additional stipulation is that in the event of the railway company having bribed the Eglinton Company to submit to an increase of rates, it shall give exactly the same bribe to the coal-masters as it has given to the Eglinton Company.

LORD HALSBURY—My Lords, I cannot help thinking that the question which is raised upon article 9 of this agreement is absolutely free from doubt. I think that when the words "lower rates than those stipulated in this agreement" and "a corresponding reduction in the rates" spoken of in the latter part of the clause are looked at, it is *luce clarius* that what the parties were contemplating was the proportionate relation of the charges to be made to the work to be done by the company. Therefore I am of opinion that the first contention of the appellants here must fail.

With reference to the eleventh clause, I must confess myself unable quite to follow the reasoning of the Sheriff-Substitute, and to some extent of one of the learned Judges in the Court below, but I do not propose to give any exposition of my own of this eleventh clause, because I believe that the materials are not before your Lordships which would sufficiently enable us to form a precise notion of what the clause contemplates. It is enough in this case to say that I think it would be an unreasonable construction of the agreement as it stands to suppose that clause eleven is intended to over-ride and control the effect of clause nine. I can conceive of a number of circumstances, and amongst them I can conceive of an agreement with the Eglinton Company such as would render the provision of clause eleven not an unreasonable and not an unintelligible one, saving nevertheless all the rights which are conferred by clause nine upon the parties to this agreement.

Under these circumstances, my Lords, I quite concur with the rest of your Lordships on the judgment which has been moved by the noble and learned Lord on the woolsack.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for Pursuer (Respondent)—Moulton, Q.C.—M'Laren. Agents—Durnford & Co. for Gordon, Pringle, Dallas & Co., W.S.—James Robertson, Kilmarnock.

Counsel for Defenders (Appellants) — Lord Advocate Balfour, Q.C.—Sir R. Webster, Q.C.—R. S. Wright. Agent—W. A. Loch for John Clerk Brodie & Sons, W.S.

COURT OF SESSION.

Wednesday, June 23.

FIRST DIVISION.

HIGGINBOTHAM'S TRUSTEES *v.* HIGGINBOTHAM.

Husband and Wife—Marriage-Contract—Income not Conveyed for Purposes of Contract—Radical Right.

By an antenuptial contract of marriage the whole estate of which the wife was then possessed, or to which she might succeed, was conveyed to trustees for the purposes therein specified, viz., for behoof of the husband, in the event of his survivance, in liferent to the extent of one-half, and for behoof of the children of the marriage in fee. There was no direction as to the income of the estate *stante matrimonio*. Subsequent to the marriage the wife succeeded to moveable estate. *Held* that as the wife had only divested herself of her estate in so far as she had directed it to be applied to certain purposes, she was entitled, in virtue of her radical right, to the income of her estate during the subsistence of the marriage.

By antenuptial contract of marriage, dated 3d October 1863, Charles Titus Higginbotham made certain provisions for his wife and children, and in security of the obligations so undertaken, assigned to the trustees therein named a policy of insurance on his own life effected in contemplation of the marriage.

On the other hand the wife, Mrs Agnes Ker or Higginbotham, assigned, disponed, conveyed, and made over to the trustees therein named her whole estate, heritable and moveable, then belonging to her, or to which she might succeed during the subsistence of the marriage, for the ends, uses, and purposes therein set forth, viz.—"For behoof of the said Charles Titus Higginbotham in the event of his surviving her, in liferent for his liferent alimentary use allenarly, and not affectable by his debts or deeds or the diligence of his creditors, but to the extent of one-half only of her said means and estate, and for behoof of the child or children of the said intended marriage in such proportions as she may appoint, or if no appointment be made by her, equally in fee, and failing a surviving child of said marriage for behoof of her own nearest heirs or assignees."

Children were born of the marriage.

Mrs Higginbotham succeeded to certain moveable property in 1877, which the marriage-contract trustees received in virtue of the conveyance in the marriage-contract.

This was a Special Case to which Archibald Galbraith and Others, the marriage-contract trustees, were the parties of the first part, Mr and Mrs Higginbotham the parties of the second part, and the children of the marriage and their *curator ad litem* the parties of the third part.

The case set out that the marriage-contract made no provision for the application of the income of the funds conveyed by Mrs Higginbotham in trust during her own life, and that the parties of the first part were advised that without judicial authority they were not in safety to part with the income.

The parties of the second part maintained that it having been solely through inadvertence that no provision was made in the contract for the application of the income of Mrs Higginbotham's funds during her life, and there being no direction to accumulate such income, Mrs Higginbotham was entitled to receive the income already accrued, and to receive the whole income of the funds as it fell due during the subsistence of the marriage, and during her own life in the event of her surviving her husband.

It was maintained on behalf of the parties of the third part that the trustees were bound to

accumulate the income of the trust funds for their benefit.

The questions stated for the opinion of the Court were these—"Is Mrs Agnes Ker or Higginbotham entitled to receive, and are the parties of the first part entitled and bound to pay to her, the income accrued, and hereafter to accrue upon the funds conveyed by her in trust as aforesaid during the joint lives of herself and her husband, and during her own life in the event of her surviving him? or, Are the parties of the first part bound to accumulate the income of the said trust funds during the life of Mrs Higginbotham?"

Argued for the second parties—The income of the wife's estate was undisposed of by the marriage contract, and therefore the wife was entitled to it in virtue of her radical right. There might be no children of the marriage, and yet, according to the opposite contention, the income was to be accumulated—*Lindsay* v. *Lindsay*, June 19, 1847, 9 D. 1297; *Lovey* v. *Tennent*, March 11, 1854, 16 D. 866; *Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120; *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027.

Argued for the first and third parties—The question was one of intention, which was to be gathered entirely from the terms of the deed—*Royal Infirmary of Edinburgh* v. *Muir's Trustees*, December 16, 1881, 9 R. 532. A reference to intention was not so admissible in the case of a contract as in the case of a testamentary deed—*Sturgis* v. *Meiklam's Trustees*, June 13, 1865, 3 Macph. (H.L.) 70. The case could only be decided in favour of the second parties by reading into the deed a clause which was not there. The fee vested in the children at birth—*Miller* v. *Finlay's Trustees*, February 25, 1875, 2 R. (H.L.) 1. The income must be held for the ultimate purposes of the deed, on the principle of *accessorium sequitur principale*—*Gillespies* v. *Marshall*, M. App., *voce Accessorium*, &c., No. 2; *Pursell* v. *Elder*, June 13, 1865, 3 Macph. (H.L.) 59; *Trevanion* v. *Vivian*, 2 Ves. Sen. 430.

At advising—

LORD PRESIDENT—In regard to a marriage where there has been a marriage-contract the first consideration is how the spouses are to live. If they have no property, then of course they must live by their industry alone, but if they have any property, either in possession or in expectancy, they surely look to that as a source from which they are to derive income and enable them to sustain the burdens of married life, *pro tanto* at least. It would be a very strange marriage-contract that settled the property belonging to the one spouse or the other in fee only upon the children without making any provision of the income for the spouses. Yet that is really the principle upon which it is proposed that we should construe this deed. I think that so unnatural an idea as that would require very strong language to make it effectual.

Now, I do not see any difficulty about this deed except that it is very ill expressed and very badly drawn. As to the intention of the deed I have no doubt, and the expression "intention" I do not use in the same sense I would in construing a will, but as I would use it in construing any onerous contract.

The husband here had no fortune, and the settlement he makes is by way of personal obligation, and the only security is a policy of insurance, which was effected in contemplation of the marriage. The lady had expectations, and therefore she conveys to the trustees all that she may acquire during the subsistence of the marriage. But a conveyance of that kind did not divest the lady at all of estate to which she might succeed or was then in possession unless the money or the property so conveyed was directed to be applied to marriage-contract purposes. She was divested only so far, and so far as there are no such directions she remained the absolute owner, and the marriage-contract trust was a mere burden. That principle was clearly given effect to in the cases of *Ramsay's Trustees* and *Newlands*. There are three branches of *Newlands'* case—the two branches to which I refer are those contained in 9 R. 1104 [July 14, 1882], and 11 R. 481, February 1, 1884.

Therefore in regard to this conveyance, as in regard to every other, we have to inquire to what extent the property has been settled on the objects of the marriage-contract—in other words, to what extent the property is directed to be applied to such purposes. The words used in the deed are that the trustees are to hold the property for the ends, uses, and purposes following, viz.—"For behoof of the said Charles Titus Higginbotham, in the event of his surviving her, in liferent for his liferent alimentary use allenarly, and not affectable by his debts or deeds or the diligence of his creditors, but to the extent of one-half only of her said means and estate, and for behoof of the child or children of the said intended marriage, in such proportions as she may appoint, or if no appointment be made by her, equally in fee, and failing a surviving child of said marriage for behoof of her own nearest heirs or assignees." Now, the children of the marriage—leaving out of view in the meantime the partial liferent given to the husband—are the only parties for whose benefit the money was settled. They are *nascituri*, and may never come into existence; the marriage may endure for a long time without there being any children, and may be dissolved without there being any children. But in all these contingencies, according to the contention of the first and third parties, no part of the money was to be used or enjoyed by the spouses during the subsistence of the marriage. So far from being supported by the words of the clause, I think the words of the clause are repugnant to such an idea. The estate is dealt with as the estate of Mrs Higginbotham, for the power of appointment is in her alone, and in the event of there being no children it is settled on her heirs. The contingent right of the children of the marriage is the sole burden on Mrs Higginbotham's estate; that is the plain meaning of the deed.

Now, what is that contingent right? It is declared to be a right of fee as distinguished from a right of liferent. That the liferent right was in contemplation of the person who framed the deed is plain from the fact that the husband gets a partial liferent in the event of his survivance. The deed is no doubt foolishly and ignorantly drawn, but that the income is to be enjoyed by the spouses *stante matrimonio* appears from every line. I think that the income accruing

during the subsistence of the marriage has not been disposed of in such a way as that the trustees are entitled to withhold it from the granter of the deed. I think the right to the income remained in Mrs Higginbotham as much after she had executed the deed as before. The result of holding aught else appears to me most startling, for then under no conceivable circumstances would any succession coming to Mrs Higginbotham be enjoyed by the spouses. They might be in poverty, and Mrs Higginbotham might succeed to a large sum of money, but the spouses could not benefit to the extent of one penny. They would be kept in poverty in order that there might be an accumulation for children who might never come into existence.

I think we should answer the questions in conformity with these views, by affirming the first and negativing the second.

Lord Mure—I am of the same opinion.

The clause which we have to construe is this conveyance to trustees, and we can only gather from the purposes expressed what the trustees are entitled to do with the money. Now, while there is a conveyance to the trustees of all the wife's property, there is no direction what to do with the income of the property so conveyed. There is evidently an omission, and we are asked what is to be done with this undisposed of income.

I agree with your Lordship that the radical right being in this lady, all that she did not expressly convey away remains in her. I think that is the sound principle as it was laid down in the cases of *Ramsay* and *Newlands*. The trustees have no power to accumulate the income, for they are not told to do so. I think it was the intention of the parties that the income should be available for the wife and her husband, and that after her death the direction to the trustees should come into operation.

Lord Shand—I quite agree with the argument that was submitted for the first and third parties, that in construing this deed one must look only to the terms of the deed. Taking that view, I think that according to the sound construction of the deed this lady has not settled her property so as to deprive her of the income during the subsistence of the marriage. It is true that for certain purposes she has conveyed away her property, and that from the date of the conveyance the title is in the trustees. But on the question for what purpose she has so conveyed it, it appears to me that the only purposes are that if the husband survives he is to have the liferent of one-half, and that if there are children they are to get the fee. There is so strong a presumption against the notion that one or both of the spouses are to be taken, by mere conveyance, to have divested themselves of the right to the income of their estate that I think nothing short of an express clause would be sufficient. In cases where a testator leaves his estate to trustees with a direction to convey the fee to beneficiaries, but postpones the period of payment until the beneficiaries reach the age of twenty-one or twenty-five, it has been held that the income is thereby disposed of. But the important element here is wanting in those cases, for of course the granter of a trust-disposition and settlement divests himself not only of all title to his property, but also of all interest. He could retain no right, for his life ceases before the deed comes into operation. When, however, as in this case, there is no direction as to the disposal of the income by the trustees, the granter from whom the right of property comes has the right to the income, and accordingly I think this lady is entitled to the income of the property so far as it came from her.

Lord Adam was absent.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for First and Third Parties—Low—Horn. Agent—F. J. Martin, W.S.

Counsel for Second Parties—Jameson—Martin. Agent—F. J. Martin, W.S.

Friday, June 25.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

GEORGE & JAMES LYON *v.* ANDERSON.

Lease—Tenant's Claim of Damages—Renunciation of Lease.

The tenant of a market garden, after certain complaints of damage by flooding through the landlord's alleged fault, got into difficulties, and renounced the lease without making in the renunciation any reservation of a claim for damages. *Held* that he was barred from subsequently insisting in such a claim.

Lease—Duty of Landlord—Drain.

The landlord of a market garden provided a drain of sufficient capacity to carry the natural flow of water from adjoining lands belonging to him, also let, and on a higher level, through the garden. The garden was flooded through the drain on the higher lands becoming choked. *Held* that the duty of cleaning it belonged not to the landlord but to the tenant of the higher land, and that the landlord was therefore not responsible to the tenant of the garden.

On 27th September 1879 George & James Lyon, gardeners, agreed to lease from Mr James Anderson of Hilton, in Aberdeenshire, a piece of ground known as Westfield, on the possession of Hadagain. The ground taken was to be used as a market garden. Adjoining the lands of Westfield, and on higher ground was the farm of Smithfield, belonging also to the estate of Hilton. Through the lands of Smithfield ran a stream which had been formerly used to drive the threshing-mill at Smithfield. This stream was conducted along an open ditch, but at the end of the ditch was a pipe or covered waterway which conducted the stream under a road leading from the farmsteading of Smithfield. About a year before the Lyons' lease began Anderson had brought a new flow of water into the mill-dam from another farm belonging to him.

The Messrs Lyon entered upon occupancy in