company authorised them to purchase, hire, provide, charter, or employ steam and other vessels of every description, and to navigate and make use of the same, and convey and carry passengers, and so on. And it rather appears to me that, taking the broad meaning of the words of the special statute, it covers and includes the case in which the railway company makes an arrangement, as I think was done here with Mr MacBrayne, to carry on this traffic. Whether Mr MacBrayne is to be regarded as merely a deputy of the railway company in what he does, I think it fairly a question; at least I should carry it this length, that it is a joint arrangement by which he is to carry on the same traffic in connection with the working of the railway. But it really is the railway company making an arrangement for carrying on the same traffic. And when we turn to the general Act to which your Lordship has referred, very important consequences follow from that—I mean the Act of 1863. The words which introduce what is called equality of treatment among passengers and traders sending goods, in section 30 of the Act of 1863 are these—[*His Lordship here read sec.* 30 *of the Railway Clauses Act* (26 *and* 27 *Vict. cap.* 92)]—and I can scarcely doubt that these provisions of this General Act would apply in the case of an arrangement of this kind, made between the Highland Railway Company and another company or individual for the supply of steamer traffic in terms of the agreement we have before us. That being so, it results, in my opinion, that the steamer traffic or arrangement for supplying steamers is part of the undertaking of this company during the year of assessment, and if so, I see no reason, and indeed it is not maintained, that the profit or loss is not to be computed on the steamer traffic of the previous year. I am therefore of opinion with your Lordship that we ought not to adhere to the decision of the Commissioners, but should find that the company are entitled to the deductions which they claim in this case.

Lord Adam—There is no doubt at all what the amount of the profits of the Highland Railway Company was in the year preceding the year of assessment; that is a matter about which there is no dispute. There is equally no doubt that the directions given by the Act of Parliament in this clause is to assess for the year of assessment on the profits of the concern for the year preceding. These two things would appear to be quite simple. But that is not what the Commissioners propose to do here. They propose to say, "We shall not assess on the profits of the preceding year, but we shall assess on something different from the profits of the preceding year, because we shall refuse to allow the sum of £1167, although that destroys the scale to which we are referred." The ground on which they maintain that, as I understand it, is this, that the concern which earned the profits in the preceding year is not the same concern or undertaking which earned the profits in the year of assessment. If that is so, the first thing that suggests itself is that that would not entitle them to go back on a different scale of profits which the Act does not entitle them to take. But apart from that question, I am of opinion that it is not a different concern, and that the railway company is not a different concern or undertaking this year. All they have done, assuming they have given up the steamboats altogether, is that they have ceased to draw profits, or to exercise certain powers which they might have exercised, but the concern or undertaking is the same in my humble opinion. But I further agree with your Lordship and Lord Shand that they have not retired from their business of steamboat traffic, because I think by that agreement they are exercising the powers given them by the Legislature by hiring steamers and still running traffic through the medium of MacBrayne. Therefore I have no hesitation in agreeing with your Lordship that the resolution of the Commissioners here ought to be reversed.

The Court reversed the decision of the Commissioners, and found that the amount of assessable profits of the appellants' company, being the profits of the year preceding the year of assessment, was £158,644.

Counsel for Highland Railway Company—Low—Patten. Agent—J. K. Lindsay, S.S.C.

Counsel for Income Tax Commissioners—Moncreiff—Lorimer. Agent—D. Crole, Solicitor for Inland Revenue.

Friday, November 13.

FIRST DIVISION.

[Lord Trayner, Ordinary.

HALDANE (WALLACE'S CURATOR) AND ANOTHER *v.* WALLACE'S TRUSTEES.

Parent and Child — Marriage-Contract — Second Marriage, Reasonable Provision to Children of.

A father by his marriage-contract conveyed the fee of his whole estate to the children of the marriage. His wife having predeceased him, leaving children, he married again, having, in contemplation of the second marriage, bound himself by antenuptial contract to pay to "child or children of the said intended marriage, and their lawful issue, such a sum or capital amount as the means at his disposal shall enable him to provide or pay as aforesaid, regard being had always to the rights and interests of his children by his former marriage, and to the obligations incumbent on him by the contract of marriage entered into betwixt him and his former wife." He died survived by issue of both marriages, and leaving a trust-disposition, the effect of which was that, after certain special legacies to the children of the first family, he divided his estate so that, taking into account funds coming to the children from other sources, the children of the first marriage, of whom there were three, would have in all about the same funds as the children of the second, of whom there were five. The children of the first marriage sought to have it found that they were entitled under the first contract of marriage to the whole funds he left at his death. *Held* that he was entitled, notwithstanding the obligation therein contained, to make

reasonable provision for his second family, and that the provision made was reasonable, and ought not to be interfered with.

The deceased Dr Walker Wallace, who died in November 1883, was twice married. By his first marriage (to Isabella Snody or Wallace) he had a family of three sons, and by his second marriage he had two sons and three daughters.

By his first marriage-contract Dr Wallace conveyed the whole of his estate, heritable and moveable (except household furniture), including all he should succeed to and which should belong to him at his death, to his wife in liferent allenarly, and to the children of the marriage in fee, and Mrs Wallace on her part conveyed her whole estate to Dr Wallace in liferent and the children of the marriage in fee.

Mrs Isabella Snody or Wallace died on 4th March 1866.

In 1867 Dr Wallace entered into his second marriage (to Mrs Jessie Russell Brock or Wallace), and prior thereto entered into a second antenuptial contract, whereby he bound himself to pay his wife an annuity if she survived him, and to make payment to the children of the second marriage "of such a sum or capital amount as the means at his disposal shall enable him to provide or pay as aforesaid, regard being always had to the rights and interests of his children by his former marriage, and to the obligations incumbent on him by the contract of marriage entered into betwixt him and his former wife."

On her part Mrs Wallace conveyed to certain trustees named in the contract her whole estate for behoof of the spouses and the survivor in liferent, and the children of the marriage in fee.

Mrs Jessie Brock or Wallace predeceased Dr Wallace, dying in 1878.

Dr Wallace left a trust-disposition, dated 13th November 1876, by which he conveyed to testamentary trustees the whole estate which should belong to him at his death. He directed them (in the event, which did not happen, of his wife surviving him) to provide an annuity for his widow greater than and in substitution for that given by the second contract, to pay a legacy of £400 to the eldest and of £150 to each of the other sons of the first marriage, and to divide the residue of the estate so as to give one-half to the children of the first marriage equally among them, and one-half to the children of the second marriage equally among them, such provision to be in full both of their legal rights and of their rights by their parents' marriage-contract.

J. W. Wallace, the eldest son of the first marriage, became insane, and a *curator bonis*, the pursuer James Haldane, C.A., was appointed to him. This action was raised by Mr Haldane and by the other surviving son (the third having died) of the first marriage against the trustees under the trust-disposition and settlement of Dr Wallace, and also against the children of the second marriage, for declarator that the pursuers were entitled in terms of the first contract of marriage between Dr Wallace and Miss Snody to the whole estate belonging to Dr Wallace at the time of his death (except household furniture), and for conveyance thereof by the trustees.

They averred that the amount of Dr Wallace's personal estate was £5447, 18s. 3d., while his heritable property was of the annual value of £200; that by the terms of the second marriage-contract the children of the second marriage were entitled to their mother's estate (she having predeceased the testator), amounting to £3050; that the testator knew of the existence of his wife's estate at the time of his second marriage; and that the provisions of the second marriage-contract were framed with this in view.

The defenders averred that at the date of her marriage with Dr Wallace the second wife's estate was slightly over £2000. They also alleged that the effect of Dr Wallace's settlement would be to give to each of the children of the first marriage £1280, and to each of the children of the second marriage £630, which was a rational provision, and reasonable in the circumstances.

They pleaded, *inter alia*—"The provision of Dr Wallace to the children of the second family being just and reasonable, should be sustained, and the defenders assoilzied."

A joint minute of admissions was put in, by which it was agreed that at the date of the second marriage the second wife's estate was worth £2027, and that it was worth at her death £3050; and at Dr Wallace's death his moveable estate, subject to expenses of realisation and administration, was £4982, 18s. 3d., while his heritage had been valued by one valuator at £1550, and by another at £1150, and was subject to an heritable debt of £1000. It was also admitted (under reservation by the pursuers as to the relevancy) that the sons of the first marriage would receive under the will of their maternal grandfather (who predeceased Dr Wallace) about £2600.

The Lord Ordinary (Trayner) pronounced the following interlocutor:—"Finds that the pursuers are entitled, under the provisions of the antenuptial contract of marriage mentioned in the summons, to the whole means and estate belonging to the late Walker Wallace at the time of his death (subject to the exception and declaration after mentioned), and that in the proportions as concluded for: Finds that the defenders, as trustees of the said Walker Wallace, are bound to pay over and convey the said estate (excepting the household furniture of the said Walker Wallace) to the pursuers in the proportions foresaid, under deduction of the sum of £1500 sterling, which the defenders are authorised to retain from the said estate to be administered by them under the provisions and directions of the trust-disposition and deed of settlement of the said Walker Wallace, dated 13th November 1876, and recorded in the Books of Council and Session the 1st December 1883: Finds neither party entitled to expenses, and decerns."

"*Opinion.*—The state No. 29 of process shows the free estate of the late Dr Wallace to be £6532 taking Mr Lammie's valuation of the Glasgow property, and £6082 taking Mr Binnie's valuation. I have no means of deciding which valuation is the more accurate, but I believe I shall get very near the true value by practically dividing the difference between the two valuations. I accordingly deduct £250 from Mr Lammie's valuation, which leaves Dr Wallace's free estate at £6282.

"By his first marriage-contract the late Dr Wallace destined his whole estate of which he should be possessed at his death to the children of his first marriage. Notwithstanding this, it is not disputed that Dr Wallace was entitled out of his estate to make a fair and reasonable provision for the children of his second marriage. In do-

ing so, I think he was bound to take into account the estate to which the children of the second marriage would succeed through their mother. He would not have acted reasonably had he ignored this, and I take it into account accordingly in estimating what in my view would have been a reasonable provision on the part of Dr Wallace in favour of the children of the second marriage, especially in view of the rights already onerously conferred on the children of the first marriage. The estate left by Mrs Wallace is stated at £3050. Taking the whole circumstances into consideration, I am of opinion that £1500 would have been as full a provision as Dr Wallace could reasonably make for his children by the second marriage, and I allow that sum to be deducted by the defenders in accounting to the pursuers for Dr Wallace's estate. The fairness of this provision may be seen by considering the amount thus allotted to each family:—

Dr Wallace's estate is . .	£6282
Deduct provision for second family	1500
Leaving for the first family	£4782
The estate to which the second family succeeds through their mother is	£3050
Add as above	1500
Total provision for second family	£4550"

The defenders reclaimed, and argued—Effect ought to be given to Dr Wallace's testamentary deed; the bulk of his estate was conquest, and as the father was the best judge of the circumstances of each member of his family the Court ought not to interfere. The provision he made could not in any circumstances be called unreasonable.

Authorities—Ersk. iii. 8, 42; Fraser on Husband and Wife, ii. pp. 16, 17; *Dalrymple* v. *Sinclair*, M. 13,035; *Bruce* v. *Glen*, M. 13,036; *Wemyss* v. *March*, February 28, 1815, F.C.; *Arthur* v. *Lamb*, June 30, 1870, 8 Macph. 928.

Replied for respondents—What the Lord Ordinary had done was to take into account what each family received from their respective mothers, and so to distribute the father's means as to make the families equal. The first family rested their claim upon the first marriage-contract; by it they got the whole of their father's estate, and whatever the second family received was a burden on that. The *onus* of showing that the first family should be deprived of any of their rights secured by contract rested on the second family.

Authority—*Hamilton* v. *Miller*, 4 Brown's Sup. 215.

At advising—

Lord President—The late Dr Walker Wallace was twice married. By his first marriage he had three sons and no daughters, but by his second marriage he had five children, two sons and three daughters. By the terms of his first marriage-contract he settled the fee of his whole estate upon the children of his first marriage, and the question which arises in this case is, how far he could make a provision for the children of the second marriage out of funds which by the terms of this first contract had been secured to the children of the first marriage.

Now, in dealing with a question of this kind it becomes of the greatest importance that we should ascertain precisely the nature of the obligation which existed in each of these contracts.

By his antenuptial contract with Miss Snody, of date 27th June 1853, Dr Wallace "assigns and dispones to and in favour of the said Isabella Janet Snody, his promised spouse, in liferent, for her liferent use allenarly, and to the child or children to be procreated of their intended marriage in fee, whom failing the heirs and assignees whomsoever of the said Walker Wallace, all and sundry lands and heritages, goods and gear, debts and sums of money, as well heritable as moveable (excepting always his household furniture of every description, hereinafter specially conveyed), and in general the whole means and estate at present belonging to him, or which he may afterwards succeed to, or which may pertain and belong to him at the time of his death in any manner of way, with the whole writs and evidents of said estate, grounds, vouchers and instructions of the said debts themselves, and all that has followed or is competent to follow thereon; and whatever heritable property the said Walker Wallace may conquest or acquire during the subsistence of his said intended marriage, he obliges himself to take the titles to the same in terms of the above destination." In short, it is a conveyance of Dr Wallace's entire estate as at the date of his death.

Now, the effect of such a contract as this is well settled by a series of decisions, though in point of form it is an absolute conveyance; it is in reality nothing more than an obligation, which no doubt would become effectual at the death of the granter, but during his lifetime the granter would retain the right of absolutely disposing of his whole estate. The right of the children under such a deed is not a *jus crediti;* it is a right merely of obtaining just as much of their father's estate as he may happen to have at the time of his death, until which time their right does not arise. Now, that is the only portion of the contract of 1853 with which we are interested in the present case.

But in 1867 Dr Wallace entered into a second marriage, and then arose the obligation contained in his second marriage-contract, which is in these terms—"And further, the said Walker Wallace hereby binds and obliges himself and his foresaids to provide for or to make payment to the child or children of the said intended marriage, and their lawful issue, of such a sum or capital amount as the means at his disposal shall enable him to provide or to pay as aforesaid, regard being had always to the rights and interests of his children by his former marriage, and to the obligations incumbent on him by the contract of marriage entered into betwixt him and his former wife." Now, it is to be observed that this obligation which I have just read was one which Dr Wallace was perfectly entitled to undertake; how far it is available to the children of this second marriage is the question which we have now to consider.

In this contract the lady's estate is conveyed separately to trustees by words of present conveyance, and is vested in them, so that by this deed the children of the second marriage had a vested right in their mother's estate. Now, let us see what Dr Wallace did in fulfilment of the obligations contained in his second marriage-contract. It is quite settled law that in cases such as this, in spite of such provisions as we find in the first marriage-contract, the husband can settle a por-

tion of his estate upon the wife and children of the second marriage, subject however to these two conditions, first, that the sum so settled is not excessive, and second, that there is no other fund extant out of which to make such a provision.

The question here then comes to be, as there was no other fund out of which the father could make a provision for the children of his second marriage, is the sum which the father has provided for these children reasonable in the circumstances?

In dealing with such a matter a father is bound to take into consideration any provision which may be made for his children over and above what he may leave to them, and accordingly in the present case I must for a moment advert to the rights of these two sets of children apart from what they may claim from their father.

By the terms of the first marriage-contract Miss Snody provided for such children as might be born of her intended marriage the whole of her estate which she had or might succeed to. It now appears that these children are entitled by the will of their grandfather Mr Snody to a sum of nearly £3000.

Mr Snody did not die until 1882, while the date of Dr Wallace's trust-disposition is 13th November 1876, but there can be no doubt that Dr Wallace knew that this money was coming to the children of the first marriage, and he was quite entitled to take this circumstance into consideration when he was making a provision in his settlement for the children of the second marriage. Now, the children of the second marriage had, by the terms of their mother's marriage-contract, a sum of £3000 settled upon them. Keeping, then, these facts in view, what Dr Wallace did by his trust-disposition was just this—after making provision for certain special legacies amounting to about £700, he directed his trustees to divide the residue into two parts, one of which was to be given to each family.

Now, the effect of this was to provide to the children of the first marriage the sum of £3591, and to the children of the second marriage the sum of £2891, which is just the other half less the £700 of special legacies bequeathed to the children of the first marriage.

Now, if we add the £3050 which the children of the second marriage were entitled to through their mother we shall find that their share is in all £5941, while that of the children of the first marriage is £6191. Now, there are five children of the second and only two surviving of the first marriage, so that in any view the result comes to be, that the children of the first marriage have a decided advantage over those of the second marriage.

The question then comes to be, whether this provision is so unreasonable that we can interfere to disturb it? If the provision to one of the families had been grossly in excess of that to the other, then the Court would be bound to correct what had been done, but can that be said to be the case here? I think not. It is always a delicate and difficult matter when the Court feels itself bound to interfere with a father's discretion in such a matter, and certainly the present is not a case where any such interference would be justifiable.

I think, therefore, that we should alter the Lord Ordinary's interlocutor, and carry out the provisions of Dr Wallace's settlement.

Lord Mure—I am of the same opinion. It is well settled that when a father has made such provisions as we find in this first marriage-contract in favour of the children of his first marriage he can nevertheless encroach on these, subject to the conditions referred to by your Lordship, in order to provide for the children of a subsequent marriage. The question in this case therefore really comes to this, Did Dr Wallace by the provisions of his second marriage-contract exceed his powers? I do not think he did, and that being so, I see no ground for our interference in the present case, all the more as I agree with your Lordship in thinking that the interference of courts of law in such questions is a matter of great delicacy.

Looking at the terms of this trust-deed, it is, I think, impossible to say that its provisions are either unjust or unreasonable. After making provision for some special legacies the residue is to be equally divided between both families, an arrangement which Dr Wallace made being well aware of what the children of each marriage were to succeed to from their mothers' estates.

Upon the whole matter I agree with your Lordship.

Lord Shand—The law applicable to this case is well laid down by Erskine, iii. 8, 42, where he says—"A father may, notwithstanding a first marriage-contract, settle, by a second, a jointure upon the second wife, or provisions on the issue of the second marriage, which will be effectual against the heir of the first, though such settlements or provisions should encroach on the subject provided to him by his mother's prior contract if the father had no other fund out of which he could provide the said wife and children;" and then a little further on he says—"Yet he cannot, without control, make such exorbitant settlements upon a second marriage as would too much encroach upon the prior *jus crediti* acquired by the children of the first; he can only provide them suitable to his circumstances. If a provision be not exorbitant, the heirs of the first marriage are liable as heirs to fulfil that rational settlement made by the father upon the wife and issue of the second marriage." . . . .

The question therefore comes to be, Whether the provisions here can be called exorbitant or not rational in the circumstances, and when we look to what Dr Wallace's means were I do not see how these provisions can be called either the one or the other.

The result will be to make the children of the first family in a somewhat better position than those of the second. I cannot see that Dr Wallace acted in any way unreasonably in what he has done, or that there is any room for our interference.

Lord Adam, who was absent on Circuit during the discussion, delivered no opinion.

The Court recalled the interlocutor of the Lord Ordinary, sustained the defences, and assoilzied the defenders.

Counsel for Pursuers—Darling—Shaw. Agents—Snody & Asher, S.S.C.

Counsel for Defenders—Murray—Salvesen. Agents—Drummond & Reid, W.S.