protection must be continued even against her wish—*Menzies* v. *Murray* [March 5, 1875], 2 R. 507.

"As regards the provisions in favour of the children of the marriage, it was conceded that the pursuers cannot revoke the deed in question without at all events making a reasonable provision for such children, and they propose to lay aside a sum of £4000 for that purpose. The right to revoke on making such a provision was based on the ground that under the deed in question the children had nothing more than a *spes successionis*. In the case of an ordinary post-nuptial contract, where provisions are made for children this view may be quite sound, because such provisions partake more or less of a testamentary character. But I cannot adopt that view in this case. The pursuers have already conveyed and delivered their estate away from themselves to trustees for behoof of the children under burden of certain liferent rights. The right of the children is therefore more than a mere *spes*. It is the same as if the children were already vested in the estate, and what has been given to them cannot be recalled—Fraser on Husband and Wife, vol. ii. p. 1503."

Counsel for Pursuers — Graham Murray. Agents—Paterson, Cameron, & Co., S.S.C.

Counsel for Defender G. C. Banks (Trustee under the Postnuptial Deed)—Dickson. Agent—Alexander Wardrop, L.A.

Counsel for the Curator *ad litem*—Salvesen. Agents—H. B. & F. Dewar, W.S.

Tuesday, January 11, 1887.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

BREATCLIFF AND OTHERS *v.* BRANSBY'S TRUSTEES.

Trust—Investment—Powers of Trustees — Real Security—Railway Mortgage—Liability of Trustees.

Held that an investment on a railway mortgage, giving the mortgagee the security of the railway company's undertaking, was "real security," and therefore within the powers of testamentary trustees who were directed by the testator to place the trust-funds "upon Government or real securities."

Mrs Mary Bransby of Bramham, in the county of York, died on 3d April 1845. She left a will dated 3d September 1844, by which she appointed as trustees two gentlemen residing in Bathgate. She directed certain specific legacies to be paid, and her whole estate to be turned into money, and the residue thereof to be held in trust, and "from time to time to invest or place out the same in or upon Government or real securities at interest, to be altered or varied as occasion may require at the discretion of my said trustees, until the same shall become payable by virtue of this my will."

Mr Haldane and Mr Smith, the defenders in this action, were assumed as trustees on the 19th April 1867 by the survivor of the original trustees. On 1st December 1876 Mr Smith and Mr Haldane, who were then the sole trustees, invested £800 in a mortgage of the Girvan and Portpatrick Junction Railway Company to bear five per cent. interest, and be repayable on 11th November 1879. The company afterwards got into difficulties, and no interest was received after Martinmas 1878. Benjamin Breatcliff, the nephew of the testatrix, and the last of the annuitants under the will, died on 15th December 1880, and the residue became payable to the residuary legatees. But the greater part of the estate consisted of the mortgage of £800, and there was thus no available residue for division.

The residuary legatees brought this action against the trustees, as such and as individuals, to have it declared that the said investment by the trustees "was not an investment authorised by the said will or by statute, and was *ultra vires* of the defenders as trustees foresaid;" that they should be found liable as individuals for all the loss occasioned by the investment; further, for count and reckoning of their intromissions with the estate, and payment of the residue on the footing that the investment was unauthorised, and that the money must be replaced.

The pursuers averred that the railway mortgage was much depreciated in value, if not unrealisable and that they had sustained loss through the investment having been made. The defenders averred that at the time of the purchase the mortgage was a perfectly good security, and that under the circumstances there was no residue available for division.

The pursuers pleaded—"(1) The said investment not being authorised by the said will or by statute was *ultra vires* of the defenders as trustees foresaid, and they are bound to make good the loss thereby occasioned."

The defenders pleaded—"(1) The said investment being within the powers of the trustees, the defenders ought to be assoilzied from the declaratory conclusions of the summons."

On 23d July 1886 the Lord Ordinary pronounced this interlocutor—"Sustains the first plea-in-law for the defenders, and assoilzies the defenders from the conclusions of the summons other than the conclusions for accounting, and decerns: Appoints the defenders to lodge in process an account of their intromissions, and that by the first box-day in vacation; grants leave to reclaim.

"*Note.*—The only question argued was whether the investment of a portion of the trust-funds on the security of a mortgage by a railway company, assigning the undertaking in the usual form, was authorised by the trust-deed. The trustees are empowered to invest the estate upon Government or real securities, and the question is whether a mortgage of the Girvan and Portpatrick Railway Company is a real security within the meaning of the power. I think it is, because it gives to the mortgagee the security of the whole undertaking, that is, of the whole real and moveable property of the company. It is true that it is a security which cannot be made available to the creditor by the ordinary diligence of the law. But he has a different kind of diligence in his right to obtain the appointment of a judicial factor, through whose administration the undertaking may be managed or disposed of for

the benefit of the company's creditors. The mortgagee has therefore the security of the real property, which is what is meant by a real security. The pursuers, however, maintain, on the authority of *Mant* v. *Leith*, 15 Beav. 524, that a railway mortgage is not within the power given to the trustees, even assuming it to be a real security. There is much weight in the considerations stated by the Master of the Rolls against the eligibility of such securities. But it cannot be held in Scotland that they are improper investments so as to infer personal liability against the trustees, who have selected them in the exercise of a power expressly conferred by the trust-deed, since they are investments which the Legislature has empowered all trustees to make unless they are expressly prohibited by the deed. It may be that the investment in question could not be supported by the subsequent enactment of the Trusts Amendment Act if it were not within the class of securities authorised by the trust itself. But the Act appears to me to suggest a sufficient answer to the argument founded on *Mant* v. *Leith*, that a railway mortgage is in its nature so improper an investment that trustees will not be justified in selecting it even if it be shown to fall within a general power conferred upon them by the trust. It is not suggested that if they were entitled to invest in railway mortgages at all, the defenders were negligent in their selection of the mortgage in question, or that the Girvan and Portpatrick Railway Company was not in good credit when the investment was made."

The pursuers reclaimed, and argued—This investment was not a legal one for the trustees to make under the conditions of the will. That authorised them to make investments on "real securities," and a mortgage over a railway company's property was not a real security, because (1) the security rested only on the success of a trading speculation, and not upon the security of real property transferred to the trustees; that had been held in England to be a bad security for trustees—*Whitely* v. *Learoyd*, March 16, 1886, 32 L.R., C.D. 196; and (2) because the security could not be affected by the ordinary diligences as applicable to real property—*Mant* v. *Leith*, March 13, 1852, 15 Beav. 524. In the Trust Act 1867 (30 and 31 Vict. c. 97), trustees were not empowered to borrow money on railway mortgages, but they were by the Trust Act 1884 (44 and 45 Vict. c. 84), sec. 3.

The defenders argued—The questions raised were (1) Whether a mortgage over a railway company's property was an investment on "real security," and there was no doubt that it was. But, secondly, it was a good investment for trustees to make, and there was no allegation that the trustees had acted fraudulently or even negligently. The Court of Session by instructions to its own officers, judicial factors, &c., had allowed them to invest funds on railway securities—*Lloyd's Curator*, December 1, 1877, 5 R. 289; Accountant of Court's Memorandum, December 12, 1877, quoted in Thoms' Judicial Factors (2d ed.) 76. If judicial factors could be allowed to make such investments, then trustees might also.

At advising—

LORD JUSTICE-CLERK—I do not think there is any ground for interfering with the judgment of the Lord Ordinary. The procedure which was mentioned by Mr Gillespie forms a strong commentary on the matter. The Legislature and the Court have sanctioned investments of this kind where there was no restriction, and it does not seem to me that on the ground that this was not an investment on real security we should interfere with the actings of the trustees, as it was a good investment when made. This was a real security, because the loan does not depend on personal security, but on the security of the company's undertaking, and also because there is a right in real property conveyed by the security. I therefore think we should adhere to the Lord Ordinary's interlocutor.

LORDS CRAIGHILL and RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuer—Chisholm. Agents—Wallace & Begg, W.S.

Counsel for Defenders—Gillespie. Agents—Tait & Johnston, S.S.C.

Wednesday, January 12.

SECOND DIVISION.

[Sheriff Court of Lanarkshire.

CONGLETON *v.* ANGUS.

Reparation—Master and Servant—Fellow-Servant—Common Employment.

A firm of carting contractors were employed by the owner of certain bags of grain to remove it to a store kept by a store-keeper. While a carter in their employment was assisting, according to his duty, in sending the grain up to the fifth floor of the building, where it was to be stored, a bag of grain fell upon him through the fault of one of the men in the employment of the store-keeper, and caused injuries which resulted in his death. *Held* that the case was ruled by *Woodhead* v. *The Gartness Mineral Company*, February 10, 1877, 4 R. 469; and *Maguire* v. *Russell*, June 10, 1885, 12 R. 1071, and that the store-keeper was not responsible, the deceased having been engaged in a common organisation of labour with the man who was in fault.

David Bannerman, grain merchant in Glasgow, employed Robert Buchanan & Son, carting contractors, Robertson Street, Glasgow, to deliver for him a quantity of wheat in bags at the stores of James Angus, a forwarding agent and general storekeeper in Robertson Street, Glasgow. On 16th September 1885 a lorry belonging to Robert Buchanan & Son, laden with the wheat bags, and under charge of James Congleton, a carter in their employment, was discharging the bags at Angus's store. The bags were raised to the fifth storey of the building by means of a chain or rope attached to a hoist which was worked by a man underneath. A man named