by the directors and manager of the society as long as the said James Russell shall continue the regular payment of the instalments, interest, and other sums to become due upon his said shares in terms of the rules of the society." That refers to the 12th rule in particular, which states how an advanced member is to make the repayment of his advances—"All advances shall be repaid by monthly instalments, with interest at the rate of 5 per cent. per annum, and which interest shall be paid monthly in advance, and at the same time as the instalments." Now, my Lords, it is impossible to read that as meaning that there should be two instalments paid by the advanced member, one as shareholder and the other as a debtor or mortgagor, but he is to repay the advance made to him for which he has given his bond and security, by these instalments which members have to pay from time to time. It is impossible, after he has actually paid that, for the society to say that the instalments they received from time to time are not to be ascribed as payments of the advance. It is perfectly clear they must be so ascribed, and therefore this gentleman, at the time of the winding-up order, having paid instalments to the amount of £414, was entitled to have full credit for the same as a repayment, as far as it would extend, of the advance made to him, reducing, as I have said, the sum to be paid to £286. Then, my Lords, the question arises whether there is anything in the contract to vary that result to prevent him exercising his right to redeem, for he must have a right to redeem on payment of the whole amount remaining due and advanced to him. There is not one word from which it can be possibly implied that an advanced member, merely because the society has sustained losses, and because these losses may diminish the return of payments to be received by the advanced member, is to have his advance recalled, and to be turned *ex post facto* into an unadvanced member, so that any repetition, as distinct from his obligation to make repayment according to his contract, can be obtained from him.

Interlocutor affirmed with a variation (being that moved by the Lord Chancellor), and appeal dismissed with costs.

Counsel for Appellants — Solicitor-General Herschell, Q.C.—Solicitor-General Asher, Q.C. —M'Clymont. Agents—Grahames, Currey, & Spens—J. Smith Clark, S.S.C.

Counsel for Respondents — Davey, Q.C.— Hedderwick. Agents—Lewin, Gregory, & Anderson—Miller & Murray, S.S.C.

COURT OF SESSION.

Friday, March 9.

SECOND DIVISION.

MACKIE *v.* GLOAG'S TRUSTEES.

Succession—Antenuptial Contract—Provisions to Children of First Marriage in Contract entered into at Second Marriage, whether Testamentary—Onerosity—Delivery—Jus quæsitum tertio *—Power of Appointment*

A widow who had three children entered into a second marriage. In contemplation of this marriage she entered into an antenuptial contract with her intended husband whereby she conveyed to trustees certain specified heritable and moveable property for behoof of herself "in liferent, for her liferent alimentary use of the annual proceeds thereof allenarly, and seclusive of the *jus mariti* and right of administration" of her husband, and not affectable by the debts or deeds of either, and for behoof of the children "procreated or to be procreated" of her body in fee, according as she might appoint, or failing an appointment, then equally among them. The trustees were infeft in the heritable property, and entered into possession and management of the estate conveyed to them. There were no children of the second marriage. The wife left a settlement by which she affected to exercise her power of apportionment, and to deal with her whole property, whether falling within the contract of marriage or not. By this deed she made a very small provision for one of the children of the first marriage. *Held*, in an action at his instance to have it declared that he had a right under the marriage-contract which she could not defeat, (1) that the provisions of the marriage-contract were, so far as he was concerned, not onerous in their character; (2) that the provisions of the marriage-contract with regard to the children of the first marriage were testamentary only, and were therefore validly revoked by the mother's settlement—*diss.* Lord Rutherfurd Clark, who was of opinion that the marriage-contract being in favour of the children "procreated and to be procreated," and being delivered to the trustees under it, constituted an irrevocable donation in favour of the children of the first marriage.

Exclusion of Jus mariti.

Opinions per Lord Justice-Clerk and Lord Young, that by the terms of the marriage-contract the *jus mariti* of the husband was excluded from the fee of the moveable estate; *per* Lord Rutherfurd Clark, that it was excluded from income only.

Apportionment Act (37 *and* 38 *Vict. c.* 37)—*Appointment under Powers Act* 1874.

Opinion (*per* Lord Fraser) that this Act applies to Scotland.

Mrs Helen Campbell or Mackie was predeceased by her husband Peter Mackie. In 1855 she contracted a second marriage with John Gloag. Several children had been born of the first marriage, three of whom, two sons and a daughter, were alive at the date of the second. In contemplation of her second marriage Mrs Mackie entered into an antenuptial marriage-contract with her intended husband John Gloag. By this deed she, with his consent, conveyed to certain parties (including herself and him) as trustees—(1) Certain heritable property in Glasgow; (2) 31 shares in the Clydesdale Bank, and 37 shares in the Gorbals Gravitation Water Company; (3) A policy of assurance upon her life for £499. Gloag on his part conveyed no property to the trustees. The purposes of the trust were that the trustees should hold the property conveyed by the wife for behoof of her "in liferent for her liferent alimentary use of the annual proceeds thereof allenarly, and seclusive of the *jus mariti*

and right of administration of the said John Gloag, and not affectable by his or her debts or deeds, or by the diligence of their creditors, and for behoof of the children procreated or to be procreated of the body of the said Mrs Helen Campbell or Mackie in such proportions and on such terms and conditions as the said Mrs Helen Campbell or Mackie might appoint by a writing under her hand, which failing, equally among them share and share alike, and their respective heirs and executors whomsoever in fee." The wife bound herself, out of her liferent to pay the premiums on the policy of assurance, and a sum of £800 with interest, being a debt due by her to the Clydesdale Bank, in security of which the bank held her shares of its own stock and those of the Gorbals Water Company. The trustees entered into possession of and made up titles to the whole trust-estate conveyed to them, and were infeft in the heritable property. They continued to administer the trust-estate and to pay the income thereof to Mrs Gloag during her lifetime. In 1872, John Gloag, in consideration of £72, 10s. paid to him by his wife, assigned to her in liferent, excluding his *jus mariti* and right of administration, and to her son by her first marriage, William Cross Mackie, the pursuer of this action, in the event of his surviving her, also in liferent, and to Alexander Mackie and Robert Mackie, his children, in fee, the lease of certain heritable subjects situated at Largs. The assignation, which was recorded, reserved to Mrs Gloag power of sale and application of the price of the subjects without the consent of any party whomsoever.

Mrs Gloag died on 16th March 1881. There were no children of the second marriage. Of the three children of the first marrriage who were alive at the date of the second, one son had predeceased her, unmarried and intestate, and there remained alive at her decease the other son, the pursuer, and the daughter Mrs M'Cutcheon.

Mrs Gloag left a trust-disposition and settlement, dated 31st January 1881, by which she conveyed to certain parties, as trustees, the whole means and estate then belonging to her, which included that formerly conveyed to her marriage contract trustees, including the leasehold subjects in Largs destined to her husband and her in conjunct fee and liferent, for his liferent allenarly, and to her in fee. The heritable subjects at Largs above referred to were specifically conveyed, and the destination of them to herself and the pursuer successively in liferent, and his children in fee, declared to be expressly revoked. The deed then proceeded on the narrative that certain property had been conveyed by her in the marriage-contract for behoof of herself in liferent and her children in fee, in such proportions as she might appoint, and that it was her intention to exercise that power to direct the marriage-contract trustees to transfer the property vested in them to the testamentary trustees that it might all be dealt with as part of her general estate, which was all conveyed to the trustees. The trustees were appointed her executors. Sundry codicils were afterwards added to it. With regard to the purposes of the deed and codicils it is sufficient for the purposes of this case to say that the testator in consideration that her son William Cross Mackie had not conducted himself to her satisfaction either in business or otherwise, left him an annuity of £25 and a legacy of £300, both payable to him in the discretion of the trustees. She also gave her trustees discretion to make certain annual payments to his only surviving son in the event of his conducting himself to their satisfaction.

The benefit to be derived by the pursuer under his mother's settlement was thus greatly less than he would have enjoyed if he had received along with Mrs M'Cutcheon an equal share of the fees of the subjects conveyed in his mother's marriage-contract with Mr Gloag, which property, as above stated, was to be divided among her children procreated or to be procreated, equally among them, failing division by her.

In November 1881 he raised the present action against his mother's testamentary trustees, and also against the trustees under her marriage contract. He concluded for reduction of his mother's trust-settlement and codicils, as having been wrongfully impetrated from her and as not being duly executed in point of law, and for declarator that he had right under the marriage-contract to one-half of the heritable property and other means and estate conveyed by his mother to her marriage-contract trustees, and for decerniture against the marriage-contract trustees to convey to him his mother's estate to the extent claimed. There were also declaratory conclusions in reference to the property at Largs, to the effect that the pursuer had the sole and exclusive right of liferent and liferent use of the heritable subjects at Largs, and for decree of removal therefrom against the testamentary trustees. There was also a conclusion for accounting against the testamentary trustee, and against both bodies of trustees conjunctly and severally for payment of £1500 as the balance of his mother's estate due to him under the marriage-contract, and of £500 in respect of the lease of the subjects at Largs.

The reductive conclusions, which were based on allegations of unsoundness of mind on the part of the testator, were afterwards abandoned, and that concerning the subjects at Largs was, in respect that the titles and keys thereof had been handed to the pursuer as at Whitsunday 1881, restricted to £25 as the amount of rent due in respect of the trustees' possession of them.

The pursuer averred that his mother had mistaken the scope of the power of appointment reserved to her in the marriage-contract, and had attempted to deprive him of his just rights under it, and to substitute therefor provisions of much less value, and dependent on the discretion of the testamentary trustees, and that this was *ultra vires* of her under the marriage-contract.

He pleaded—"(1) The pursuer's mother Mrs Mackie or Gloag did not validly execute her power of appointment under the said antenuptial-contract of marriage by the foresaid trust-settlements or otherwise. More particularly, there has been no valid execution of the power, in respect that (1st) no provision has been appointed to the pursuer, or at least it is illusory ; (2nd) no provision has been appointed to the heirs and executors of the pursuer's deceased brother Alexander ; and (3d) beneficiaries under the truster's settlements, not being objects of the power, are made to share in the estate, the subject of the power. (2) The pursuer is entitled to one-half of the heritable subjects, means, and estate

thereby conveyed, either in his own right, or partly in his own right and as next-of-kin of his brother Alexander Mackie. Or otherwise, with regard to the said heritable subjects, the pursuer is entitled to one-third thereof as in his own right, and to another third as heir-at-law of his said brother. (3) The defenders' trustees under the said antenuptial contract are now bound to convey to the pursuer a part or share of the said subjects and means and estate according to the extent of his rights and interests therein, and to account to him for the rents, profits, and income thereof since his mother's death. Or otherwise, if the same were conveyed by them to the trustees under Mrs Mackie's second trust-settlement, and the same have been sold, both sets of trustees are now bound to account to the pursuer for their intromissions therewith, including the prices or values thereof."

The defenders pleaded—"(1) The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. (2) The provisions contained in the marriage-contract of Helen Campbell or Mackie and John Gloag in favour of the children of the said Helen Campbell or Mackie of her first marriage were not onerous or irrevocable, and the pursuer had and has no *jus credití* therein, and the said provision being testamentary and revocable the present action cannot be maintained. (3) The power of apportionment under the antenuptial contract of marriage libelled having been validly exercised by Mrs Mackie or Gloag in the trust-settlement and codicils executed by her, the pursuer is not entitled to have the said deeds set aside, or to have the property falling under the said contract of marriage dealt with as if no apportionment had been made. (4) The said exercise of the said powers is not invalid in respect of the particular objections stated thereto by the pursuer, because (1st) the pursuer takes a substantial interest under the said deeds of Mrs Gloag; (2d) it is not necessary to a valid exercise of a power of apportionment to include a deceased child in the scheme of apportionment; (3d) that it is a lawful and valid exercise of the said power to apportion the funds to children in liferent and grandchildren in fee; and (4th) the apportionment is valid in respect of the provisions of 37 and 38 Vict., c. 37."

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer by minute lodged in process has abandoned his conclusions for reduction founded on the alleged mental incapacity of the testator: Finds that the pursuer is one of the children procreated of the marriage between the now deceased Peter Mackie and Helen Campbell or Mackie or Gloag: Finds that sometime after the death of Peter Mackie, his widow Helen Campbell or Mackie contracted a second marriage with John Gloag, and entered into an antenuptial contract with him: . . . Finds that the provision therein made in favour of the then existing children of Mrs Mackie was testamentary and revocable, and conferred on them no *jus credití* entitling them to challenge the deeds of settlement of the said Helen Campbell or Mackie or Gloag: Therefore sustains the second plea-in-law for the defenders: Finds and declares that the pursuer has under and in virtue of an assignation, recorded . . . 23d April 1873, right to a liferent of a lease of the subjects therein described, which assignation was granted by the said John Gloag, with consent of the pursuer's mother, to and in favour of her in liferent, and to the pursuer, in the event of his surviving her, also in liferent, for his liferent use after her death, and to Alexander Mackie and Robert Mackie, children of the pursuer, in fee, and which liferent right in favour of the pursuer commenced at the death of his mother on 16th March 1881: Finds that the defenders took possession of the subjects contained in said lease, and retained possession of them till Whitsunday 1881: Finds that they are bound to pay a rent to the pursuer for the time they so possessed, and fixes the same at £5, for which decerns against the defenders: Finds that the pursuer obtained possession of the said subjects at Whitsunday 1881, and that it is unnecessary therefore to grant any decree ordaining the defenders to flit and remove from the same: *Quoad ultra*, assoilzies the defenders from the conclusions of the action, and decerns," &c.

"*Opinion.*—The pursuer William Cross Mackie is a son by her first marriage of Mrs Helen Campbell or Mackie or Gloag, and he seeks in the present action to upset the testamentary disposition of her property made by her. Her settlements are sought to be reduced upon the ground that she was not of sound mind when she executed them, which ground of reduction has however been departed from by the pursuer, conform to his minute lodged in process.

"It is, however, still maintained by the pursuer that he is entitled to obtain declarator that the disposition and settlement of his mother was *ultra vires* of her, in respect that it is in violation of the antenuptial marriage-contract which she entered into with her second husband John Gloag.

"The first husband of the truster, whose deeds are challenged, was Peter Mackie. Of the marriage between him and Mrs Helen Campbell or Mackie or Gloag there were three children, viz., the pursuer, and Mrs Agnes Mackie or M'Cutcheon, and Alexander Mackie, who died before his mother.

"In the year 1855 Mrs Helen Campbell or Mackie, the mother, married John Gloag, and entered into an antenuptial marriage-contract with him dated 12th December 1855. Apparently the whole property that was dealt with under this contract belonged to the wife, and its object was to protect that property for her use or for the use of those to whom she might think fit to give it. She conveyed over to certain trustees—[*His Lordship here specified the property conveyed, and recited the purposes as above quoted*]. There were no children of the marriage between the pursuer's mother and John Gloag.

"The question now arises, whether the pursuer is entitled to found upon this marriage-contract as giving him a right to challenge the subsequent testamentary arrangements made by his mother, whereby his interest is limited to an annuity of £25 a-year, and a legacy of £300—being very much less than the sum he would obtain if the provision in the marriage-contract dividing the mother's property among her children equally had been allowed to take effect. It is unnecessary to detail the testamentary deeds executed by Mrs Gloag. The import of them is, that becoming more and more dissatisfied with the conduct of her son the pursuer, she makes a reduction of the legacy left to him in each succeeding settlement or codicil.

"The Lord Ordinary is of opinion that the pursuer is not entitled to found upon the marriage-contract as a ground of challenge of his mother's will. That contract, so far as he is concerned, was simply *mortis causa* and revocable. As respects any children that might have been procreated of the marriage, the provision was *in obligatione*, and could not be defeated by any gratuitous deed of the parent. But so far as concerns the children of a former marriage, there was no onerosity in the matter. They were merely heirs *in destinatione*, and their provision could be recalled like any other legacy. Thus there may be in the same deed persons called as beneficiaries to the same fund who may have very different rights, and so the children procreated and the children to be procreated may have, the first only the rights of a legatee, while the others have a *jus crediti* which no gratuitous deed can defeat. If the provision had been to the children of the marriage, whom failing to the children of Mrs Gloag by her first marriage, there can be no doubt that the latter must submit to any gratuitous defeasance by their mother of the provision, and the case is not altered, although the clause does not call them by way of substitutes, but confers upon them an equal share with the children of the marriage. The law is stated very well by Bankton (i. 5, 15)—'Though the children are creditors in such provisions with respect to gratuitous deeds made in contravention thereof, yet this extends not to the substitutes failing children; for the children only are *in obligatione*, in whose favour the provision as binding was made, the intention of parties being only to secure their interest; but other substitutes are only *in destinatione*, heirs by simple destination, and so may be disappointed of their hope of succession at pleasure as any other heirs by naked destination.' See also Erskine, iii. 8, 39; *Lang* v. *Brown*, May 24, 1867, 5 Macph. 789; *Macleod* v. *Cunninghame*, July 20, 1841, 3 D. 1288, *aff.* 5 Bell's App. 210.

"No doubt there may be cases where a provision in a marriage-contract not in favour of children of the marriage must be held to be irrevocable. If, for example, there should be a destination in the contract, after heirs of the marriage, to the wife's heirs, or one-half to her heirs and one-half to the husband's, the wife is understood to have contracted for the destination to her own heirs, as well as for that to the children of the marriage, and consequently the husband cannot himself gratuitously change the destination to the prejudice of the wife's heirs. See Bankton, i. 5, 16; *Kinsman* v. *Scot*, M. 12,980; *Yorkston* v. *Simpson*, M. 12,981. But in the present case this qualification of the rule does not apply, for it is the wife herself who makes the alteration upon the destination in the marriage-contract, and this in reference to property of her own. She was under no obligation whatever to make any provision for the children of her first marriage, and when she did make it in her marriage-contract with Gloag she was under no obligation to abstain from revoking it. Gloag made no provision for her by the marriage-contract, and it cannot be held that he stipulated for the benefits conferred by his wife on the children of her first marriage as a part of the bargain entered into with her. The mistake that has been committed in this case is in supposing that the pursuer has a *jus quæsitum* under his mother's marriage-contract with Gloag, in the same way as children of that marriage would have had.

"If it had been necessary, the Lord Ordinary would have been prepared to state the reasons upon which he holds that the Act 37 and 38 Vict. cap. 37, applies to Scotland, and therefore that the execution of the power of appointment by Mrs Gloag was not inept, because it made no provision for the heirs of Alexander Mackie, who predeceased his mother. Nor is it necessary to express any opinion as to whether the share of the marriage-contract fund given to the pursuer under his mother's settlement was illusory. These questions are superseded by the finding that the pursuer has no title to sue.

"There was conveyed by Mrs Gloag's trust-disposition and settlement to her trustees the lease of certain heritable subjects, described in the conclusions of the summons, lying within the parish of Largs. This lease had, by deed of assignation dated in November 1872, been assigned by John Gloag (in consideration of the sum of £72, 8s. paid to him) to Mrs Gloag in liferent, and to the pursuer, her son, in the event of his surviving, also in liferent, and to the pursuer's two sons in fee. Mrs Gloag apparently conceived that she had right to dispose of this lease as she thought fit. A power of sale was reserved to her, but there was no power reserved of gratuitously defeating the liferent of the pursuer. The defenders at first did not admit this contention on the part of the pursuer, and therefore they retained possession from the time of Mrs Gloag's death on 16th March 1881 till Whitsunday 1881, when they delivered up the subjects to the pursuer along with the titles, and in the record in this action the 5th plea is—[*that the conclusions hereanent are uncalled for*]. The Lord Ordinary is thus saved the necessity of expressing any opinion as to the legal rights of parties, further than to give effect to the admission by the defenders that the pursuer is entitled to the liferent of the lease notwithstanding the terms of Mrs Gloag's trust-disposition and settlement. The defenders must, however, pay a rent for the period between 16th March and Whitsunday 1881, and as it was conceded that the rent for a whole year would be £25, the Lord Ordinary considers that the sum to be paid by the defenders should be £5."

The pursuer reclaimed, and argued—This was a provision for children of both marriages under antenuptial contract, by which the granter was divested in favour of trustees, under an obligation to convey to certain beneficiaries in existence at the date of granting. From the moment of delivery of the deed, which was constituted by the infeftment of the trustees, the latter were holding for the children independently of the granter. This deed was therefore (1) onerous, and (2) a delivered and irrevocable deed. The authorities relied on by the Lord Ordinary did not meet the circumstances of the present case. The deed in *Macleod's* case was unilateral, that in *Long's* case was postnuptial. This case was *sui generis* in its facts, for the beneficiary claiming was not an ordinary third party, but had a natural claim on the granter. This was clearly not a case of substitution of the children of the first marriage, but of institution. The Act 37 and 38 Vict. c. 37, was only a supplement to an

English Act, and did not apply to Scotland.

Authorities—*Burnett* v. *Morrow*, March 26, 1864, 2 Macph. 929; *Tennent* v. *Tennent's Trustees*, July 2, 1869, 7 Macph. 936; *Turnbull* v. *Tawse*, 1 U. & T. 80; *Duguid* v. *Caddell's Trustees*, June 29, 1831, 7 S. 844; *Miller* v. *Milne's Trustees*, February 3, 1859, 21 D. 377; *Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800; *Napier* v. *Orr*, November 18, 1864, 3 Macph. 57; *Leckie* v. *Leckie*, 1776, M. 11,581; *Downie* v. *M'Killop*, December 5, 1843, 6 D. 180; *Sommerville* v. *Sommerville*, May 18, 1819, F.C.; *Collie* v. *Pirrie's Trustees*, January 22, 1851, 13 D. 506; *Gilpin* v. *Martin*, May 25, 1869, 7 Macph. 807; *Ferguson's Trustees* v. *Hamilton*, January 13, 1860, 22 D. 1442.

The defenders replied—The circumstance that the provision was in a marriage-contract, and in favour of a child of the truster, did not make it irrevocable. It was settled by a long series of decisions that any rights in a marriage-contract, beyond those to immediate children, were testamentary and revocable, unless such right were a purchased right, and then it would subsist on the ground of *jus quæsitum tertio*. If the children benefitted were not children of both contracting parties, they had no right in virtue of the contract between them. A trust for behoof of persons in existence, along with others not in existence, was not the same as one for behoof of the former class alone. The trust here owed its existence solely to the marriage. The trustees were holding against the granter for behoof only of the proper objects of the marriage-contract, *i.e.*, the offspring of the marriage in contemplation of which it was made; if none, they were holding, in virtue of the reserved power of appointment, for behoof of the granter herself and her testamentary nominees. Had Mrs Gloag meant this provision to be irrevocable she would have said so; not having done so it is to be presumed she meant the reverse. The children of the first marriage had thus no succession protected by paction. Their right was one merely of succession, not of contract. They had no *jus quæsitum*.

Authorities—*Forrest* v. *Robertson's Trustees*, October 27, 1876, 4 R. 22; Fraser on Husband and Wife, p. 1410, and cases there cited; *Costine's Trustees* v. *Costine*, March 19, 1876, 5 R. 782—*aff.* H. of L. 6 R. 13; *Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237; *Barbour* v. *M'Niven*, July 7, 1826, 4 S. 806.

At advising—

Lord Young—The leading question in the case, and the only one which I find it necessary to consider, is, Whether the marriage-contract of 25th December 1825, between Mrs Mackie and her second husband Mr Gloag, imports an irrevocable gift by her to her children by her first marriage of certain property which she thereby conveyed to the marriage trustees? It is clear enough that these children being strangers, in the sense of not being proper objects of the contract, take no right by virtue of the contract between the spouses, or in respect of the onerosity of the deed. If they have any right therefore, it is not by onerous contract, but by gift, so perfected as to be irrevocable by the giver. The law on the subject of gift is well settled, and is this—That while a completed gift cannot be recalled, an imperfect gift is not enforceable, however clearly it may appear that it was at one time intended. A gift may be completely and so irrevocably made by delivering the subject of it to the donee *animo donandi*, which is the most obvious case, or by delivering it with the same *animus* to a trustee for the donee in such manner as to put it beyond the power and control of the donor, or by the donor constituting a trust in himself for the donee, which though a possible is not a familiar case, and one which need not now be considered.

The question then is, Does this marriage-contract, with what followed on it, import a complete gift to the children of Mrs Mackie by her first marriage?

The radical question in all such cases is, whether or not an irrevocable gift was intended by the alleged donor? although this question must of course be determined in the case of a deed relied on as a deed of gift by the ordinary rules of construction — keeping in view the character and purpose of the deed, which may have, and I think here has, an important bearing on the matter.

The deed here relied on as a deed of gift is a marriage-contract, to which the alleged donees are strangers in the sense which I have explained. But although it was quite possible thereby to make an irrevocable gift to them, it is material to have in view the character and purpose and proper object of the deed in construing the language to which this effect is attributed, as being presumably according to the meaning and intention of the party using it.

It was according to the contract on which the marriage between Mrs Mackie and Mr Gloag followed that the former should secure certain property of hers for herself in liferent, and the children of the marriage in fee, by vesting it in trustees with directions to that end, and that the security should be completed by Mr Gloag renouncing his *jus mariti* over it, for I think it clear that his *jus mariti* was renounced with respect to the whole property, and not with respect only to the income. Beyond this the contract of the spouses does not extend. The deed provides for the interests of the wife's children by her first marriage, but with respect to them there was no contract, or to use Mr Erskine's quaint language, only a contract by Mrs Mackie with herself alone. She had no occasion to contract with these children, or with Mr Gloag for them, beyond this, that she should be at liberty to introduce them to share her property with the children she might bear to him, equally or otherwise as she should eventually determine. That they should so share, whether she desired it or not, and that failing children of the marriage they should have the whole irrespective of her wishes, was assuredly not matter of contract between her and Mr Gloag. There may nevertheless be a complete and irrevocable gift to them by herself irrespective of Mr Gloag altogether, but in considering whether there is or is not, it is, I think, material to notice that the only language relied on as importing it is that of the contract between her and him, and that such gift is certainly not matter of contract between them. It is not merely that the language occurs in the deed of contract, but that it is part of the language in which the contract regarding the

children of the marriage is expressed, and has an important meaning and effect in qualifying and limiting her obligation by that contract, which is completely satisfied without the notice of an irrevocable gift to the children of her first marriage. Mr Gloag was willing, and so contracted, that she should be at liberty to introduce her children by her first marriage, or by a third marriage, to share her property with the children she might bear to him, but a gift to these other children of hers, irrespective of her wishes and emerging circumstances, was assuredly not matter of contract with him, or, I should think, according to her intention.

The vesting of the property in the marriage trustees, and the limitation of Mrs Mackie's right to a liferent, was essential to the security and preservation of the property for the purpose of the contract, and so was matter of contract. But the purpose of the contract being satisfied, or at an end—as it was completely on the dissolution of the marriage without issue—the trust, according to a familar rule, resulted to the truster, viz., Mrs Mackie herself, or failing her to her heirs, legal or voluntary, subject of course to any trust direction outwith the contract, for there was no longer any operative direction within it. With respect to the direction to the trustees, *ultra* the contract, to hold for the children of the truster's first marriage, or it might be of a third, failing children by Mr Gloag, I think this was a simple and gratuitous destination by her (which might of course be made by trust direction), and as such alterable at the truster's pleasure.

It has been my intention to express myself so as to distinguish the case in hand from that where a party by a delivered deed conveys his property directly to another, reserving his liferent, or conveys it to trustees for himself in liferent and another in fee. In either of these cases the deed would probably import an irrevocable gift, and certainly would in the absence of circumstances affording any other reasonable explanation of the intention of making it. The deed here is a marriage-contract, with what is substantially a destination of property *ultra* the purpose of the contract. It is complicated with the introduction of strangers to share property with the proper objects of the contract, but failing these objects (which is according to the fact as it happens) the destination to these strangers is a pure and simple destination *ultra* the contract—just as it would have been had it been in words—that failing children of the marriage contracted above, the property should go to the children of its owner by a former or subsequent marriage. Such a destination, according to the authorities, imports no irrevocable gift, but only a simple and alterable destination. It is reasonable to assume that this marriage-contract was prepared by the conveyancer, and its meaning and effect explained to the parties, with reference to the rule of law settled by these authorities. I am therefore of opinion that the gift contended for by the pursuer was not intended, and that the deed relied on, being construed according to the established rules of law, does not import it.

Lord Craighill—The pursuer of this action is the son of the late Mrs Helen Campbell or Mackie, afterwards Gloag, by her marriage with a person of the name of Mackie. A daughter also was born of this marriage, who is still in life. These are almost the only particulars in the family history, excepting the death of the husband Mr Mackie, with which we are made acquainted. After the death of Mr Mackie arrangements for the marriage of Mrs Mackie with a person of the name of Gloag were concluded. In contemplation of this marriage there was executed an antenuptial contract by which Mrs Mackie granted a trust-disposition of specified portions of her property, for the benefit of which the pursuer, as one of the children of her first marriage, sues in the present action. The deed was delivered, the trustees were infeft in the heritage, they made up titles to the moveables, and from that time till the present they have continued in the administration of her property. Her second marriage took place in 1855, but how long it lasted we have not been informed. There were no children born of this marriage. Mrs Gloag before her death executed a settlement consisting of several testamentary writings, which are condescended on in the summons. The property conveyed included, *inter alia*, that which had been put under trust in the antenuptial contract with Mr Gloag. The pursuer was not omitted from this settlement, but the provisions left to him were considerably less than would have been the share of the trust estate falling to him were the marriage-contract trust to be brought into operation. After the death of his mother he for this reason instituted the present action, the first conclusion of which is that the testamentary disposition and codicils left by his mother should be reduced, and failing reduction that it should be found and declared that these testamentary deeds were *ultra vires*, and that he was entitled to the half of the estate put under trust by his mother's marriage-contract. The conclusion for reduction was abandoned. On the declaratory conclusion parties were heard before the Lord Ordinary, and the result was an interlocutor assoilzieing the defenders, against which the pursuer has reclaimed. Is that interlocutor to be affirmed? is the question presented to us for determination. There are two grounds upon which this interlocutor has been impugned. The first is, that the provision in favour of the children of the first marriage was irrevocable, because it was a marriage-contract provision; and the second, that apart from this consideration, and viewing the provision as a mere donation, it was irrevocable, the deed conferring it having been delivered to the trustees for behoof of all concerned, the truster being thereby divested and the property conveyed with no burden, and under no condition other than the truster's liferent being thereby transferred to the beneficiaries of the trust.

With reference to the first of these contentions, my opinion coincides with that of the Lord Ordinary. Onerous provisions, or provisions which are matters of contract, are irrevocable; but those which are not may be revoked, even though they occur in an antenuptial contract. The parties to whom they are given are introduced into the deed, not in fulfilment of any purpose influencing the execution of her deed, but incidentally and merely of good will; and the right, such as it is, is in its character purely testamentary. If unrevoked it will take effect, but it may be revoked should the maker of the deed be so disposed. The contrast between contract

rights and those which are not is very well illustrated on the present occasion. If the trust created by the marriage-contract, through delivery of the deed to the trustees, had not been brought into operation, the provisions for the children of the second marriage would all the same have been irrevocable. The property which was intended for them might, in consequence of the deed remaining latent, have been exposed to risks, but the benefit conferred could not be revoked. The granter would have remained, whatever she might have done, debtor to the contract beneficiaries. On the other hand, it is just as plain that if the deed had not been delivered, the interests, such as they were, created in favour of the children of the first marriage would have remained within the power of the trustees. Nobody had contracted upon their account, and as through non-delivery the provisions of the deed, so far as they were concerned, were left in the granter's power, they could not successfully have challenged the act whether the disposition had been revoked or destroyed. In other words, the conveyance to them or upon their account was voluntary or testamentary, and what is so given, where the thing given has not been delivered, may at any time be recalled. These are the views of the Lord Ordinary. They are also mine, and in my opinion they are fully confirmed by the decisions in the case of *Lang* and in the case of *Mitchell's Trustees*, so frequently referred to in the course of the argument from the bar. No doubt in those two cases the deeds the effect of which was presented for decision were upon the face of them testamentary deeds, not marriage-contracts; but so far as the result depends merely upon the terms of the deed and not upon its delivery, the principles by which the question must be decided appear to me to be identical.

The answer to the second question must, I think, also be given against the pursuer. The terms of the deed cannot by mere delivery be altered. It remains on the delivery such as it was when delivery occurred. Were the pursuer able to shew that upon the terms of the deed there was conferred on the children of the first marriage a right intended to be an irrevocable right, then delivery of the deed would accomplish irrevocability; but if there is nothing to show that according to the intention of the maker the intention was irrevocable, revocability will not be taken away by delivery. The case of *Smitton* v. *Tod, &c.*, establishes this proposition, were proof of its soundness required (2 D. 225). In pursuing this inquiry let us consider first what was the character of the right conveyed to the children of the second marriage whose rights were created and protected by the contract. That right was conditional but irrevocable. It could not be revoked, but whether the estate should be carried from the truster depended on the existence of children of the second marriage. So long as that was in suspense there was only a conditional divestiture of the truster, and the trust right was nothing but a contingent right superinduced on her radical right. To me it appears there is nothing in the deed which suggests that according to the intention of the truster as there, or indeed as anywhere disclosed. the right of the children of the first marriage should be unconditional, while that of the children of the second marriage, whose rights were matters of contract, was only to be contingent. And the contrary is in the circumstances the natural presumption. The right of those who are under contract was the highest right conferred under the trust, and once it appears that the divestiture for these beneficiaries was only a conditional divestiture, the power of the granter to deal with her estate under the radical right is plainly preserved. If the deed, till the condition shall be purified according to its terms, had been executed, not in contemplation of marriage merely, but also for the purpose of making a settlement upon the children of the granter's first marriage, what the pursuer contends for would have been accomplished. But there is no such purpose specified in the deed. The pursuer says, however, that it is to be inferred from several circumstances. The first of these is that children of the first and children of the second marriage are specified together, as those for whom the trust as regards the fee of the property has been constituted. And there is no doubt that this is a peculiarity, for a similar form of expression is not to be met with in any of the decided cases, but once it is ascertained that children of the first marriage were not parties to the contract this specialty becomes immaterial. Those beneficiaries were in reality at the time only the heirs of the granter. If they had been so described, admittedly the pursuer's contention could not have been successfully maintained, there being on this point the authority of many decided cases. But the principle underlying those decisions is equally applicable on the present occasion. The pursuer also says that the reservation of the power of apportionment suggests that the provision in favour of the children of the first marriage was irrevocable. The circumstance is not immaterial, but it is far from being conclusive. The purpose of this reservation would still remain after the provision to the children of the first marriage had been recalled. The necessity or the expediency of apportioning among the children of the second marriage, should such exist, was a thing for which provision might reasonably be made, and this consideration affords full satisfaction of the terms of this part of the deed.

The obligations undertaken by the truster, I may add, have had some influence on my opinion. She became bound to keep up a policy of insurance, and to pay £800 of debt charged upon another portion of the trust estate, both burdens to be defrayed out of her liferent which was reserved under the trust. The idea that she intended to come under such an obligation for the benefit of the children of the first marriage seems to me to be inconsistent with every reasonable probability.

On the whole, my view on this part of the case is that delivery left the rights of the children of the first marriage as they were upon the face of the deed. They are there, according to its true reading, not creditors but simply beneficiaries at will, and what was given to them as such might be, and as I think was, subsequently recalled by the testamentary writings left by the truster for the regulation of her successors. For these reasons I think the interlocutor of the Lord Ordinary ought to be affirmed and the reclaiming note refused.

LORD RUTHERFURD CLARK—Helen Campbell

was married first to Peter Mackie, and secondly in December 1855 to John Gloag. At the time of her second marriage three children of her first marriage were alive.

In contemplation of her second marriage she executed a marriage-contract dated 12th December 1855. In fact, it is nothing more than a conveyance of certain heritable and moveable estate to trustees in trust for the purposes therein expressed. Gloag is a party to it in so far as he signs it and thereby signifies his assent to it. But he settles no estate and undertakes no obligations.

The trustees are directed to hold the estate so conveyed in trust "for behoof of Mrs Mackie, for her liferent alimentary use of the proceeds thereof allenarly, and seclusive of the *jus mariti* of the said John Gloag, and not affectable by his or her debts or deeds, and for behoof of the children procreated or to be procreated of the body of the said Helen Campbell or Mackie," in such proportions and on such terms as she might appoint, and failing an appointment, equally among them, share and share alike, and their respective heirs and executors in fee. There is no other or further trust. Mrs Mackie undertook out of her liferent to pay the premium due on a policy on her life, and a sum of £800 due to the Clydesdale Bank, in security of which they held certain shares in that bank and in the Gorbals Gravitation Water Company. That policy and these shares formed part of the estate conveyed to the trustees.

The deed was at once delivered to the trustees, who accepted of the trust. Accordingly they made up their title to the heritable and moveable estate, and entered on the administration of it. During her lifetime Mrs Gloag received the income of the trust.

Mrs Gloag died in March 1881. She had no children by her second marriage. She left certain testamentary deeds by which she disposed of the estate settled under the marriage-contract trust. The pursuer contends that these deeds exceed her power of appointment. The defenders maintain that they are within that power; but they further say that inasmuch as there was no child of the second marriage Mrs Gloag was not divested of the fee, and had an absolute right of disposal. It is on this last point that the Court is at present called to give its judgment.

In considering this question it must be observed that the marriage-contract does not in any sense bear to be a testamentary deed. It does not profess to convey the whole estate belonging to the granter, nor the whole estate which should belong to her at her death. Nor was its effect suspended until that event should occur. On the contrary the marriage-contract was a *de præsenti* conveyance of certain specified estate, and it was intended to have and did have an immediate effect. It divested Mrs Gloag of the estate therein contained, and vested it in the trustees for the purposes of the trust. *Ex figura verborum* she retained no interest in the estate beyond an alimentary liferent.

As Mrs Gloag was thus divested of her estate by *de præsenti* conveyance, delivered to and accepted by the trustees, I do not see how she can retain any interest beyond what she takes under the trust itself, unless the trust purposes fail or unless the trust conveyance is revocable. In the former case the trustees hold for the truster, for the truster can never be divested except by the conveyance of the beneficial fee to some other person. This can never happen when there is a failure of the trust purposes. In the latter case the truster can revoke the trust conveyance.

The trust can only fail either through a failure of beneficiaries or by reason of some condition which suspends or resolves it. In this case there is no failure of beneficiaries; for the children of the first marriage, who are beneficiaries, existed at the date of the trust, and are now claiming the benefit of it. If it fails, it must be because it is conditional, and because the condition has not been purified.

The defenders argued that it was conditional on the existence of children of the second marriage, and that it lapsed or became ineffectual because none were born. The argument is based on this one consideration that it was granted in contemplation of the second marriage, from which it is contended that it could have no effect as a divesting deed unless there were children of that marriage. But the cause of granting, or, in other words, the reason why the deed was executed, does not in my opinion express or imply any condition, suspension, or resolution of the conveyance or of the trust thereby created. It is a mere recital of the consideration which led to the act; but it does not make it the less absolute.

It is said that the only purpose which the truster had in view was to make a provision for the children of her second marriage, for whom alone there could exist an onerous cause of granting. I concede that for them only there was an onerous cause, and that as regards the children of the first marriage the deed must be considered as a gift. But I fail to see why the circumstance that one set of the beneficiaries take for onerous causes, while the others are donees, can attach or imply any condition. On the contrary, the inference seems to me to be all the other way. The truster was contemplating a second marriage. She had children, and others might be born. Her marriage would have a material effect on her estate; for in the absence of provision to the contrary the rents of her heritable estate and the fee of her moveable estate would pass *jure mariti* to her husband. She had to consider what she would do. What she did was to divest herself of the estate, reserving only a liferent from which the *jus mariti* of her husband was excluded, and to give the fee to her children born and to be born. This seems to be a perfectly rational act, and so far from being conditional, it required to be absolute in order to be effectual.

For it is to be observed that if the trust purposes fail, so that the truster is the fiar of the trust-estate, she was the fiar of it from the date of her marriage. It could not, of course, be known so long as there was a possibility of issue whether she was fiar or not. But if the failure of issue of the second marriage means a failure of the trust purposes, and therefore of the trust, it was ascertained on the failure of issue that the truster had never been divested of her estate, or, in other words, that though she was divested of the title the trustees had all along held for her as the sole beneficiary. But if this were so, the necessary consequence would be, that in so far as the estate was moveable it passed to the husband *jure*

mariti. For in my opinion the *jus mariti* is excluded only as regards the income, and I conceive that nothing could be more contrary to the intentions of the truster, and I cannot imply a condition which I think would defeat an important purpose of the trust, and for which in my opinion there is no warrant but the merest conjecture.

It is said that the exclusion applies to the fee. I cannot so read the deed. The words of exclusion are to be found only in that part of the deed which deals with the liferent, and are, I think, expressly limited to the liferent. From the character of the deed as effecting an immediate divestiture of the truster there was no necessity, or indeed room, for any wider exclusion.

Further, it is urged that the truster undertakes very serious obligations in the form of paying out of her liferent the premium of the policy of insurance and the debt due to the bank, and that it is impossible to hold that she undertook such obligations in favour of children already born. I can only say that she did undertake them, and that I can find in the trust-deed no indication that she did not undertake them in favour of all the beneficiaries. The trustees were the creditors in the obligations and were entitled to enforce them for the maintenance and protection of the trust-estate. The interest of the beneficiaries, subject to the reserved power of apportionment, is, I conceive, identical in quantity and quality.

The next question is, whether the truster could revoke? It is conceded that in so far as regards the children of the second marriage she could not; but it is contended that she could revoke as regards the children of the first marriage. There is involved in this point a twofold consideration, viz., whether her power of revocation was limited to the case of there being no children of the second marriage, or whether, if there were, she could revoke the interest of the children of the first marriage.

On the latter of these alternatives I can see no room for doubt. If a child had been born of the second marriage he would have taken at his birth a right of fee. But, as I have already said, the interest of both sets of children is identical, and if the interest of the one cannot be revoked it seems to me to follow that the other is equally irrevocable. Neither take their rights by testament, but by a *de præsenti* conveyance, conceived in precisely the same terms as to both, although there may be an onerous consideration in the one case and none in the other.

In considering the other alternative I assume from what I have already said that the trust conveyance is subject to no condition or contingency. There was therefore an absolute conveyance in trust for the children already born, as well as for those that might be born. The conveyance was in no sense testamentary, because it was delivered during the lifetime of the truster, because she was thereby divested of her estate, and because an immediate fee is created in the beneficiaries.

I cannot look on the conveyance as anything else than an irrevocable conveyance in favour of the trustees for the benefit of existing beneficiaries. We have some examples of such a conveyance in our books, as, for instance, in *Turnbull*, 1 W. and S. 80, and *Tod* v. *Smitton*, 2 D. 225. Both of these cases are, I think, of authority, and I adopt entirely the view which is taken of them by the Lord President in *Spalding*, 2 R. 237. The present case is, I think, stronger than either, for if the trust conveyance was to be considered to be testamentary, in which case alone it would be revocable, one object of it at least would be defeated by letting in the right of the husband *jure mariti.*

I am quite aware of the rule that marriage-contracts are to be regarded as testamentary in so far as they contain dispositions beyond the purposes of the marriage. But I do not think that that rule can hold when the deed operates an immediate divestiture in favour of existing children who are by the deed as much favoured as the children of the contemplated marriage. In this case I hold that there was an instant and irrevocable gift in favour of children born and to be born which was completed as soon as the deed was delivered to the trustees. Whenever the title of the trustees was made up nothing remained to be done in order to the full completion of the gift.

I do not examine the note of the Lord Ordinary, because it is obvious that the point on which I think that this case should be decided was not stated to him. For he deals with rights *in obligatione* or *destinatione* only, and not under an absolute conveyance.

LORD JUSTICE-CLERK—After what has fallen from your Lordships it is obvious that this is a difficult case, as it is also an important one. I have certainly found it a difficult case, and my opinion upon the result of the argument has more than once varied. But I have come at last to concur with the majority of your Lordships, and I shall in a sentence or two express wherein I think the matter of cardinal importance to the decision of the question lies.

It has been fixed, or at all events decided, on the authority of cases mainly of recent years, beginning perhaps with the case of *Leckie* v. *Sommerville* in 1819, and coming down to the present time, that where onerous and irrevocable provisions are contained in the same deed with gratuitous and testamentary provisions in favour of other parties the precautions taken by the granter of the deed by way of delivery to or possession by trustees are to be attributed mainly, or in the general case, to the onerous and irrevocable provisions, and do not necessarily convert gratuitous and testamentary provisions into anything of a stronger kind. That is unquestionably the rule which has been brought down to us. In cases of substitution gifts adjected to conveyances proceeding upon an onerous cause are beyond all question irrevocable like the provisions conceived in favour of the children of a marriage. The peculiarity of this case, and it is an important one, is, that the rights of the gratuitous and testamentary grantees are coincident with those of the onerous creditors in the debt—that is to say, that the rights of the children of her first marriage take effect alongside of, and apparently to the same extent and practical operation, as those of the children of the second marriage. But on the whole matter I am of opinion that that creates no distinction. The right of the children of the first marriage was from the first gratuitous. There is no doubt about that. In the second place, if gratuitous it was testamentary, because it could

not take effect as far as they were concerned—at least in its main operation—until the death of the granter, the mother. It appears to me therefore that on the failure of the onerous and irrevocable grant by the failure of children of the second marriage, the interest of the children of the first marriage remains at the end what it was at the beginning, a gratuitous and necessarily testamentary grant. And in that view the possession by the trustees and delivery to them was not intended to operate as an immediate denuding of the right, but was intended simply to preserve the onerous and irrevocable rights of the children of the second marriage.

I do not look upon this as a conditional grant. That is not the nature of it. It was not a conditional grant. It was a perfectly available and absolute provision in regard to both the sets of persons favoured by the deed, but with this difference, that in regard to the children of the second marriage, if they had ever existed, it could not be revocable, while in regard to the children of the first marriage it was subject to revocation, and although perfectly good and absolute enough so long as it remained unrevoked, I cannot think that the mother here intended to denude herself of this part of her property absolutely in favour of the children of the first marriage, there being no reason that can be assigned for her putting herself in the position of divesting herself to that extent.

I agree with Lord Young that the husband's *jus mariti* was excluded entirely—that in point of fact he took no interest, and could take none, in regard to the property of the fee by this trust-deed. On the whole matter, therefore, although I quite admit that the fact of its being a conveyance of specific subjects, and not a general settlement of the property of the granter, is material, and in some respects makes it an exceptional deed, I am not prepared to go the length of converting what was a testamentary grant into an absolute conveyance.

I therefore concur with the majority, and with the Lord Ordinary.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Campbell Smith—Nevay. Agent—William Officer, S.S.C.

Counsel for Defenders (Respondents)—Lord Advocate (Balfour, Q.C.)—Robertson—Jameson. Agents—J. & J. Ross, W.S.

Saturday, March 10.

FIRST DIVISION.

[Lord Lee, Ordinary.

CHISHOLM *v.* ROBERTSON.

Prescription, Triennial—Act 1579, *c.* 83.

Blank forms of orders for the hire of sacks, bearing reference to conditions prefixed, were issued by a contractor, and were returned filled in and signed by the hirer, who then got the use of the sacks. In an action by the contractor for payment of his account, brought more than three years after the date of the last item, *held* that the claim was founded on a written obligation within the meaning of the Statute 1579, c. 83, and therefore was not subject to the triennial prescription.

This was an action in which John Chisholm, sack contractor, Perth, sued John Robertson, grain merchant, Aberdeen, for the sum of £145, 7s. 3d., being the amount due by the defender for hire of the pursuer's sacks. The whole terms and conditions upon which the pursuer was in use to supply sacks on hire were contained in printed forms issued by him to grain merchants and others, and appended thereto was a printed form of order to be filled up by the person taking the sacks on hire, in the following terms—"J. Chisholm will please give the bearer sacks, which we hereby hire upon the above conditions, for grain, to be railed at* station for station.

"* If to be shipped, enter ship's name and destination."

The pursuer averred that several of these printed forms were filled in and signed, either by the defender himself or by some-one acting on his behalf; that he had had the use of the pursuer's sacks, and was therefore due the amount sued for, conform to account produced.

The defender pleaded, *inter alia*, that as the account ended on 26th October 1879, and this action was not raised until 22d November 1882, the account had undergone the triennial prescription.

The Act 1579, c. 83, provides—"That all actions of debt for house-maills, men's ordinaries, servants' fees, merchants' accounts, and others the like debt that are not founded upon written obligations, be pursued within three years, otherways the creditor shall have no action, except he either prove by writ or by oath of the party."

On 20th February 1883 the Lord Ordinary (Lee) pronounced this interlocutor—"Finds that the present action is founded on written obligations alleged to have been granted by or on behalf of the defender, in terms of the orders and relative printed conditions: Therefore repels the plea of prescription; allows to both parties a proof of their averments so far as not admitted, &c.

"*Opinion.*—The present action is for the hire of sacks conform to account produced. The hires are said to be instructed by the orders contained in the bundle No. 11 of process; and these orders bear reference to conditions prefixed, regulating the terms upon which the sacks were obtained. They are alleged to be in each case filled in and signed either by the defender himself, or by some-one acting on his behalf; and if this allegation is disputed, I apprehend that it may be established by proof of the signatures, and of the authority of the granter to act for the defender where the signature is not that of the defender himself.

"The defender pleads the triennial prescription, and as the account ends 26th October 1879, and it is not disputed that the alleged debt is of the kind to which the statute applies, the only question is whether the alleged debt is 'founded on written obligation' within the meaning of the statutory exception.

"It has long been settled that a mere order for goods is not sufficient to exclude the application