian. He is a consenting party to the marriage and to the deed, but I cannot construe that consent to have been in any other character than that of her guardian. The marriage would of course have been equally valid by our law without that consent, but as a matter of decency and respectability it is usual for a father to become a consenting party to his daughter's marriage whether she be in minority or not. I never heard, however, that such consent binds the father in pecuniary obligations if he undertakes

none, and clearly he undertook none in the present case.

The marriage proved an unhappy one, and after Mrs Douglas had instituted an action of separation and aliment the proceedings resulted in a voluntary agreement in January 1876 to live separate. This agreement was followed by a regular deed of separation dated 4th April and 26th June same year. The father had obviously been disappointed and dissatisfied with the treatment his daughter received from her husband, and which had rendered that separation necessary. This, no doubt, was what led to the insertion in his deed of settlement of the foresaid provision and declaration to prevent the share of his residuary estate which he wished to bestow on his daughter and her children from falling under the eventual liferent of her husband as *acquirenda* conveyed by the marriage-contract.

The father's deed of settlement was accordingly executed on 12th July 1876, being within a few weeks after the agreement to live separate had been embodied in the final and formal deed. The deed of settlement was followed by a codicil dated 26th March 1878, but as the codicil merely substituted an annuity of £1000 to his widow in place of a liferent of £20,000, the codicil need not be further noticed. This deed of settlement conveyed his whole estate, heritable and moveable, to his wife and others as trustees for the ends and purposes therein mentioned. The deed bore —"In the last place, with respect to the residue of my means and estate, I direct and appoint my trustees to hold and apply the said residue for behoof of my whole lawful children now alive or hereafter to be born, in equal shares, and their respective lawful issue *per stirpes*, as after mentioned"—the shares of sons who had attained majority to vest at the truster's death, and the shares of the other sons on their attaiuing majority; the shares of daughters who had attained majority or been married to vest also on his death, and those of the other daughters on their attaining majority or being married—declaring that all property and funds, heritable and moveable, "falling in virtue of these presents to females shall belong to them exclusive of the *jus mariti* and right of courtesy and every other right of any husband whom they may have, and shall be unaffectable by or for the deeds or debts of such husband: And further, it is hereby expressly provided and declared that the share of my estate, both as regards capital and revenue, falling to my daughter Mrs Wilhelmina Kay or Douglas, wife of James Earl Douglas, merchant, Dundee, shall not fall under the conveyance granted by her in the antenuptial marriage-contract entered into between her and the said James Earl Douglas, to the trustees therein mentioned, but the said share shall belong to her exclusive of the said marriage-contract trustees; and I authorise my trustees to take such steps as they may think necessary or proper for giving effect to the provision and declaration last expressed regarding the shares of females and the share of the said Mrs Wilhelmina Kay or Douglas." Then follows a clause declaring the shares of the children respectively to be in full of all their legal rights.

The granter died on 16th April 1878 survived by Mr and Mrs Douglas and the three children of their marriage, who are still in pupillarity. In supplement of her father's deed Mrs Douglas executed a deed of settlement on 9th August 1878, by which, on the narrative of the marriage-contract and of her father's deed, and that his trustees were in the course of realising his estate, she conveyed to her mother and certain other trustees her whole means and estate, and particularly her share of the estate of her said father which was settled by him on her, exclusive of her said husband and of her marriage-contract trustees, with power to do all in connection therewith which she could have done herself, in trust for behoof of her whole children in equal shares, and their respective issue *per stirpes*, whom failing to her own heirs and executors, to the exclusion always of the said James Earl Douglas and the said marriage-contract trustees, who should not in any event be entitled to any part or portion of the means and estate conveyed to her said *mortis causa* trustees.

The trust estate of the late Mr Kay is still in the hands of his *mortis causa* trustees, who are, it has been seen, authorised by his deed to take such "steps as they may think necessary or proper for giving effect to the provision and declaration [therein] last expressed regarding the shares of females and the share of the said Mrs Wilhelmina Kay or Douglas." There is therefore no want of the means of protection, if such be deemed necessary, for securing and enforcing the separate rights of Mrs Douglas, and of her pupil children now in her place, as regards her share of her father's residuary estate. The trustees are directed by Mr Kay's deed to hold and apply his residuary estate for behoof of his whole lawful children alive at his death, and their respective lawful issue *per stirpes*. A right to a share of that estate no doubt vested at his death in Mrs Douglas which entitled her to deal with that share by testamentary deed; but the clause as to vesting falls to be read along with the clause by which Mr Kay imposes on his trustees the duty of taking such steps, or, in other words, of executing such deeds, as may be proper for giving effect to the provision and declaration that Mr Douglas should in no event have any right or interest in his wife's share of the residuary estate destined to her and her children. Mr Kay's trustees have not yet parted with that share of his residuary estate, and accordingly the leading conclusion of the summons is to have it made over by them to the pursuers for Mr Douglas' liferent use. That conclusion is quite at variance with the duty imposed on these trustees to take whatever steps may be required to protect the fund against that claim. The share remains in the meantime, as it did in the lifetime of Mrs Douglas, under the protection of Mr Kay's trust, and if your Lordships think it requires any further protection it will be the duty of these trustees to do whatever they may be directed to do for that purpose.

The only other conclusion in the summons is for reduction, if necessary, of the deed of Mrs Douglas, but that deed really adds nothing to the deed of Mr Kay, and although I have noticed it to make the narrative complete, I shall not further allude to it.

Having now narrated the terms of the deeds and the material facts of the present case, my opinion upon it may be substantially embodied under the following heads:—

1st. A conveyance or destination by a lady in her antenuptial marriage-contract, of her *acquisita*

and also of her *acquirenda* during the marriage, although conceived in favour of trustees, to be held and applied by them for specified purposes, will not prevent third parties from effectually gifting or bequeathing to her the whole or any part of their own free means and estate upon different conditions, or absolutely for her own separate use, if it be clearly stipulated that what is so gifted or bequeathed is not to be subject to the trusts or conditions of the clause as to *acquirenda* in the contract. A donor may dispose of his own means and estate on whatever conditions, not being in themselves unlawful, he thinks proper; and his gift or bequest must either be accepted on the conditions on which it is made or altogether rejected.

2d. The consent of a father to the marriage of his daughter of an age capable of contracting marriage is not necessary either to the validity or regularity of the marriage, and a narrative in the marriage-contract that the marriage is contracted with the father's consent does not of itself import any pecuniary undertaking or obligation by him either to his daughter or to her husband. The father notwithstanding of such consent remains equally free with any third party to gift or bequeath to his daughter any part of his means and estate not dealt with by the contract, on whatever conditions or restrictions, not being in themselves unlawful, he thinks proper, including the condition, if such be his pleasure, that what is so voluntarily given by him shall be hers absolutely, for her own separate use, and shall not be subject to the terms or conditions of the clause in the contract. The father, so far as he has come under no obligation to the contrary, is just as free and unfettered in disposing of the free residue of his estate as any third party can be. Subject to the qualification that a father cannot by a gratuitous *mortis causa* deed defeat the legitim, the father might have gifted or bequeathed his whole residuary estate to a stranger. No reservation in such a contract was necessary to enable him to do so, and the exceptional position of the legitim only illustrates and confirms the rule. Where the gift or bequest to the daughter is conditional, the daughter's choice between acceptance under the condition and total rejection is precisely the same as if the donor were a stranger.

In opposition to the principles I have thus laid down it has been said or suggested, on behalf of Mr Douglas, who is himself one of the trustees under his wife's conveyance in the contract—

First, That the father having been a consenter to that conveyance, could not bestow upon his daughter any share of his residuary estate for her absolute and separate use without its thereby becoming *eo ipso* a part of her *acquirenda*, of which the eventual liferent was by the contract provided to her husband.

Second, That the daughter was herself disqualified or barred by her conveyance in the contract from accepting any share of such residue otherwise than under the condition that her husband's eventual right of liferent should attach to it. It is avowed that the same objection would have been applicable had the donor been a stranger. Indeed that has been put as the clearer case of the two; and accordingly it is said that what she could not have accepted from a stranger she could not accept from her father. The result of the Lord Ordinary's interlocutor is to negative both of these propositions. My own opinion is, that whether taken together or separately they are both and each of them altogether unsound, and this alike on principle and authority.

The efficacy of a conveyance by a lady in her antenuptial marriage-contract of her *acquisita* and *acquirenda*, *per aversionem*, which we have recently had occasion to confirm—if indeed it needed any confirmation—rests on a principle of great practical utility. But to construe that conveyance as inferring an interdiction against all the world from giving her anything that shall not be subject to the terms and conditions of such conveyance seems to me a startling doctrine. Suppose the *jus mariti* and right of administration not to be excluded in that conveyance, and that the husband turns out a spendthrift and a drunkard, with whom the wife cannot even live with safety, can her wealthy father or wealthy relations not give or bequeath to her anything out of their abundance for her absolute and separate use, under an express declaration that the trusts or conditions of that conveyance shall not be applicable to it. That I think would be a lamentable state of the law.

It has been suggested that because marriage is itself an onerous consideration it is to be held in the present case that the husband would not have bestowed his hand upon the lady had he not understood that all her expectations from her wealthy father and friends were to go to swell the fund destined for his liferent use, and that the less he could and did provide in return the stronger would be his claim. The father in this case was worth not less than £90,000 of personalty and £5000 of heritable estate. The provisions made by the husband for the wife in the event of her survivance were £30 for mournings and an annuity of £150 payable half-yearly so long only as she did not marry again. It is usually understood that the more the husband provides the more he expects in return. But here that rule is proposed to be reversed. I can only say that he would have been a plain-spoken bridegroom who avowed the condition assigned for him here as that on which alone he would marry the lady, and a complacent father and bride who would have persevered with the marriage after that avowal.

If a contract contains no conveyance of the wife's *acquirenda*, her *acquirenda* will in the ordinary case pass to the husband. It is not therefore on the part of the bridegroom, but of the bride and her friends, that such a conveyance is usually proposed, the object being, as it obviously was in the present case, not to enlarge, but fairly and reasonably to restrict, the rights of the husband and of his creditors in that *acquirenda*, for the benefit of the wife and children of the marriage.

I understand it to be conceded that if the father had protected his daughter's share of his residuary estate by a trust, that would have excluded the claim of the husband and of his co-trustees. I think the fund is in reality protected by the trust created by the father himself, and that if additional protection be thought necessary his trustees are taken bound to provide for it. But a trust although useful to protect a lady against despoiling herself, is not essential to the creation of separate estate in the per-

son of a married lady and the effectual exclusion of her husband and her husband's creditors, as was expressly decided in the case of *Young* v. *Loudon & Coy.*, June 26, 1855, 17 D. 998. Nor did we hold in the recent liquidation cases of the City of Glasgow Bank a trust to be necessary either to create separate estate in the person of a married woman or to entitle her to deal with it as such, and to bind her for the consequences of having done so. The suggestion that a trust might have made a difference is moreover inconsistent with the only grounds on which the husband's claim to the liferent is rested. For if the father could not give, and the daughter could not accept, to the exclusion of that eventual right of liferent, the husband would be entitled to it, trust or no trust. And if, on the other hand, he had not that right under the clause in the contract, he has neither title nor interest to interfere in the matter of trust at all.

I should have entertained the views I have now expressed although I had had no precedent to guide me. But the case of *Thurburn* v. *Maclaine*, Nov. 30, 1864 (Rep. 3 series, 134), cannot, I think, be attentively read without seeing that it is a direct authority in favour of the judgment of the Lord Ordinary and of the opinion I have expressed in the present case.

The material facts of that case were these—Mr Thurburn had two daughters, Anna and Barbara. In 1849 he became a party to an antenuptial marriage settlement in the English form between his daughter Anna and Mr Maclaine. Of the four Judges who decided that case, I am, I regret to say, the only survivor. We had of course before us all the deeds connected with it, including the marriage settlement, which is accessible in the library along with the rest of the session papers. In the contract between Mr and Mrs Douglas, Mr Kay's position is that of a mere consenter in the capacity of his daughter's guardian. Mr Kay therefore did not require any explanatory clause or reservation as Mr Thurburn did to enable him to escape from pecuniary obligations, for he had never contemplated, and far less held out, the prospect of his coming under such obligations. The position Mr Thurburn occupied in the marriage settlement or contract of his daughter Anna was very different from the position occupied by Mr Kay in the marriage-contract here. The deed in the former case was entered into between the bridegroom Mr Maclaine, therein designed of Kington, of the first part; Mr Thurburn, therein designed of Murtle, of the second part; Elizabeth Thurburn, his wife, of the third part; Anna Thurburn, their eldest daughter, the bride, on the fourth part; and Robert Thurburn and others, therein named as trustees for the issue of the marriage, on the fifth part. The deed set forth in the outset that whereas upon the treaty for the contemplated marriage it had been agreed that in consideration thereof, and of certain estates of Mr Maclaine in the county of Gloucester intended to be settled by him, by indenture of even date therewith, for the benefit of the spouses and the issue of the marriage, Mr Thurburn should within twelve months after the marriage pay to Mr Maclaine for his absolute use £3000, and should within 12 months after his death pay the further sum of £17,000 to the said Robert Thurburn and others (the parties of the fifth part) in trust, to be invested by them for the purposes thereinafter specified, viz., to pay a certain proportion of the annual produce thereof to the said Elizabeth Thurburn, the mother of the bride, if she survived her husband, and subject to her life interest therein, to pay the annual produce to the married parties, one-half to the wife for her separate use, and the other half to the husband during their joint lives, and the whole to the survivor of them, the fee to be held by the said parties of the fifth part in trust for the issue of the marriage, subject to certain powers of appointment, all in manner therein specified.

The marriage settlement further set forth, that whereas Mr Thurburn had by a disposition and settlement executed and registered according to the laws of Scotland, and dated August 27, 1845, disposed of his whole real and personal estates to his wife and two other trustees, and directed them, subject to certain rights reserved to his wife, to convey the whole residue and remainder of his estates to his two daughters Anna and Barbara equally, declaring that the said £3000 and £17,000 should be received in part satisfaction of the provision intended to be made for the said Anna Thurburn by the said disposition and settlement, "or any deed of disposition to be substituted in lieu thereof, provided such provision by any substituted deed for the said Anna Thurburn, shall, together with the said sum of £17,000 and £3000, amount to or exceed one moiety of the real and personal estate of the said John Thurburn." Then followed this clause—"And it hath been also agreed that in case the said intended marriages shall take effect, and the said Anna Thurburn, or the said William Osborne Maclaine in her right, shall at any time or times during the said intended coverture, whether under or by virtue of such deed of disposition, or any substituted deed of disposition, or otherwise howsoever, become seised or possessed of or entitled to any lands, tenements, hereditaments, chattels, moneys, or other real and personal estate (not being of the nature of income), being of the gross value of £500 at any one time, then and in such case the same hereditaments, moneys, and premises shall forthwith be conveyed or otherwise vested in the said Robert Thurburn" and others (the parties of the fifth part) "upon and for the trusts, intents, and purposes, and in the manner hereinafter declared or mentioned, concerning the same"—that is to say (as the marriage settlement proceeds to explain), for behoof of the spouse in certain proportions in liferent, and the children of the marriage in fee. It is unnecessary to narrate the subsequent clauses of the marriage settlement, because these are merely directed, with considerable prolixity, to the carrying into effect of the covenants or arrangements the substance of which I have just mentioned.

It will thus be seen that by this marriage settlement Mr Thurburn and Mr Maclaine contracted directly and onerously with each other. Mr Maclaine thereby agreed to settle his estates in Gloucestershire, by indenture of even date with the marriage settlement, for behoof of the spouses and the issue of the marriage, and in consideration thereof Mr Thurburn agreed to pay the £3000 and the £17,000 as part of what his daughter Anna was to have under his deed of settlement of 27th August 1845, to be held by the parties of the fifth part in trust for the purposes already specified. Had it not been for the reserved power to revoke the deed of disposition of 27th August

1845, and execute another deed in lieu thereof, the effect of a marriage settlement containing the covenants by Mr Thurburn which this marriage settlement contained would have been to carry to the parties of the fifth part all which he had bestowed or might bestow on his daughter Anna, to be held by these parties in trust for the same purposes with the £3000 and £17,000. To enable Mr Thurburn under a marriage settlement so framed to retain a power to prevent that result it was obviously necessary to insert an express power to revoke his deed of 27th August 1845 and execute another deed if he should afterwards wish to do so, and this power he reserved to himself accordingly. But no such reservation would have been necessary had Mr Thurburn not made the deed of settlement of 27th August 1845 substantially in the first instance a part of the marriage settlement. He would have been as free in that case, without any reservation, as Mr Kay was in the present case, to bestow his residuary estate wholly or partially on his daughter Anna either conditionally or absolutely as he thought proper, and the effect of the reserved power was really neither more nor less than to place or replace him in that position. Such accordingly was the view unanimously taken of his position by myself and my brother Judges who decided that case of *Thurburn* v. *Maclaine*.

It did not occur to any of us that if Mr Thurburn had been a mere consenting party to his daughter's marriage and marriage settlement, without himself undertaking any pecuniary obligations, there would have been room or occasion either for reservation or power of revocation on his part. But Mr Thurburn had virtually embodied his own deed of 27th August 1845 in his daughter's marriage settlement, and made it part and portion thereof, assuming at the same time the position of a principal covenanting or contracting party; and it could not be doubted that in such a deed a reserved power to revoke his own deed was essential if he did not mean the terms of his own deed to be equally binding on him as the rest of the marriage settlement. On the other hand, in so far as he did revoke his own deed, he virtually and effectually took it out of the marriage settlement, and stood to that extent as free as he would have done had it never been embodied therein.

The case came before us in the First Division, as then constituted, by a multiplepoinding, of which the trustees of Mr Thurburn under his deed of 27th August 1845 and relative codicils were the raisers, and which brought into Court Mr Thurburn's whole means and estate, heritable and moveable, and in which all parties interested were called and lodged claims.

It appeared from a codicil, dated in August 1857, that Mr Thurburn, at that time, intended if his daughter Barbara had survived him that she should have the fee of Murtle subject to the liferent of his wife. But Barbara having died in October 1858, he became desirous to enlarge the separate and independent provisions of his surviving daughter Mrs Maclaine. Accordingly, by a codicil dated 1st February 1859, on the narrative of his intention to alter the destination of his estate of Murtle and make other alterations on his deed of settlement, he directed his trustees to dispone and convey his lands and estate of Murtle, with his household furniture and effects in the mansion-house and offices, to his wife in liferent, and to his daughter Mrs Maclaine in fee, exclusive of the *jus mariti* of her then or any future husband, and he further directed his trustees to divide and apportion the residue and remainder of his estate, heritable and moveable, into four equal portions—"One-fourth thereof to be paid and delivered to the said Anna Thurburn or Maclaine for her own absolute use and behoof, and to be at her own absolute disposal (free and unfettered by her said marriage settlement), and in the event of her predeceasing me or making no dispone of the same, then to be divided among her whole children equally share and share alike;" one-fourth to Mrs Maclaine in liferent exclusive of the *jus mariti*, and to be divided after her death among her children; and the remaining two-fourths to be divided between John and Elizabeth, two of the children, and any other children she might have by that or any future marriage.

The question whether the codicil of 1st February 1859 fell to receive effect (which the Lord Ordinary had decided in the negative) was specially and directly raised between Mrs Maclaine on the one hand, and Robert Thurburn and others, parties to the marriage settlement of the fifth part, who claimed the whole residuary estates of Mr Thurburn, heritable and moveable, as included in the *acquirenda* and conveyed to them by Mrs Maclaine, and falling therefore to be held by them along with and for the same purposes as with the £17,000, which was to go ultimately to the issue of the marriage in fee.

The whole case was fully and ably argued, and we repeatedly considered it at consultation—all the more anxiously that on the leading question, viz., as to the efficacy of the codicil of 1st February 1859 we were disposed to differ from the able judgment of Lord Barcaple (Ordinary), which we eventually did. I can state distinctly that on that question there was no difference of opinion amongst us either as to the principles applicable to it or as to the result although less was said about it at the advising by some of us than by others. It was, obviously, because the subordinate question whether Mr Thurburn intended Murtle to be entailed or to go to Mrs Maclaine in fee-simple that the Lord President (Colonsay) gave prominence to that question in the outset of his opinion. To see that this must have been a perplexing part of the case it is only necessary to read the apparently inconsistent directions given in the codicil as to the terms of the clauses to be inserted in the disposition. But if we had not been of opinion that the codicil fell to receive effect, that question could not have arisen. Upon the subordinate question we concurred in the opinion of the President that we could only direct a simple destination of Murtle, which of course gave the fee to Mrs Maclaine. On the leading question itself, viz., as to the efficacy of the codicil, there is enough in the reported opinions to show that there was unanimity in the views entertained about it.

Thus the Lord President, after observing that the question came to be as to the effect of the marriage settlement, proceeded to say—"Now, in the first place, was Mr Thurburn bound or restrained by that marriage-contract from dealing with his estate as he pleased? He had by the contract agreed to give £3000 and £17,000 and certain other provisions benefiting Mrs Maclaine,

and so forth; but was he in any respect fettered by the clause in the marriage-contract? He was a party to the marriage-contract to all the effects to which he bound himself by it; but was he a party who bound himself to that clause? I do not think, on a fair reading of it, he was a party to that clause at all. But I see that in the marriage-contract, notwithstanding all the provisions in it, he provides that nothing in the last-mentioned proviso, *i.e.*, about the £17,000 contained, shall abridge the right of the said John Thurburn to make the said deed of disposition" (the deed of 1845) "and execute another deed of disposition in lieu thereof. Therefore, although he was a party to that marriage-contract, he was not in any way tied up to dispose of his estate in such a manner as to bring it under the power of the marriage-contract trustees. But he was a party to the marriage-contract, and consequently acquainted with its provisions, and being acquainted with its provisions I think we trace in this deed sufficient indications of his purpose—not that his estate is to go into the hands and fall under the power of the marriage-contract trustees, but that it is not to do so." His Lordship then notices the argument that, whatever may have been Mr Maclaine's view in the marriage settlement, "the parties themselves made an agreement which is obligatory upon them, and that Mrs Maclaine is disabled from taking this estate except under the condition that it shall go to the trustees in the marriage settlement—that is to say, that Mr Maclaine, or any other person who might be disposed to settle an estate on Mrs Maclaine, could not settle it except in such a way that it must fall under the provisions of the marriage-contract. What would be the effect of that? If it is an argument entitled to any weight, I think it would come to this, that as Mrs Maclaine cannot take the estate upon the condition on which it is given, she cannot take it at all, and consequently it cannot come to the marriage-contract trustees." His Lordship then observes as to the fourth of the personalty which Mrs Maclaine was to take in fee under the codicil—"I think that comes under the same condition."

I need not quote any more than the first sentence of Lord Curriehill's opinion, because his Lordship there says—"I concur so entirely in all the views which your Lordship has expressed that I shall not repeat any of them, but only make one or two remarks in addition." The only additional remark of his Lordship which I shall notice is the remark that Mrs Maclaine, although not bound to convey Murtle to the marriage settlement trustees, might do so if she thought proper, but the explanation which he also adds of that observation is that she was virtually heritable proprietrix of the estate, and might convey it to whomsoever she pleased. Neither need I read my own opinion or that of Lord Ardmillan, which are very clearly to the same effect.

But the conclusive proof of what the views of the Court in deciding that case were are to be found in the interlocutor itself, which reverses the interlocutor of the Lord Ordinary—1st, In so far as it finds that the marriage settlement trustees (parties of the 5th part) were entitled to a conveyance of Murtle, with the household furniture and effects therein which belonged to Mr Thurburn. 2d, In so far as it found that these parties were entitled to have paid and made over to them, for the purposes of their trust, one-fourth of the free residue of Mr Thurburn's heritable and personal estate. These findings being reversed, the interlocutor proceeds substantively to find, *inter alia*—1st, That the raisers (the trustees under the settlement and codicil of Mr Thurburn) are "entitled and bound, in terms of the said codicil, to dispone and convey the said lands and estate of Murtle and effects foresaid" to Mr Thurburn's widow in liferent, "and after her decease to the said Mrs Anna Thurburn or Maclaine in fee, but exclusive of the *jus mariti* of her husband, present or future, and not affectable by the diligence of his creditors in any way or manner, either as to the said lands and subjects themselves or the rents or other annual proceeds thereof." 2d, "That the raisers are entitled and bound, in terms of the said codicil, to pay or deliver the said one-fourth of the residue or remainder to the said Anna Thurburn or Maclaine for her own absolute disposal, free and unfettered by her said marriage settlement; and in the event of her making no disposal of the same, then to be divided among her whole children share and share alike."

It is surely unnecessary to go beyond the terms of these findings in order to show that we decided that a lady who in her marriage-contract has conveyed her *acquirenda* to trustees for specified purposes is nevertheless entitled to accept a gift or bequest either from her father or anyone else free to give, upon different conditions or for different purposes than those specified in her marriage-contract conveyance, and that the gift or bequest may be either of heritable or personal estate, and without the creation of a trust may be effectually declared to be for her own absolute and separate use and disposal free and unfettered by her marriage-contract.

The second of the above findings as to payment or delivery to Anna Maclaine of one-fourth of the residue or remainder of Mr Thurburn's means and estate for her own absolute disposal free and unfettered by her marriage-contract is indeed of itself conclusive on that point.

Neither, I think, can it be necessary to go beyond the above findings in the judgment to show that it sanctions the doctrine (affirmed also in the opinions) that a father who becomes a party (in the case now before us a mere consenting party) to his daughter's marriage-contract is thereby no further bound in personal obligations than he binds himself.

Your Lordship in the chair has said that there must have been specialties in the case of *Thurburn* v. *Maclaine* to have led to the result there arrived at. I know of no such specialties, and none have been suggested.

There is one difference in the position of the two cases, but that it makes any difference in the principles applicable I cannot perceive. In both cases the father was free to dispose of his own as he pleased. In the one case because although he was a principal contracting party, and bound himself as such, he reserved a power, and exercised it, to set himself free. In the other case because he was a mere consenter and never bound himself at all. If there be any distinction arising from this difference, it appears to me that the present case is ruled *a fortiori* by the other.

The judgment in *Thurburn's* case was accepted as law by the parties and the profession. It has ruled the practice for fifteen years. What is now

to be the law as to *acquirenda* in marriage-contracts if your Lordships shall reverse the Lord Ordinary's interlocutor is more than I know, but I am unable at present to perceive how the two judgments can stand together.

Lord Shand—I am of opinion with a majority of your Lordships that the pursuers are entitled to decree. The argument addressed to the Court by the reclaimers was divided into two branches. The first was that Mrs Douglas' father was not entitled to attach any condition to the provision he made in her favour in his deed of settlement because he had been a consenting party to the marriage-contract. The second was that the declaration in his trust-deed was ineffectual because Mrs Douglas was made absolute proprietor of the fund, and was in consequence bound under the marriage-contract to convey it to the trustees. On the first of these questions I understand that all your Lordships agree with the Lord Ordinary that Mr Kay was a consenting party to the marriage-contract only in his capacity of curator to his daughter, who was a minor; and I find nothing to show that he bound himself individually for any of the obligations in that deed. He was entitled therefore to dispose of his property as he pleased, just as if he had been a stranger. But taking it so, I am of opinion that Mrs Douglas was bound to convey this fund to the marriage-contract trustees.

I agree with my brother Lord Deas that the question is one of much general importance, because, as is well known, clauses such as that which we have here, by which the lady undertakes to convey to the marriage-contract trustees her whole estate, present or acquired during the marriage, are of very common occurrence. It has been said that the decision which the Court are now to pronounce seems to trench upon the important doctrine that a testator may leave property under what conditions he pleases. I do not think so. If a testator desires to leave property under conditions he may effectually do so in general by means of a trust. But, on the other hand, if it could be held that property might be left to a lady, as has been done here, and she were free to convey it to whom she pleased notwithstanding her obligations in her marriage-contract, such obligations would be rendered entirely nugatory. A lady in such circumstances would only have to arrange with her parents, or whoever else was likely to leave her money or estate, that what is so left should be declared independent of the marriage-contract. I think the importance of the case lies in the question whether a clause so common in marriage-contracts may be rendered entirely nugatory in so simple a manner.

The question here is complicated by the fact that Mrs Douglas herself is dead, and has left a settlement by which she has conveyed her whole means, including the money which she got from her father, to a separate body of trustees, and consequently it is not Mrs Douglas herself who is defender, but her trustees. I shall take the case first as if it were free from this specialty, and consider the question as if it had arisen with Mrs Douglas herself after the money had been paid to her. Her father provided that the money should vest at his death, and be payable immediately thereafter, so that it was a mere matter of convenience to the trustees that her share was not paid during the six months which elapsed between his death and hers. She was practically in possession.

In the marriage-contract there was a direct conveyance by Mrs Douglas to the trustees of all that she should succeed to. I cannot doubt that this was regarded as an important stipulation in the marriage-contract. Mr Douglas was a man of little means. He undertook to provide his wife in a small sum by way of annuity, and to make certain other small provisions in favour of the children of the marriage. I do not doubt therefore that the marriage took place to a considerable extent on the faith of Mrs Douglas' obligation or conveyance in the marriage-contract, and at all events the question must be decided on that footing. It is plain that she became bound to convey to the trustees whatever estate she should succeed to, and of which she should have the power of disposal.

Now, what is the effect of her father's testamentary disposition? It was a bequest to her of a share in the residue of his estate, to vest in her immediately on his death, and to be paid to her as soon thereafter as the state of the trust permitted. It was given under the condition that the husband's *jus mariti* and right of administration were excluded, and that was an effectual condition. But then there was the further condition which raises the question now in dispute. I am clearly of opinion that as the lady acquired the absolute right of property and possession of this estate, so that she became entitled to dispose of it as she pleased, the condition that it was not to be applied in a particular way is repugnant. It is a condition inconsistent with an absolute right of ownership, and consequently is ineffectual. Mr Kay no doubt intended that the estate should not come under the control of the marriage-contract trustees, but he has attempted to effect two inconsistent things—to give an absolute right of property, and to give it under a condition. If Mrs Douglas had chosen, notwithstanding the terms of her father's deed, to give the money to the trustees, could anyone have set aside that proceeding? It would be very difficult to maintain that. I cannot imagine that anyone would have a title or interest to require that the provision should revert to Mr Kay's general estate. And yet if that cannot be maintained, I do not see how it is possible to sustain the Lord Ordinary's judgment. The condition is nothing more than an attempt to give a personal privilege to an absolute owner to disregard an obligation which applies to all property to which the owner may acquire right, and I am not aware of any rule or principle of law by which such a privilege or condition should attach to a gift. You might as well provide that what is given in absolute ownership should not be liable to the debts and deeds of the owner. The declaration by Mr Kay amounts to this, that his gift shall be liable to all his daughter's debts except her obligation to her marriage-contract trustees. On the general grounds stated by your Lordship in the chair and Lord Mure I hold this condition to be ineffectual. I do not think any defence can be gathered from Mr Kay's request to his trustees to take what means they could to make the condition regarding Mrs Douglas' share effectual. The counsel for Mrs Douglas' trustees could not suggest any means

for carrying out this request, and I do not see that this was possible consistent with the absolute right of ownership given.

In the actual case Mrs Douglas died before receiving payment, but she has given a title to certain trustees for the purpose of administering the fund. Now, the first purpose of this trust, as is usual, is the payment of the truster's debts; and her conveyance in the marriage-contract creates an obligation or debt which must be fulfilled. It seems to me, therefore, that even if the money had been paid over to her trustees they would have been bound to hand it over to the marriage-contract trustees as the payment of one of the truster's debts.

I come now to the authorities. The case of *Thurburn* is no doubt in some aspects against the judgment to be pronounced; but there were very special circumstances in that case. The main subject in dispute was heritable estate of considerable value, in regard to which there was a destination-over to the daughter's second son; and with regard to the residue there was the same peculiarity—a destination-over—for the money was to go to the children of the marriage. It has been observed that the Court were agreed in the ground of judgment in that case. I can hardly say so. The Lord Ordinary (Lord Barcaple) expressed his opinion very distinctly that "the truster's mere wish and intention, however plainly expressed, cannot exclude the operation of the clause in the marriage-settlement if it otherwise applies." And if we turn to the grounds of judgment adopted by the Judges who recalled the Lord Ordinary's interlocutor, they seem to me to be by no means the same. The Lord President (Lord Colonsay) says—"It is a matter of contention that whatever may have been Mr Thurburn's view, the parties themselves made an agreement which is obligatory upon them, and that Mrs Maclaine is disabled from taking this estate except under the condition that it shall go to the trustees in the marriage settlement—that is to say, that Mr Thurburn, or any other person who might be disposed to settle an estate on Mrs Maclaine, could not settle it except in such a way that it must fall under the provisions of the marriage-contract. What would be the effect of that? If it is an argument entitled to any weight, I think it would come to this, that as Mrs Maclaine cannot take the estate upon the condition on which it is given, she cannot take it at all, and consequently it cannot come to the marriage-contract trustees; and if she cannot take it at all, I think the next substitute in the destination would probably get it. But that, however, is not a question we need determine now." Lord Curriehill, on the other hand, said—"It is said that if Mrs Maclaine is to be an unlimited fiar, she is under an obligation to convey the subjects to the marriage-contract trustees. Now, I think that she has the power to convey. If she thinks proper to convey this estate to the marriage-contract trustees, it appears to me that the conveyance would be valid, as the substitutes have no *jus quæsitum* according to the view I take of the case." The opinion of my brother Lord Deas does not, so far as I see, touch the point, and Lord Ardmillan reverts to the view of the Lord President.

Since the case of *Thurburn* there have been several cases of authority in which the Court has enunciated the principle that when an absolute right of property is given to anyone under a condition, the condition is ineffectual unless a trust has been created or the means given of creating a trust. These cases are—*Allan's Trustees* v. *Allan*, referred to by your Lordship; *White's Trustees* v. *White;* and *Gibson's Trustees* v. *Ross*. In the last of these cases a testator directed his trustees to retain the residue of his estate till his only child (a daughter) should be married, and a child born of the marriage, and then to convey to the daughter and to her children equally, but subject to a power of appointment in the daughter, and declaring that neither the annual proceeds nor the fee should be subject to the *jus mariti* and right of administration of the daughter's husband, or subject to his or her debts or deeds or the diligence of his or her creditors, but that the same should be an alimentary provision for his daughter during her life; and he directed the trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them. It was held that, the truster having given an absolute right of fee, the condition was ineffectual, being a mere expression of intention. Now, that decision was subsequent to the case of *Thurburn's Trustees*, and seems to me to impair whatever argument might be drawn from that case against the decision we are about to pronounce.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, and found and declared in terms of the declaratory conclusions of the summons, and remitted to the Lord Ordinary to proceed with the conclusions for accounting.

Counsel for Pursuers (Reclaimers)—M'Laren—Darling. Agents—Lindsay, Paterson, & Co., W.S.

Counsel for Defenders (Respondents)—Lord Advocate (Watson)—Asher—Jameson. Agent—T. J. Gordon, W.S.

Tuesday, December 2.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* PLAYFAIR AND OTHERS (WALKER'S TRUSTEES).

Railway—Compensation—Lands Clauses Consolidation Act 1845—*Railway Works "injuriously affecting" Lands.*

Terms of an undertaking granted by a railway company to certain parties, owners of property, who were opposing a Bill brought forward by the company in Parliament, on the faith of which the opposition was withdrawn, and which were *held* to bind the company to a submission to arbitration of a claim for compensation in respect of the property in question, the relevancy of the averment in support of the claim being reserved.

Opinion (*per* Lord Curriehill, Ordinary) that in order to found a claim for compensation in respect of railway works "injuriously affecting" land under section 6 of the Railway Clauses Consolidation (Scotland) Act 1845, the injury must be such as will permanently diminish the value of the land.