factio; therefore there is no foundation for the inference in fact sought to be deduced. That is the conclusion I have come to as regards the property of these jewels, &c., and as regards the defender Johnson, who it seems has obtained possession of and pawned them, he is apparently not now in a condition to redeem them, and decree for their value must accordingly go out against him.

Lord Deas—It was contended by Mr Nevay that a married woman can have no paraphernalia if she is living with a man, not her husband, in adultery. I know of no law to support that. The fact of her being a married woman entitles her to have paraphernalia, and notwithstanding her adultery she remains a married woman so long as not divorced.

It was further contended that the mutual deed of settlement, by one of the clauses of which Mrs Johnson bequeathed the jewels in dispute to her niece, was a deed which came under the rule of law as to *turpis causa*, and is null out and out. Now, supposing it to be assumed that as between the aunt and her paramour the deed was to be regarded as a deed *in turpi causa*, I know no law which makes a bequest in it to an innocent third party necessarily a nullity. The niece here claims under the deed a bequest made to her by her aunt of these paraphernal articles. The aunt had a right to make that bequest independently altogether both of her husband and of her paramour. The jewels did not belong either to the husband or to the paramour. If the bequest had been made by the paramour to his wife's niece, it might have been suggested that the bequest to the niece was calculated to encourage the aunt to continue with him in adultery. But how the bequest by the aunt to her own niece could be expected to operate as an encouragement to the paramour to continue in adultery with the aunt has not been made intelligible. The law on this subject was carried to extreme lengths in some old cases, which Mr Nevay very naturally cited in his favour. But the law is not now administered with such unreasonable jealousy as it then was. There is one undoubted fact here which to my mind is of itself conclusive against the husband, viz., that by whomsoever these jewels might be claimed, being paraphernal, they could not belong to or be claimed by the husband Johnson, who neither had nor has anything to do with them.

Lord Mure concurred.

Lord Shand—I am of the same opinion on both points. As to the argument that the articles in question are not paraphernal, I have no further observation to make.

As to the point made against this provision by Mrs Johnson to her niece, I agree that even had it been shown that the stipulation as between Leitch and Mrs Johnson was bad, on the ground that so far as that stipulation was concerned the deed was granted *ob turpem causam*, yet this legacy to the niece would remain perfectly good. That is obviously reasonable. This part of the deed is simply a testamentary disposition by Mrs Johnson of her own property in favour of her own niece, separable and separate from all else in the deed, and it is impossible to show or to conceive that it was granted in reference to any immoral consideration which might be held to affect another part of the deed. Had it been a provision by Leitch, there might possibly have been an immoral consideration, but in the case of the aunt, affection for her niece is the obvious motive, and we have nothing to do with other considerations. I agree with your Lordships that there is not on the evidence proof to show that the deed was granted for an immoral consideration, and we have no sufficient ground to lead to the inference that it was so.

The Court adhered.

Counsel for Pursuer (Respondent)—Rhind—J. M. Gibson. Agent—D. Howard Smith, L.A.

Counsel for Defenders (Reclaimers)—Nevay. Agent—Robert Broatch, L.A.

Wednesday, May 19.

SECOND DIVISION.

[Lord Young, Ordinary.

HOPE JOHNSTONE *v.* HOPE JOHNSTONE AND OTHERS.

Entail—Heir in Possession—Provisions to Younger Children—Revocation.

A, the son of an heiress of entail, in his marriage-contract, to which his mother was a party, undertook to bind himself and the succeeding heirs of entail, if he should succeed to the entailed estate, to make payment to his younger children of a sum equal to three years' free rent of that estate. On succeeding to the estate, A executed in 1819 a bond in implement of the provisions of the marriage-contract, and in conformity with them; he subsequently executed three bonds of different dates, for sums amounting in all to £40,000, in favour of his younger children. By a trust-disposition and settlement dated 1853 he recalled all deeds of a testamentary character, with the exception of certain specified deeds which did not include the bond of 1819, and in 1867 he placed the bond of 1819 and the three subsequent bonds on record; at A's death three years' free rent amounted to £56,000.—*Held* (1) that A was bound by the provisions of his marriage-contract, and could not revoke the bond of 1819, granted in satisfaction thereof, and recorded; (2) that in point of fact it had not been revoked; and (3) that therefore the younger children were entitled to a sum of £56,000, the bonds of provision for £40,000 being taken to be *pro tanto* in satisfaction of the prior bond.

Question—Whether the obligations in the marriage-contract would have bound the heirs of entail if no bonds had been executed?

Succession—Cumulative Bequests—Debitor non presumitur donare.

A, in addition to the bond of provision of three years' rent of the entailed estate, bequeathed by his trust-disposition a sum of £7500 to his younger children out of his

general estate. It appeared that he was under the belief that the amount of three years' rent would not exceed £40,000, whereas it was found to be £56,000.—*Held* that the children were entitled to take both provisions, and that the maxim *debitor non presumitur donare* did not apply, the heir of entail and not A being debtor in the bond of provision.

The Earl of Hopetoun in 1793 executed a deed of trust which had for its purpose the sale of certain parts of the entailed estate of Annandale for the payment of debts, and thereafter the trustees were directed to entail the remainder in terms of any deed of entail which he might afterwards execute. A deed of entail was thereafter executed by the Earl in 1799 in accordance with the power reserved in the above-mentioned deed of trust, in which after appointing the series of heirs and making various other provisions he provided as follows:—"Excepting also and reserving to the eldest son whom I may have by any subsequent marriage, and to the heirs and members of taillie before mentioned, after their respective succession to the aforesaid lands, earldom, lordships, baronies, and others, full power and faculty, as they and each of them are hereby authorised and empowered, to provide their children, other than the heir succeeding by virtue of this deed of entail, in competent portions and provisions, bearing interest from the death of the granter; and also to provide, in competent portions and provisions, the children, other than the heir succeeding by virtue of this taillie, of their eldest son or grandson who shall be heir-apparent and next in succession at the time, according to this deed of taillie, to the said lands, earldom, lordships, baronies, and others before mentioned; which provisions to the younger children of such eldest son or grandson are to bear interest from the death of the father of such younger children, and are to take effect only in the event of such eldest son or grandson dying before his father and mother, who shall have been heir of taillie, or before he shall himself, in virtue of this deed of entail, have provided his said younger children: But providing always that the whole sum to be granted as portions and provisions to the younger children of my eldest son, or of any heir of taillie in possession at the time, shall not exceed a sum equal to three years' free rent of the said lands, earldom, lordships, baronies, and others."

The appointment of trustees contained in the deed of 1793 was revoked by a deed executed in 1800, and a new body of trustees were appointed by a deed executed in 1813 with the same powers as if they had been nominated by the deed of 1793. The deed of 1813 also contained certain alterations upon the deed of entail of 1799. These trustees so appointed were on the death of the Earl infeft in the entailed estates, and held them for the payment of his debts.

In July 1816 a contract of marriage was entered into between Mr J. J. Johnstone Hope, eldest son of Lady Anne Johnstone Hope, the heiress of entail in possession of the estates, and Miss A. A. Gordon, to which Lady Anne Johnstone Hope was a party. By this deed Lady Anne bound herself and the heirs of entail succeeding her in the estate, in the event of her surviving her son, to make a provision for her son's younger children in terms of the deed of entail, and Mr Johnstone Hope, in the event of his surviving his mother and succeeding to the estate, bound himself as follows—"To grant, subscribe, and deliver a bond or bonds of provision, in the terms allowed and pointed out by said deed of entail, in favour of any younger child or children he may have by this present intended marriage, binding and obliging himself, and the heirs of entail succeeding to him, to pay to the younger children of this present intended marriage, other than the apparent heir for the time, such a sum as is allowed to be provided for the younger children of an heir in possession of said estates by said entail; which provisions for younger children shall be payable in manner mentioned in the said deed of entail itself, and in the said deed of alteration relative thereto, executed by the said deceased James Earl of Hopetoun, bearing date the 20th day of March 1813; reserving power always to the said John James Johnstone Hope, if he shall think fit, to restrict the said sum of provisions, in case the younger children shall not exceed two in number besides the heir-apparent, to one year's free rent of the said entailed estate; and if there shall be three younger children, to one and a-half year's free rent, and if four younger children, to two years' free rent; and if five younger children, to two and a-half years' free rent of the said entailed estate; and also reserving to the said John James Johnstone Hope full power to divide and proportion the said provisions amongst his said younger children of this marriage, if more than one, into such shares and proportions as he shall think proper by a deed duly executed." Lady Anne Hope died in 1818, and on 11th January 1819 Mr Johnstone Hope having succeeded to the estate executed a bond of provision in implement of the obligation in his marriage-contract, binding himself and his heirs of tailzie and provision succeeding to him in the entailed estate to make payment to the younger children of his marriage three years' free rent of the estate as the same should amount to at the time of his decease.

Lord Hopetoun's trustees, as before mentioned, were infeft in the entailed estate, and had authority and instructions to execute a new entail in conformity with the entail of 1799 and 1813 above referred to. They accordingly in 1839 executed a deed of entail in favour of Mr Johnstone Hope, therein and afterwards called Mr Hope Johnstone, as to a part of the estate, and another entail as regards the remainder in 1850. Mr Hope Johnstone made up a title and was infeft on the entail of 1839, and immediately thereafter executed another bond of provision in favour of his younger children, which narrated the obligation contained in his marriage-contract, and was apparently intended to supersede the bond of 1819, at least so far as the estates embraced in the entail of 1839 were concerned. By the bond he provided that in the event of there being more than three younger children, the heir should pay them £36,000, being three years' "free rent or value as aforesaid." This bond provided further as follows:—And declaring, as it is further hereby specially provided and declared, that in case by the fluctuation of rents or by the miscalculation of burdens affecting the said entailed lands and estates of Annandale, the provisions hereby granted shall exceed such proportions of the rent or value of my said entailed estates as is by the said Act" (Aberdeen Act) "or by the said entail

of said estate allowed to be granted for provisions to younger children, such provisions shall not be deemed to be null and void, but the same shall be voidable at the instance of the heir of entail next in the order of succession, or of any other heir of entail, to such extent as such provisions shall exceed those authorised by the said Act in each respective case to be granted, but no further, all in terms of the seventh section of said Act, which is fully expressive of my intention: And lastly, declaring, as it is hereby expressly provided and declared, that the provisions hereby granted shall be in full satisfaction and payment to my said younger children, and shall be accepted by them as in full implement, of the whole obligations undertaken on their behalf by the said deceased Lady Anne Hope Johnstone, or incumbent upon me by my said marriage-contract, and in full of the provisions contained in the bond of provision granted by me in favour of my children other than the heir succeeding to me in my entailed estates of Annandale, dated 11th January 1819, in implement of—in so far as I was then in a situation to implement—the obligations undertaken by me in my marriage-contract for provisions to the children of my present marriage other than the heir succeeding to my entailed estates, as said is, and in full satisfaction of all portion natural, bairns' part of gear, executry, or any other thing whatever which they or any of them can ask or claim by and through my decease, my own good will excepted." Following on the subsequent deed of entail of 1850, Mr Hope Johnstone in 1853 executed another supplementary bond of provision to secure the younger children in the provision of £36,000, directing the heir of entail to pay to the younger children the sum of £11,250, being three years' rent or value of the lands contained in the entail of 1850. But it was declared that this provision was not over and above that provided by the bond of 1839, but was merely in aid and supplement of it to secure the full amount of the provision of £36,000. By a later bond of provision dated in 1861 Mr Hope Johnstone increased this provision by £4000, making £40,000 in all, "three years' free rent or value as aforesaid in the whole" entailed estate. All these different bonds of provision were recorded by Mr Hope Johnstone's own instructions in 1867. His trust-disposition and settlement, which was executed in 1853, contained the following clause:—"And I revoke and recal all trust-dispositions and settlements, and other deeds of a testamentary nature, executed by me at any time heretofore, but excepting always from this revocation of prior settlements the bond of annuity granted by me in favour of my said wife, dated the 27th day of December 1839, and the bond of provision granted by me in favour of my children other than the heir succeeding to me in my entailed lands and estates, dated the said 27th day of December 1839, and the supplementary bond of provision granted by me in their favour of even date herewith." Under these deeds the question arose, whether the younger children were to be entitled merely to the sum of £40,000, which it was maintained was all that the granter of the bond intended, or whether they were to be entitled to the actual amount of three years' rent of the entailed estate as at the time of his death, which amounted to over £56,000?

Another branch of the case related to a bequest of £7500 to the younger children made by Mr Hope Johnstone in a codicil to his general trust-disposition and settlement, which the defenders Mr Hope Johnstone's trustees contended should be imputed *pro tanto* in satisfaction of the provisions to the younger children in the event of these being held to be above £40,000; the facts in reference to this will be found in the Lord Ordinary's note. The action was at the instance of Miss L. Hope Johnstone, second daughter of Mr Hope Johnstone (being one of seven younger children), and was directed against the heir of entail in possession, the three next heirs of entail, and the surviving trustees acting under Mr Hope Johnstone's trust-disposition and settlement. £40,000 having been already paid to the younger children, the sum concluded for in the action was the pursuer's share of the balance of £16,280.

It was pleaded for the pursuer, *inter alia*—"(1) The bond of provision dated 11th January 1819, having been granted by the said John James Hope Johnstone in the exercise of his legal right as heir of entail in possession of the entailed lands and estate of Annandale and others, imposed a valid and effectual obligation upon the heirs of entail succeeding to him in the said entailed lands to make payment by instalments as therein mentioned to his younger children who survived him, and to the marriage-contract trustees of his son George, who predeceased him, of a sum equal to three years' free rent of the said entailed lands, amounting to £56,280, 17s. $9\frac{6}{12}$d., equally divisible among them, with interest from the death of the granter till paid. (4) Alternatively, and in the event of the said bond of provision of 11th January 1819 not being found valid and effectual against the heirs of entail, the said deceased John James Hope Johnstone being bound by his marriage-contract to grant a bond or bonds of provision for the said sum of £56,280 17s. $9\frac{6}{12}$d., and having failed to do so to the extent of the said sum of £16,280, 17s. $9\frac{6}{12}$d., the defenders, his trustees and executors, as his representatives, are liable to the pursuer in one-seventh share of the latter sum."

It was pleaded for the heir of entail in possession and the trustees, *inter alia*—"(2) The sums received by the pursuer having been provided to her by Mr Hope Johnstone, as in full implement of the obligations under his contract of marriage and bond of provision of 1819, the pursuer is not entitled to the sum of £2325, 16s. 9d. over and above these sums, as concluded for. (3) The pursuer is bound to elect between these sums and her claims under the contract of marriage and bond of provision of 1819, and is not entitled to retain the said sum of £1071, 8s. 7d. if she elects to claim her share of three years' rents. (4) Assuming that the pursuer has a good claim for the balance of a share of three years' rent, it ought to be charged on the entailed estate by virtue of the bond of 1819."

For the next heirs it was pleaded, *inter alia*—"(3) The present defenders being the heirs of entail at present entitled to succeed to the said entailed lands and estate under the dispositions and deeds of entail of 9th December 1839, and 30th and 31st October and 1st November 1850, are liable only in respect of the provisions imposed upon succeeding heirs of entail (under the reservation contained in the said entails) by the bonds of provision, dated respectively 27th December 1839, 23d December

1853, and 12th February 1861, which have been fully implemented and discharged. (4) The bond of provision of 1819 being superseded by the bonds of provision of 1839, 1853, and 1861, granted after the said deceased John James Hope Johnstone had made up his title to the said entailed lands and estate, cannot now be founded on. (5) Assuming, but not admitting, the whole four bonds of provision of 1819, 1839, 1853, and 1861 to be valid and effectual bonds of provision binding upon the defenders as heirs of entail entitled to succeed to the said entailed lands and estate, their true construction and effect is that provisions to the amount of £40,000, and no more, are chargeable against the succeeding heirs of entail. (6) The said bonds of 1839, 1853, and 1861, and the trust-disposition and settlement, dated 23d December 1853, by the said deceased John James Hope Johnstone, form together his settlement in favour of his younger children, and therefore the pursuer is not entitled to reprobate the provision in her favour under the said bonds, and at the same time to claim a share of the sum of £7500 bequeathed to younger children under the trust-disposition and settlement by the late John James Hope Johnstone, but she is bound to make her election between one-seventh share of the foresaid sum of £40,000, plus one-seventh share of the foresaid sum of £7500 and one-seventh share of the said three years' free rental."

The Lord Ordinary (YOUNG) on 30th January 1880 decided in favour of the pursuer on both points, adding the following judgment—"The primary question in the case, stated in the most compendious form, is, Whether the younger children of the late Mr Hope Johnstone (being more than three) are entitled to a provision to the amount of three years' rent of the entailed estate of Annandale as at the date of his death, payable by the heir of entail who has succeeded him therein? The pursuer (one of the younger children) sues only for her own share, but her ground of action raises the general question as I have stated it. It is admitted that three years' rents amount to £56,000, and that the claims of the younger children have been paid by the succeeding heir to the extent of £40,000, which he raised by charge on the estate under the authority of the Court, and the action is accordingly limited to the pursuer's individual share of the balance of £16,000, which is due to her or not according as the general question shall be answered in the affirmative or negative.

"There is a subsidiary question—Whether, in case the pursuer shall succeed on the primary question, a certain provision amounting to £1071, 8s. 7d., which she has received under her father's general settlement of his personal and unentailed property, shall be imputed in satisfaction of her claim *pro tanto?* This question I lay aside in the meantime, and proceed to consider what I have called the primary question.

"The foundation of the younger children's claim is their father's marriage-contract obligation in their favour, which is, admittedly, to provide them with a sum equal to three years' rents, and bind the heirs of entail to pay it. I do not waste time by stating the exact position which he occupied with reference to the estate at the date of the contract, which is immaterial to the validity and onerous character of the obligation. It is not disputed that the entail under which he held the estate at his death permitted the provision which he thus bound himself to make. He succeeded to the estate on his mother's death in 1818, and in 1819, while possessing on a personal title, he executed a bond of provision in professed implement of his marriage-contract obligation, and admittedly in conformity therewith. This is the bond referred to in the summons and the pursuer's pleas, and on which she chiefly relies. With reference to the power to bind the heirs of entail, the bond refers to the only entail then existing—viz., that executed by Lord Hopetoun in 1799, with an alteration made in 1813. The entailer's (Lord Hopetoun's) testamentary trustees were then infeft in the estate, with authority and instructions to execute a new entail in exact conformity with that of 1799 (and 1813), which they accordingly did as to a part in 1839, and the remainder in 1850. Mr Hope Johnstone made up a title, and was infeft on the entail of 1839, and immediately thereafter executed the bond of provision of 27th December 1839, which he plainly, from its terms, meant to supersede that of 1819—so far at least as concerned the lands embraced in that entail—and to be in implement of his marriage-contract obligation. The provision thereby to the younger children, if three or more, was £36,000, 'being three years' free rent or value of the said entailed lands,'—*i.e.*, those included in the entail of 1839. After the execution by the trustees of the entail of the residue in 1850 (and on 23d December 1853), Mr Hope Johnstone executed a supplementary bond of provision, whereby he provided to the younger children, if three or more, £11,250, 'being three years' free rent or value of the said entailed lands,'—*i.e.*, those included in the entail of 1850—but that only to enable them from both estates to obtain payment of £36,000. By a supplementary bond of 12th February 1861 he increased this provision by £4000, thereby making it £40,000, being 'three years' rent or value as aforesaid in the whole,'—*i.e.*, as I read it, three years' rent of the lands embraced by both entails. This is the £40,000 which the succeeding heir raised by charge on the estate and paid to the younger children. The defenders contend that this is all they are legally entitled to, while admitting, what indeed is manifest, that they will thus be disappointed of their right under their father's marriage-contract to the amount of £16,000, with corresponding benefit to the heir of entail. The question is, Whether this is the legal result of the several deeds taken together which, so far as in my opinion material to the case, I have noticed, with the exception of the deceased Mr Hope Johnstone's general trust-settlement and codicils made in 1853 and subsequently, whereby in the result he directed his trustees and executors out of his general and unentailed property to divide £7500 among his younger children, and revoked 'all trust-dispositions and settlements and other deeds of a testamentary nature executed by him any time before,' except the bonds of provision of 1839 and 1853? The clause of revocation being in the primary trust-deed dated in 1853, has of course no application to the bond of 1861.

"The pursuer relies on the marriage-contract and the obligation which it laid on her father, which was within his powers under the entail,

and on the bond of 1819 executed in fulfilment of it. The defenders answer that the contract *per se* was ineffectual to bind the heirs of entail, or after Mr Johnstone's death to be any medium for affecting them; and with respect to the bond of 1819 they say—1st, that it was invalid in respect it referred only to the entail of 1799, under which the granter never made up a title, and which was superseded and displaced by the entails of 1839 and 1850 under which he did; 2d, that it was revoked impliedly by the subsequent bonds of provision which superseded it, and expressly by the general trust-settlement—the result being that the children can take nothing except under the subsequent bonds, and are without remedy for the admitted deficiency of their amount to satisfy their right under the marriage-contract obligation.

"Whether the younger children might have had a remedy against the heir of entail and the entailed estate under the marriage-contract alone is a question which my opinion on the case otherwise renders it unnecessary for me to decide, and I shall only say that I should not, as at present advised, be prepared to decide it against the pursuer. When a prospective heir of entail incurs an onerous obligation within his powers by the entail under which he eventually succeeds, and dies in possession of the estate without executing the formal instruments for carrying it into effect, I am not prepared to hold that this Court is powerless to supply the omission, and that the obligation must go unfulfilled, or the debtor therein, according to its tenor and intention, be changed. There is here no question of feudal title, or the integrity and security of the registers. According to the substance of the obligation, the heir of entail is the proper debtor in it, and the obligant was legally entitled to put it upon him; and it is according to the practice of the Court, and the analogy of many cases, to disregard merely formal objections to a just demand urged by the true debtor, against whom it may be enforced without injustice.

"I am, however, of opinion, that the objections stated by the defenders against the bond of 1819 are not well founded; and if this bond is valid and subsisting, the pursuer is admittedly entitled to the remedy she asks under the first conclusions of the summons.

"The first of these objections is, that it refers to the entail of 1799, under which the granter made up no title, and which was superseded by the subsequent entails under which he made up title and possessed the estate. The Earl of Hopetoun was the true and only entailer, and I have already pointed out that the deed of 1799, which he himself executed, was only superseded in pursuance of his testamentary directions, under which his trustees executed the two later deeds in precise conformity with his own deed of 1799—the possession of the trustees in the interval being for the purpose of clearing off debt. The execution of these deeds in no way affected Mr Hope Johnstone's possession or rights with respect to the estate and the succeeding heirs. I therefore hold that the bond of 1819 in truth and reality referred to the entail under which he completed his formal title and was in possession at his death.

"The second objection is that the bond (1819) was virtually revoked by the subsequent bonds which superseded it. In my opinion this is true only in so far as the subsequent bonds themselves satisfied the obligation in execution of which that of 1819 was granted. The bond of 1819 was not voluntary in the sense of being gratuitous or matter of bounty, but was executed in the performance of a duty and execution of an onerous contract obligation. That the granter might have simply destroyed it or revoked it without putting anything in its place is no otherwise true than that he might have done any other wrong thing. The law presumes that it is the intention of every man to do his duty and perform his obligations, and this Court always endeavours to construe a man's deeds and interpret his conduct in conformity with that presumption. The bonds of 1839 and subsequently indicate, perhaps conclusively, that Mr Hope Johnstone then underestimated the extent or money value of his marriage-contract obligation, but they indicate no intention to defeat it, or leave it unperformed as it in truth existed, and to impute such intention to him would, I am persuaded, do him injustice as well as violate the legal presumption I have referred to. The result, in my opinion, is that the latter bonds shall be held to supersede and come in place of the first (1819) only to the extent of £40,000, which the heir of entail has paid under them and charged on the estate.

"The last objection to the bond of 1819 is that it was revoked by the general clause of revocation in the trust-settlement of 1853. The revocation in terms comprehends only 'trust-dispositions and settlements and other deeds of a testamentary nature'—language inapplicable to the bond of 1819. But the defenders urge that the meaning ought by construction to be enlarged so as to include it in respect of the intention indicated by the express exception of the bonds of 1839 and 1853, which would have been unnecessary or superfluous taking the words 'deeds of a testamentary nature' in their ordinary and natural meaning. I am not sure that I should have yielded to this argument in any view—the superfluous expression of exceptions being too common to afford any safe or satisfactory ground for putting by construction an unusual and unnatural meaning on words. But assuming that such construction would have been admissible, as probably in accordance with the testator's intention in the absence of anything to the contrary, I here find much to the contrary. *First*, If it be assumed that the testator knew that the bonds of 1839 and 1853 did not fully but only partially fulfil his legal obligation, the argument in question would impute to him, by construction, an intention to leave it unfulfilled with respect to the residue, and in fact and result leave it unfulfilled to the amount of £16,000. Now, although the Court might be astute to avoid such a result, and to that end favour any plausible argument for extending or limiting the ordinary meaning of words, I venture to think that to reject the ordinary meaning of words and put another on them by construction, however plausibly supported, to the effect of imputing an improper intention and doing injustice, is contrary to the principles that govern the construction of deeds. *Second*, If it be assumed, on the other hand, that the testator was under the erroneous belief that the bonds of 1839 and 1853 completely fulfilled his contract obligation, then it must be acknowledged the intention imputed by the con-

struction contended for was, if it existed, founded in error. For in this view the suggestion is that the testator, erroneously thinking that the bond of 1819 was no longer useful, revoked it as a superfluous instrument. I doubt whether an express revocation, under the influence of error, of an instrument properly made in fulfilment of a contract obligation would be effectual to defeat the obligation or hinder the fulfilment of it by the instrument, and am clearly of opinion that words which in their ordinary sense do not express such revocation, ought not, on the argument I am now considering, to be construed so as to imply it.

"Having regard to the obligation (the validity and meaning of which are not in controversy), and to the presumable, and I believe real, intention of the obligant to fulfil it, I am of opinion that the bonds of 1839, 1853, and 1861 are to be taken as implement only to the extent of £40,000, and that for the admitted balance of £16,000 the younger children are entitled to have recourse to the prior bond of 1819, which is to be held a valid and subsisting instrument to that end accordingly. This disposes of the primary question in the case.

"The subsidiary question is, Whether the testamentary provision to the younger children by the general trust settlement is to be taken as satisfaction to them *pro tanto* of the marriage-contract provision? The heir of entail in possession is, as it happens, the beneficial heir and residuary legatee of the general estate under the trust-settlement, and the circumstance has some bearing on the defenders' argument on the question of satisfaction. They say that the testator provided £7500 to his younger children out of his general estate, in the belief that they would have £40,000 and no more out of the entailed estate under the marriage-contract provision, and that the connection in his mind between the two provisions appears from the fact, that having in 1861 increased (as he apparently thought he did) the contract provision from £36,000 to £40,000, he in 1869 reduced the testamentary provision from £15,000 to £7500. The fact is clear, whatever the value of it, that the testamentary provision of £10,000 was first made by the codicil of 23d December 1853, executed on the same day as the bond declaring the contract provision at £36,000, and that on 12th February 1861, being the date of the bond raising that provision to £40,000, he made another codicil raising the testamentary provision to £15,000. It was not till 1869 that he reduced this provision to £7500, or one-half of the sum at which it had previously stood, and that without any change on the contract provision of £40,000.

"I find here no foundation whatever for the plea of satisfaction. The maxim *debitor non presumitur donare* is inapplicable, for the testator was not debtor to his younger children in the sense that they were creditors of his or of his estate after his death. Their right was and is to have the amount of their provision paid by the heir of entail, who is at liberty to raise it by charge on the entailed estate—their right to payment, and his to raise by charge, being commensurate. I have not to decide on the question whether a legacy of £7500 to a proper creditor of the testator for £56,000 would be imputed *pro tanto* in extinction of the debt, and should have no difficulty in deciding it in the negative if I had. I assume that the testator under-estimated by £16,000 the true money value of the younger children's provision under the marriage-contract, and that the under-estimate appears from his deeds. But I know of no principle or authority which entitles the Court on that account to interfere with his testament and strike out of it the provision to his younger children. He might have made it or not had he been better informed on this or any other subject which might have reasonably influenced his testamentary intentions. The Court is not called upon or entitled to enter upon such conjectural matters.

"I therefore repel the defences, and give the pursuer decree in terms of the first alternative conclusions of the summons, and with expenses."

The defenders reclaimed.

Argued for the next heirs—(1) The effect of the provisions in the different bonds was that the younger children were only entitled to £40,000, such being the evident intention and anticipation of the granter. (2) There was an express revocation of the bond of 1819 in the granter's general trust-disposition and settlement. (3) If the bond of 1819 existed at all, it was obligatory not on the heirs of entail but of the granter. There was no obligation subsisting at Mr Hope Johnstone's death on his heirs to make a provision of three years' rents—rather, although there may have been such an obligation, it was not put in force by Mr Hope Johnstone, as he failed to bind his heirs. A bond of provision till delivered was in the power of the granter. [Lord Gifford—Only when not an onerous deed.] *Russell* v. *Gordon*, Dec. 9, 1739, M. 9490, and also Elchies, Mutual Contract, No. 13; *Hay Newton* v. *Hay Newton*, July 18, 1867, 5 Macph. 1056. [Lord Justice-Clerk—But the deed was put on record, and that is surely equivalent to delivery.] It must be known *quo animo* it was put on record.

On the second point it was argued for the heir in possession—The testator when he gave this provision of £7500 was under the belief that all his younger children would get was £40,000; if they are to get more, the £7500 must be imputed *pro tanto* to the increase above that sum.

Their Lordships took time to consider whether they would hear a reply for the reclaimer, but decided the case without doing so.

At advising—

Lord Justice-Clerk—I agree with the opinion of the Lord Ordinary as expressed in his note. Under the entail of the lands in question executed by Lord Hopetoun the heir in possession has the right of making a provision for his younger children of three years' rent of the entailed estate. Mr Hope Johnstone—who was not then in possession, his mother being alive—came under an obligation in his marriage-contract to make such a provision, which was in the following terms—[*quotes ut supra*]. Mr Hope Johnstone therefore came under this obligation, if he succeeded to the entailed estate, of settling by a bond of provision three years' free rent on his younger children, the only power of restriction being in the event of such children being less in number than five, otherwise the obligation in the marriage-contract was binding and the whole provision was to be made. That provision was absolutely binding on Mr Hope Johnstone--of this

there is no doubt at all. A question was raised as to whether in the event of no such deed having been executed by Mr Hope Johnstone the provision failed? It was said that it could not transmit against his heirs-general, because the provision had only reference to the entailed estate, nor against the next heir, because the next heir could not be bound without a deed being granted. But I think that is by no means to be taken for granted. Mr Hope Johnstone having in a highly onerous deed like a marriage-contract bound himself, in the event of his succeeding to the entailed estate, to make such a provision, and having succeeded to the estate, I am not prepared to say that the obligation could not be enforced, even although no further deed was executed. But this question does not arise, for in 1819 Mr Hope Johnstone, who had in the meantime succeeded to the estate, executed a deed binding himself and his heirs in the manner in which he was authorised to do by the deed of entail and in terms of the marriage-contract, and the real question which has been argued in this case is, Has this deed of provision been revoked? I am quite clear that by subsequent deeds it was not, and could not, be superseded. I should have thought that it was out of the granter's power to have interfered with this obligation at any time, but what to my mind puts it beyond all question is that Mr Hope Johnstone himself directed this deed to be put upon record along with the subsequent deeds of provision which were said to revoke it. My opinion in regard to these subsequent deeds is that they were granted with reference to the Aberdeen Act, which was passed in the interval.

I am of opinion, therefore—(1) that the obligation in the marriage-contract was a subsisting one, that the deed of 1829 was not revocable, and having been recorded could not be superseded. (2) That it has not in any way been superseded.

On the second question which was argued—the provision of £7000 in Mr Hope Johnstone's deed of settlement—I am quite clear that this and the provision of three years' rent are two separate things, and that the £7000 is not to be imputed *pro tanto* to the sum to be paid from the entailed estate, which must bear its own burdens.

Lord Ormidale—I am of the same opinion, and without any difficulty. The case as brought into Court is laid on the marriage-contract and deed of 1819. I shall look, therefore, how the case would stand on these deeds alone. The Lord Ordinary in deciding the case gives effect to the deed of 1819 alone, without absolutely deciding the question whether the marriage-contract would have been sufficient to give the younger children a right without it, and I am disposed to adopt that view. It is of great importance to notice that this onerous obligation is contained in the marriage-contract, as it accounts for the execution of the bond of provision in 1819, and makes this deed a highly onerous one. It is not necessary to determine whether the marriage-contract and the obligation therein contained would have been enough in itself; the obligation there was to execute a bond or bonds of provision, and if he had executed none there might have been some difficulty as to how the obligation was to be implemented after his death. But it is not necessary to determine this, as I take the same view as the Lord Ordinary upon this point. Now, coming to the deed of provision of 1819, I can see no objection to it in itself. It is within the powers of the entail, and is merely following out in terms the obligation Mr Hope Johnstone had come under in his marriage-contract. Bonds of this description have always been construed liberally by the Court if they are within the powers of the entail. I think the law stated by Mr Sandford at page 380 of his book, supported by the authorities there quoted by him, which I may say I have gone over and verified, exactly expresses my views of the law on this matter (*Crawford* v. *Hotchkis*, March 11, 1809, F.C.). Now, I think we have here a good bond of provision implementing an obligation, contained in a highly onerous contract of marriage, that he would grant such a bond. The obligation was that three years' free rent should be given to the younger children. It is not said that he gave more than this, or that the sum sued for (£56,000) is more than this. The bond in itself is all regular. It requires, therefore, in my opinion, something very special to take away its effect. There were two points maintained by the reclaimers—(1) That the bond of 1819 had been revoked and recalled, if not expressly, at least by fair implication, in consequence of the subsequent bonds of provision which were executed, and in which the amount conveyed is nowhere stated as over £40,000. But the answer to that is, that it was beyond the power of Mr Hope Johnstone to recal the bond of 1819. It was a highly onerous deed, and throughout the argument I have heard nothing to the contrary, viz., to the effect that it was possible to recal it. But, further, although these deeds were executed later, they do not bear to revoke this provision. For what reason they were executed I cannot say, but certainly that was not their purpose. It was then said that he did actually recal the bond of 1819 in his testamentary settlements; but, as I have already said, it was out of his power to do so, and what is to my mind conclusive that he did not mean to do so is, that this deed of 1819 was recorded by his own directions in 1867, after the date of the subsequent bonds of provision.

The only other question raised in the case is in regard to the supplementary provision of £7000. But your Lordship has met that sufficiently, and the Lord Ordinary in his note has entered fully into this matter, and I quite agree with his views.

On the whole matter I concur.

Lord Gifford—I am of the same opinion, and latterly with no difficulty. The late Mr Hope Johnstone in his marriage-contract bound himself absolutely that if he succeeded to the estate he would provide his younger children there years' rent of the entailed estate, with a power to restrict the amount only in the event of there being fewer than five children. The reason why he only bound himself to bind the heirs of entail was that at the date of his marriage he was not heir in possession himself. His mother died in 1818, and the year after Mr Hope Johnstone implemented his onerous obligation to provide three years' rent. I am of opinion, in the first place, that Mr Hope Johnstone was bound to implement his obligation. The moment the event happened which enabled him to do so he did implement it, and by a bond which is free from any possible objection. It was said that the bond was not

delivered. But it did not require any technical delivery, for it was by a father in favour of his children, and besides he put it on record himself. It was then said that the bond was no longer binding because it had been impliedly recalled by three subsequent bonds of provision. But (1) It was not in Mr Hope Johnstone's power to recal it. A father who binds himself in his marriage-contract to make a provision in favour of his children, and makes it, cannot recal it at will. It was maintained that he might have burnt it while in his own power, but so he might have done any other wrong act, but that would not prove that the act was a right or lawful one. But (2) He never recalled it. No doubt the subsequent deeds seem to be for a smaller sum, but you cannot innovate upon a larger provision by a subsequent deed giving a smaller sum. Subsequent deeds may give security for a smaller sum *pro tanto* of the whole obligation, but they do not innovate on the original bond. And in corroboration of this we find that the deed was afterwards recorded. I see no answer to this, and this disposes of the whole of the first point.

On the second point—the £7000 provision—I concur. The father left a legacy from his general estate to his younger children. Why should he not? The only answer attempted to be given was the maxim *debitor non presumitur donare.* But this does not apply, for he was not the debtor during his lifetime; he only bound the heir of entail to pay it. Throughout the whole argument I have failed to see where the difficulty lay.

LORD YOUNG—I concur.

The Court adhered.

Counsel for Pursuer (Respondent)—Johnstone—Pearson. Agents—Pringle & Dallas, W.S.

Counsel for the Heir in Possession and the late Mr Hope Johnstone's Trustees (Defenders and Reclaimers)—Kinnear—Keir. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the next Heirs (Defenders and Reclaimers)—Lord Advocate (M'Laren)—Mackay. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Wednesday, May 19.*

FIRST DIVISION.

[Lord Young, Ordinary.

CITY OF GLASGOW BANK LIQUIDATION—(*JOHN GILLESPIE'S CASE*)—THE LIQUIDATORS *v.* JOHN GILLESPIE (MR AND MRS GODBY'S MARRIAGE-CONTRACT TRUSTEE) AND OTHERS.

Trust—Homologation—Homologation of Trustee's Illegal Acting by Beneficiary—Where Trustee sought Relief from Beneficiary.

Trustees invested part of the funds under their charge in the stock of a bank of unlimited liability—an investment which the deed did not authorise. The bank failed, and its liquidators, as coming in place of the only surviving trustee,—who had surrendered to them his entire estate on receiving his discharge,—raised an action against the beneficiaries for payment of the calls on the stock belonging to the trust-estate. They averred that the beneficiaries in question "were informed and were well aware of the said investment, and gave their sanction and approval thereto;" and "also from time to time received accounts showing the investments of the trust and the application of the income, and were thus informed that the said bank stock was retained as a permanent investment of the trust-funds." *Held* that this averment, although, if well founded, it might bar the beneficiaries from claiming damages from the trustee for his breach of trust, was irrelevant where it was sought to show that the beneficiaries had come under an obligation to relieve the trustee in the circumstances which had occurred.

Question (*per* Lord Deas) Whether such an obligation could be proved otherwise than by writ of the beneficiaries in express terms?

By antenuptial contract of marriage between Mr Frederick Godby and Miss Mary Binnie or Godby, now Parkhurst, dated 7th October 1848, Mr Godby conveyed to Robert Binnie and John Binnie, and the survivor of them accepting, and such others as might be appointed, by virtue of the powers thereinafter specified, as trustees for the purposes therein mentioned, two policies of insurance on his life for £200 and £800 respectively; and the trustees were directed to hold the same when recovered for behoof of Miss Binnie in liferent, and the children of the marriage in fee, with ulterior destinations in the event of there being no children. By the same deed Miss Binnie conveyed to the trustees the sum of £500, receipt of which the trustees acknowledged, and which sum it was declared "shall be invested by us, the said trustees, on such security as we or our foresaids, as trustees foresaid, with consent of me, the said Mary Binnie, may approve of;" and it was further agreed that the trustees should pay the annual proceeds or interest of this sum half-yearly to Miss Binnie, on her own receipt alone, during the joint lives of Frederick Godby and her, and thereafter to the survivor; and that the same should belong to the children of the marriage in fee, with ulterior destinations in the event of there being no children.

Mr Godby died on 2d January 1856. The amount received in respect of the policies of insurance on his life assigned to the trustees by the marriage-contract was £1102, 10s. Of this sum £800 was in 1868 invested by the trustees in £500 City of Glasgow Bank stock, and stood registered in their names. On 29th December 1869 one of the trustees—John Binnie—resigned office, and by deed of assumption dated 6th and registered 21st March 1871 the surviving trustees assumed John Gillespie, W.S., and James Gillespie, residing near Cramond, Edinburgh, as trustees along with himself, and the stock was thereafter registered in their and his names.

Robert Binnie died in 1872, and on the City of Glasgow Bank going into liquidation the Court on 22d February 1879 ordered James Gillespie's name to be deleted from the register of members and list of contributories. The remaining trustee,

* Decided March 20.