his power to render a beneficial statute nugatory.

For the reasons I have stated, as well for the reasons given by the Lord Ordinary, I am of opinion that the interlocutor reclaimed against should be affirmed.

The Court pronounced this interlocutor:—

"The Lords of the Second Division of the Court having, along with three Judges of the First Division of the Court, heard counsel for the parties on the reclaiming-note for the pursuer against Lord Stormonth Darling's interlocutor of 2nd June 1891, do, in terms of the opinion of a majority of the Judges present at the hearing, recal the said interlocutor; repel the second plea-in-law for the defender; decern and ordain the defender to make payment to the pursuer of the sum of forty pounds sterling, with interest at the rate of 5 per centum per annum from the date of citation on the summons until payment: Find that the defender is liable to the pursuer in interest at the rate of 5 per centum per annum on the principal sum of £1600 mentioned in the summons from and after the term of Martinmas 1890, and that half-yearly, termly, and proportionally during the not-payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of Whitsunday 1891 for the interest due preceding that date, and the next term's payment at Martinmas following, and so forth half-yearly, termly, and proportionally thereafter during the not-payment of the said principal sum, the said terms of payment respectively being always first come and byegone, with the interest of such of the said sums at the rate of 5 per centum per annum from the time when the same falls due until payment, and decern: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer—Asher, Q.C.—C. S. Dickson. Agents—Davidson & Syme, W.S.

Counsel for the Defender—D.-F. Balfour, Q.C. — Dundas. Agents — Waddell & M'Intosh, W.S.

Tuesday, March 8.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

HALL *v.* MACDONALD.

Succession—Antenuptial Contract of Marriage — Provisions for Grandchildren, whether Onerous or Testamentary—Subsequent Trust-Disposition and Settlement by the Husband — Power to Increase Wife's Provisions.

A husband by an antenuptial contract of marriage disponed his whole estate, heritable and moveable, to his wife in liferent and to the child or children of the intended marriage, and the issue of the bodies of such children, whom failing to his own heirs whomsoever in fee, under a declaration that if there was no child alive at the dissolution of the marriage the wife's liferent should be limited to £150. There was no trust created by this deed, and the husband retained his whole estate in his own possession until his death. He died, predeceased by his only child, and survived by his wife and one grandchild, leaving a trust-disposition and settlement executed a few years before his death under which his wife was given the unrestricted liferent of his whole estate. After her death his whole estate was to be converted into money, his grandchild was to receive a legacy upon attaining twenty-one years of age, and after payment of other legacies the residue of the estate was to be divided among the nephews and nieces of himself and of his wife.

Held (*rev.* Lord Kincairney) that the provisions for children in the antenuptial contract of marriage were onerous and contractual only as regarded the children themselves; that as regarded the issue of such children these provisions were testamentary merely, and might be and had been validly revoked by the husband's subsequent trust-disposition and settlement; and that the restriction of the widow's liferent to £150 in the event of there being no child alive at the dissolution of the marriage was in the husband's favour, but did not oblige him to restrict her provision to that amount.

Held further (*aff.* Lord Kincairney) that under the marriage contract there being no child but only a grandchild alive at the dissolution of the marriage, the widow's provision would have fallen to be restricted to £150.

Case of *Mackie* v. *Gloag's Trustees*, March 9, 1883, 10 R. 746, *rev.* March 6, 1884, 11 R. (H. of L.) 10, commented upon and distinguished.

The late Andrew Hall of Calrossie, near Tain, in the county of Ross, died upon 19th February 1891.

There was an antenuptial contract of marriage between him and his wife, Jane Chisholm Scott, dated 7th May 1849, in the following terms:—"It is contracted, agreed, and matrimonially ended between the parties following, viz., Andrew Hall, farmer, Scibercross, on the one part, and Miss Jane Chisholm Scott, daughter of John Scott, Esq. of Ashtrees, on the other part, in manner following—That is to say, the said parties have accepted of each other and hereby accept of each other for lawful spouses, and promise to solemnise the bond of marriage with all convenient speed agreeably to the rules of the Church. In contemplation of which marriage the said Andrew Hall hereby assigns, dispones, and makes over to and in favour of the said Jane

Chisholm Scott, his promised spouse, in liferent for her liferent use allenarly, subject to the restriction in the events after mentioned, and to the child or children of the said intended marriage and the issue of the bodies of such children, whom failing to the said Andrew Hall's own heirs and assignees whomsoever in fee, All and sundry lands and heritages, goods and gear, debts and sums of money, household furniture of every description, and in general the whole estate and effects, heritable and moveable, at present belonging or which may happen to pertain and belong to him at the time of his death in any manner of way, with the whole writs and evidents of the said estate, grounds, vouchers, and instructions of the said debts themselves, and all that has followed or may be competent to follow thereon; but declaring always that the said Jane Chisholm Scott shall be bound and obliged out of said liferent to maintain, educate, and support the children of the said intended marriage till they respectively attain the age of majority or be married; declaring however, that in case the said Jane Chisholm Scott shall enter into a second marriage during the existence of the children of said marriage or the issue of the bodies of such children, then and in that event the said liferent hereby provided to her shall cease and determine: And further, declaring that in case there be no children procreated of the said intended marriage, or if there shall be no living child or children at the dissolution of the said intended marriage, then the said liferent provision of the estate and effects of the said Andrew Hall in favour of the said Jane Chisholm Scott shall be restricted, and the same is hereby restricted to a free yearly annuity of £150 sterling, and which free yearly annuity of £150 the said Andrew Hall hereby binds and obliges himself and his heirs, executors, and successors whomsoever to pay to the said Jane Chisholm Scott; . . . but with and under this condition and provision always, as it is hereby expressly provided and declared, that in case the said Jane Chisholm Scott shall enter into a second marriage, then and in that event the said annuity of £150 hereby provided shall be, and the same is hereby restricted to the sum of £50 sterling yearly, payable at the terms, and with interest and penalty as aforesaid; and which provisions above written, conceived in favour of the said Jane Chisholm Scott under the conditions above expressed, she hereby accepts of in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she *jure relictæ* or otherwise could ask, claim, or crave of the said Andrew Hall, or his heirs, executors, and representatives, by and through his death, in case she shall survive him, or that her nearest of kin could ask or demand of him through her death in case he should happen to survive her: And it is further declared that in case there shall be more than one child of the said intended marriage, it shall be lawful to and in the power of the said Andrew Hall, at any time of his life, and even on deathbed, by any deed or writing under his hand, to divide and proportion as he shall think proper among the said children the above-written provisions in their favour, and failing of such division, the said provisions shall belong to and be divided among the said children equally, share and share alike, and to the issue of such of them as may predecease before the said provisions become payable; and also it shall be in the power of the said Andrew Hall, by any deed or writing under his hand, to appoint and provide such sum or sums as he may think proper to be advanced and paid out of the said means and estate to any of the said children, at such times and in such manner as he may appoint, in which case the liferent provision in favour of the said Jane Chisholm Scott shall suffer restriction corresponding to the amount of the sums so advanced: For which causes, and on the other part, the said Jane Chisholm Scott hereby assigns, dispones, and makes over to the said Andrew Hall and his heirs and assignees all and sundry lands and heritages, goods and gear, debts and sums of money, and in general the whole estate and effects now belonging or that shall pertain and belong to her during the subsistence of the said marriage other than the provisions before specified, with all that has followed or that may be competent to follow thereon: . . . And it is also hereby agreed that all manner of action and execution shall pass upon this contract for implement thereof in favour of the said Jane Chisholm Scott and the children of the marriage, at the instance of all or any one of the persons after mentioned, viz." . . .

The only child of the marriage was a daughter, Isabella Janet Hall, who married the Rev. Colin Macdonald, minister of the parish of Rogart, and died upon 25th November 1877 leaving an only child, Andrew Hall Macdonald, who was born on 16th December 1876. By trust-disposition and settlement dated 4th March 1885, with relative codicil dated 27th January 1891, Andrew Hall nominated his wife Mrs Jane Chisholm Scott or Hall; John Scott, farmer, Newton, Cromarty; Hugh Ross, bank agent, Tain; and Norman Reid, farmer, Glastullich, Ross-shire, to be his trustees and executors. The purposes of the trust were as follows—"(*First*) That my trustees shall, from the produce of my means and estate, pay all my just and lawful debts and funeral expenses, and the expense of executing this trust. (*Second*) That my trustees shall, subject to the said debts and expenses, assign and convey to my said wife my said estates, heritable and moveable, including my said lands and estate of Calrossie, in liferent for her liferent use allenarly, but declaring always, as it is hereby expressly provided and declared, that my said wife shall have full control and management of my said estates and effects, heritable and moveable, during all the days of her life, and shall be entirely independent, in the said control and management, of my other trustees, named or to be named or assumed as aforesaid. (*Third*) That my trustees shall, as soon as

convenient and advantageous after the death of my said wife, convert my said estates and effects, heritable and moveable, including the said lands and estate of Calrossie, into money, and shall make payment of the following legacies and provisions free of legacy-duty, namely—To my grandson, Andrew Hall Macdonald, on his attaining the age of twenty-one years complete, and on condition that he shall cease using the surname 'Macdonald' and adopt the surname Hall, my trustees being hereby enjoined and required to obtain from my said grandson his written obligation and undertaking to that effect, the sum of £5000 sterling, declaring that it shall be in the power of my said trustees to postpone payment of the said legacy till my said grandson shall attain the age of twenty-five years complete, if they shall see cause for so doing; and declaring further that if my said grandson shall die before he attains the age of twenty-one years complete, or the age of twenty-five years complete in the event of my trustees postponing payment as aforesaid, then the said legacy shall not vest in my said grandson, and the said sum of £5000 sterling shall form part of the general fund of my moveable means and estate; to the Colonial Missions of the Church of Scotland the sum of £500 sterling; to . . . (his trustees) and the acceptors or acceptor, and survivors or survivor of them for their trouble in connection with the trust hereby created, the sum of £500 sterling each, and to my own and my said wife's nephews and nieces the residue of my said means and estate, share and share alike, declaring that in the event of any of them predeceasing me or my said wife, leaving lawful issue, the share of the said residue which would have been payable to such nephew or niece shall be divided equally among his or her issue, and failing such issue shall be divided among the surviving nephews and nieces or their issue equally *per stirpes;* and with regard to my pictures, including the portraits of my brothers, and my books, letters, and papers, I direct my trustees after the death of my said wife to hand them over to the said John Scott for safe keeping."

Andrew Hall was survived by his wife and the other trustees, who all accepted office. The value of the truster's estate at the date of his marriage was about £6000, and at his death it amounted to £56,000 or thereby. In consequence of the conflict between the trust-deed and the marriage-contract the trustees as pursuers and real raisers raised an action of multiplepoinding, in which they called the said Andrew Hall Macdonald and his father as his administrator-in-law, and the nephews and nieces of the truster and of his wife and their representatives, and themselves as defenders.

The pursuers and real raisers pleaded that they were "entitled to hold and administer the trust-estate for behoof of the party or parties who may be found to have just right thereto, or *alternative* on payment and conveyance of the estate to such persons and in such proportions as shall be determined herein, they are entitled to decree of exoneration and discharge."

Andrew Hall Macdonald and his father, as his curator and administrator-in-law, claimed "to be ranked and preferred to the whole fund *in medio*, subject to the annuity or life interest to which the pursuer Mrs Jane Chisholm Scott or Hall has right under the said marriage-contract."

He pleaded—"(1) In respect of the terms of said marriage-contract these claimants are entitled to be ranked and preferred in terms of their claim. (2) In respect of the terms of the said marriage-contract the trust-disposition and codicil were *ultra vires*, and ought not to receive effect, and the claims founded thereon ought to be repelled. (3) In the event of Mrs Hall's claim being sustained, it can only be on the footing and under the declaration that she is bound to maintain, educate, and support the claimant, Andrew Hall Macdonald, until he attains majority or is married."

The truster's widow, Mrs Jane Chisholm Scott or Hall, claimed that on a sound construction of the antenuptial contract and of the trust-disposition and settlement, and looking to the change in her husband's circumstances since the date of his marriage, she ought to be ranked and preferred to the liferent use of the whole fund.

The other trustees claimed to be ranked and preferred in the fund *in medio*, to the extent of £500 pounds each.

Upon 19th November 1891 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Finds (1) that on the dissolution of the marriage between the late Andrew Hall and the claimant Mrs Jane Chisholm Scott or Hall, by the death of the said Andrew Hall, there was no living child of the marriage; (2) that the claimant Andrew Hall Macdonald is the sole heir of the said marriage; (3) that the whole estate of the said Andrew Hall vested in the said Andrew Hall Macdonald under the antenuptial contract of marriage between the said Andrew Hall and the said Jane Chisholm Scott or Hall, subject to the provision therein in favour of the said Jane Chisholm Scott or Hall; (4) that it was provided by the said marriage-contract that in the event of the dissolution of the marriage without a child of the marriage then living, which event occurred, the provision of the liferent of the estate to the widow should be restricted to an annuity of £150; (5) that the said restriction of the widow's liferent has not been effectually removed by the trust-disposition and settlement of the said Andrew Hall, and that the provision to her of a liferent of said estate is ineffectual, as being in breach of the said marriage-contract; (6) that the legacies to the claimants John Scott and Norman Reid were beyond the power of the testator, and are ineffectual: Therefore repels the claims of the claimants Mrs Jane Chisholm Scott or Hall and of John Scott and Norman Reid, and

decerns: Finds that the claimant Andrew Hall Macdonald is entitled to the whole fund *in medio*, subject to the right of the said Mrs Jane Chisholm Scott or Hall to an annuity of £150, and to that effect sustains the claim of the said Andrew Hall Macdonald, and ranks and prefers him on the fund *in medio* accordingly," &c.

"*Opinion.*—The fund *in medio* in this multiplepoinding consists of the estate of Andrew Hall, who died on 19th February last. He was survived by his widow and his grandson, his only living descendant. Prior to his marriage in 1849 an antenuptial contract of marriage had been executed, and he left a trust-disposition and settlement dated in 1885. The distribution of his estate depends on these two deeds.

"The main question is between the widow, who claims the liferent of the estate, and rests her claim on the trust-disposition, and the grandson, who in virtue of the marriage-contract claims the estate, subject to an annuity of £150 in favour of the widow.

"The first question regards the construction of the marriage-contract. It is a clumsy and ill-framed deed, by no means easy to construe. Divested of legal redundancy it may be summarised, so far as bearing on the present question, as follows:—

"The deceased conveys the *universitas* of his estate to his wife in liferent allenarly, and 'to the child or children' of the marriage and their issue, whom failing to his nearest heirs and assignees in fee. He provides that his widow shall out of her liferent aliment 'the children' until majority or marriage, and declares that if she shall marry during the existence of children or their issue her liferent shall cease. He further declares, and this is the clause which is specially applicable, that 'if there shall be no living child' at the dissolution of the marriage, her liferent shall be restricted to an annuity of £150, to be reduced to £50 in the event of her marriage.

"The deceased further reserves power to apportion among his children their provisions, and failing apportionment provides for equal division among 'the said children equally,' and among the issue of such of them as might predecease. Power is also reserved to authorise advances to any of the children; and finally, it is provided that action and execution shall pass on the contract in favour of the widow and the children in name of the persons mentioned.

"It is thus provided that if there shall be no child alive at the dissolution of the marriage the widow's liferent shall be restricted to an annuity, and the first question is, whether that provision applies when at the dissolution of the marriage no child of the marriage survives but a grandchild does, and that depends on whether the word 'child' in this clause can be construed as including a grandchild.

"I was impressed with the argument in favour of that construction, but on full consideration I have come reluctantly to the conclusion that I cannot adopt it. I consider, indeed, that the word 'child' is flexible, and is capable of being read as comprehending a grandchild, but that interpretation cannot be readily adopted. According to its primary and natural signification, the word certainly denotes only issue in the first degree, and in order to warrant the inclusion of grandchildren some clear and decided indication to that effect must be found in the rest of the deed.

"The words 'child' or 'children' occur in the deed several times, and in three instances are used in collocation with the issue of the children. In these three instances the meaning of the words is of necessity confined to issue of the first degree, and cannot by any possibility include grandchildren. Now, the meaning of the term in these instances being absolutely fixed, it is maintained that it falls to be construed in the same way in other parts of the deed. That is always a strong, and sometimes a conclusive, consideration; and in the case of *Edwardes* v. *Hughes*, December 19, 1890, 18 R. 319, was regarded as absolutely conclusive. I doubt whether it is absolutely conclusive in this case, for it seems difficult to hold that in at least one passage the word 'children' was not intended to extend to their issue. I allude to the clause of apportionment where the power is to apportion among the children with the declaration that failing apportionment the estate should be divided equally among the children and the issue of such of them as might have died. Reference was also made to the clause providing for action and execution on the contract, and it was maintained that it could not be supposed that the granter intended by this clause to protect the rights of his widow and children and not of his grandchildren. This argument, however, appears hardly conclusive, for the granter might have thought it right to leave the interests of grandchildren to be protected by their surviving parent or by trustees under their parents' marriage-contract.

"Further, when it is found that the granter takes pains to mention issue in particular instances, it is reasonable to infer that when he mentions children only he had not their issue in contemplation.

"It is quite true that some anomalous consequences follow from construing the word 'children' in the clause in question as not including grandchildren. For it would appear that under the first part of the deed the widow, if she married while a grandchild lived, would forfeit her whole liferent, while under the second part so construed, she would, if she married while a grandchild lived, have an annuity of £50. That is so, apparently, but then the deed is ill framed and ill conceived throughout. There is a similar difference between the provisions of the first part of the deed and those of the second applicable to the case of the widow marrying when no issue of the marriage survived. In the one case she would retain her whole liferent, and if the latter part of the deed applied, her pro-

vision would be restricted to £50. In a deed like this it does not, I think, go for much to point out an anomalous or unreasonable consequence as resulting from what is otherwise the natural construction of the deed. On the whole, I cannot find sufficient grounds for departing from the primary meaning of the words used, and for extending the meaning of the word 'child' in the particular clause in question so as to include a grandchild.

"If, therefore, this question falls to be determined by the marriage-contract, I think it must be held that the event has occurred in which the widow's liferent was to be restricted to an annuity. I cannot say that I fully appreciate the object of this restriction or its reasonableness. But what I have to consider is not the propriety of the provision, but merely the construction of the words.

"I think that the grandchild's provisions are protected by the marriage-contract, and were contractual and not testamentary—*Mackie* v. *Gloag's Trustees*, March 6, 1884, 11 R. (H. of L.) 10, and that he is therefore in a position to plead that he has a *jus crediti* under the marriage-contract to the whole estate burdened only by the annuity to the widow, and that Mr Hall was at his death under obligation, by the words of the marriage-contract, to provide to him the estate subject to that burden.

"The next question is, whether Mr Hall has by his trust-deed, effectually removed the restriction on his widow's liferent to the detriment of the rights provided to the heir of the marriage. I have, with hesitation, and difficulty, and reluctance, also come to the conclusion that there is no sufficient authority for sustaining such a departure from the obligations in the marriage-contract.

"There is no doubt that the trust-disposition, taken as a whole, is utterly inconsistent with the marriage-contract, and entirely beyond the powers of the truster. But it was pleaded that it ought to be sustained to the limited effect of cancelling the restriction of the widow's liferent. It appears that Mr Hall's estate had increased very greatly since the date of his marriage, and it was maintained that a provision to his widow of an annuity of £150, although originally adequate, had become wholly inadequate and disproportionate to his fortune when he died, and that nothing could be more reasonable than that he should enlarge that provision, and it was submitted that the removal of the restriction on the liferent was a reasonable method of effecting that enlargement.

"Reference was made in support of this contention to *Colquhoun* v. *Mackay*, May 28, 1828, 6 S. 879; *Haldane* v. *Hutchison*, November 13, 1885, 13 R. 179; and in particular to *Champion* v. *Duncan*, November 9, 1867, 6 Macph. 17, 21; also to Erskine iii. 8, 25; and to a passage in Lord Fraser's Husband and Wife, in which he says that 'a father, notwithstanding the destination of his estate to the heir of the marriage, is entitled to execute deeds granting rational provisions to his wife and other children unprovided for or increasing those which are inadequate, provided that in this last case there be some necessity for making an alteration in what has been already settled.'

"I have not found any case in which a testamentary increase of provisions settled on a wife or child by antenuptial contract of marriage has been sustained in a question with an heir of the marriage founding on the marriage-contract. But it is settled that it is within the power of a father in such a case to make effectual provisions by marriage-contract for his wife and children of a second marriage, and it may follow on the same principle that it may in some cases be in his power to enlarge provisions in a first marriage-contract. Had Mr Hall, on the narrative that the annuity of £150 was inadequate considering the enlargement of his fortune, increased that annuity, there might have been grounds for maintaining the validity of such a provision. But that is not what he has done. He has ignored the marriage-contract altogether, as if—which may have been the case—he had forgotten its existence. He has settled his estates on a totally different scheme, and I doubt the possibility of extracting one provision from his deed and giving effect to that and ignoring the rest of it.

"Even if that could be done, I am not prepared, in the absence of direct authority, to give effect to an encroachment on the marriage-contract so radical and important by a deed purely testamentary, and without consideration. The alteration may not have been unreasonable, but it is not alleged that there was any such necessity for it, as Lord Fraser seems to have considered essential in such cases.

"The case of *M'Lachlan* v. *Wilson*, July 6, 1839, 1 D. 1177, was not dissimilar to the present case. In that case a husband, who by antenuptial contract of marriage had provided an annuity to his wife, subject to forfeiture on her second marriage, by a subsequent deed declared that forfeiture removed. The second deed was, if I understand the case rightly, regarded as a donation *inter virum et uxorem*, and ineffectual against creditors. Lord Fullerton, it is true, differed from the other Judges, and held that the deed should be supported as a rational modification of the widow's previous provisions. His Lordship's views are very important, but were not adopted by the majority of the Court, and I am bound to regard the case as an authority against the widow so far as it applies.

"On the whole, I have unwillingly come to the conclusion that there is no sufficient authority for the widow's claim.

"A claim has been lodged for two of Mr Hall's trustees for legacies of £500 each. But I have no difficulty in holding that, in view of the marriage-contract, that claim cannot be supported."

The claimant Mrs Jane Chisholm Scott or Hall—the truster's widow—reclaimed, and argued—(1) The question whether provisions to grandchildren in an antenuptial contract

are revocable was still open—*Edwardes* v. *Hughes*, December 19, 1890, 18 R. 319 (Lord Kinnear's opinion). The question here was whether the provisions in the marriage-contract in favour of grandchildren were pactional or testamentary, whether grandchildren were within the contractual relation, or whether the provisions in their favour were revocable by the spouses. They were testamentary and revocable. They had been revoked by the husband's trust-disposition and settlement to which the wife must be held to have consented, for she was claiming under it. The trust-disposition and settlement should be given effect to, and it gave the widow the liferent of the whole estate. In the contract between the spouses upon which the marriage took place a benefit to grandchildren was not contracted for. The case of *Mackie* v. *Gloag's Trustees*, March 9, 1883, 10 R. 746, *reversed* March 6, 1884, 11 R. (H. of L.) 10, relied upon by the respondent was really in favour of the reclaimer (opinion of Lord Watson), because the facts there were of an entirely different character. There property was put aside in the hands of trustees by a delivered deed, and therefore was unaffected by subsequent testamentary writings. Also the interested parties were children of a former marriage who were expressly in contemplation of the wife when she entered into the marriage-contract—Ersk. iii. 8, 39; Bank. i. 5, 15, 16; *Kinsman* v. *Scot*, M. 12,980; *Yorkston* v. *Simpson*, M. 12,981; *Newstead* v. *Searles*, March 2, 1737, 1 Atkyns 264; *Macleod* v. *Cunningham*, July 20, 1841, 3 D. 1288, *aff.* 5 Bell's App. 210; *Pretty* v. *Newbigging*, March 1, 1854, 16 D. 667; *Clark* v. *Wright*, 1861, 6 Hurl. & Nor. 849; *Lang* v. *Brown*, May 24, 1867, 5 Macph. 789. (2) If the marriage-contract provisions were irrevocable the truster evidently used the word "children" as including "grandchildren"—*e.g.* surely the power of apportionment was not limited to apportionment among children. There was a grandchild alive at the death of the truster, and therefore the widow's liferent was not restricted to £150. Accordingly, even under the marriage-contract she was entitled to a liferent of the whole estate. (3) Even if the marriage-contract was held irrevocable, and "child" did not include "grandchild," the truster was entitled in the altered state of his circumstances to increase his widow's provision as he had done—Ersk. iii. 8, 25; Fraser's Husband and Wife, ii. 1415, and cases there cited—*Champion* v. *Duncan*, November 9, 1867, 6 Macph.; *Lowden's Trustees* v. *Lowden, &c.*, June 1, 1881, 8 R. 741. The Lord Ordinary had not that case before him. *Haldane* v. *Hutchison*, November 13, 1885, 13 R. 179.

Argued for the respondent—the grandson—(1) His right was fixed by the marriage-contract, which was an onerous deed, and it could not be defeated gratuitously by the trust-disposition; grandchildren were within the contemplation of the spouses when the marriage-contract was entered into. They were specially called after children, and before the clause "whom failing" which introduced heirs generally. He was a direct disponee—at lowest a conditional institute—and not a mere substitute. If a person was plainly within the contractual provisions of a marriage-contract his right was indefeasible even although he were a stranger—*Clark* v. *Wright, supra.* (2) In giving effect to the marriage-contract the widow's liferent fell to be limited to £150 as there was no child alive at the truster's death. "Children" could only include "grandchildren" in exceptional circumstances, and where that construction was for the benefit of the grandchildren, which was not the case here. "Children of the marriage" occurred four times in the deed, and in none of these places was it the least necessary to hold that they included grandchildren; in one case it would be absurd to hold children as including grandchildren. The widow was not laid under an obligation to support her grandchildren. When the parties wished to refer to grandchildren they knew how to do it by adding "the issue of the bodies of such children." (3) If the marriage-contract was to receive effect the provisions in favour of the widow under the trust-disposition could not be given effect to as "a reasonable addition because of change of circumstances," for they gave no such addition but attempted the substitution of a totally new scheme.

At advising—

LORD KINNEAR—The main question which is raised on this record is, whether the trust-disposition and settlement of the late Andrew Hall of Calrossie, who died on the 19th of February 1891, is valid and effectual to give to his widow the liferent of his heritable and moveable estate, or whether he was precluded by the terms of an antenuptial contract of marriage from giving her more than an annuity of £150. There were no children of the marriage surviving at the date of its dissolution by the death of the husband, and it is maintained by the only grandchild that the marriage-contract has provided for this event by a stipulation binding on the spouses under which he is entitled to the whole estate, subject only to an annuity of £150 in favour of his grandmother.

The contract is in a very common form, and in so far as regards its leading provisions it does not appear to me to present any serious difficulty of construction. It sets out in the ordinary words of style that the parties have accepted of each other "for lawful spouses, and promise to solemnise the bond of marriage," and then it proceeds—"In contemplation of which marriage the said Andrew Hall hereby assigns, dispones, and makes over to and in favour of the said Jane Chisholm Scott, his promised spouse, in liferent for her liferent use allenarly, subject to the restriction in the events after mentioned, and to the child or children of the said intended marriage and the issue of the bodies of such children, whom failing to the said Andrew Hall's own heirs and assignees whomsoever in fee, all and

sundry lands and heritages, &c., and in general the whole estate and effects, heritable and moveable, at present belonging or which may happen to pertain and belong to him at the time of his death in any manner of way." Then follows a declaration that the future wife, the said Jane Chisholm Scott, shall be bound and obliged out of said liferent to maintain, educate, and support the children of the marriage till they respectively attain the age of majority or be married; a declaration that in case she shall enter into a second marriage during the existence of the children of the marriage or the issue of the bodies of such children, then the liferent provided to her shall cease and determine; and a further declaration that if there shall be no children of the marriage, or if there shall be no living child or children at the dissolution of the marriage, then the liferent in favour of the wife is to be restricted to a yearly annuity of £150. There follows another declaration restricting the annuity of £150 to £50 in the event of her entering into a second marriage. And these provisions in favour of the wife are declared to be in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she *jure relictæ* or otherwise could claim by the death of her husband. For these causes, and on the other part, the wife makes over to the husband, his heirs and assignees, the whole estate and effects then belonging or that should belong to her during the subsistence of the marriage, other than the provisions before specified. And finally, it is agreed "that all manner of action and execution shall pass upon this contract for implement thereof in favour of the said Jane Chisholm Scott and the children of the marriage" at the instance of certain persons named.

The question is, whether the destination in favour of the issue of the children of the marriage creates a right in the grandchildren of the spouses, which the husband could not defeat either by enlarging the annuity to his widow or by bequeathing the fee of the estate as he might think fit. The Lord Ordinary has answered this question in the affirmative. By his trust-disposition and settlement the deceased conveys his whole estate, heritable and moveable, to his wife in liferent, and directs his trustees upon her death to convert the whole estate into money, to pay certain legacies, and, among others, a legacy of £5000 to his only grandson, the claimant Andrew Hall Macdonald, and to pay the residue to his own and his wife's nephews and nieces, share and share alike. The Lord Ordinary has held "that the grandchild's provisions are protected by the marriage-contract, and were contractual and not testamentary, and that he is therefore in a position to plead that he has a *jus crediti* under the marriage-contract to the whole estate, burdened only by the annuity to the widow, and that Mr Hall was at his death under obligation, by the words of the marriage-contract, to provide to him the estate, subject to that burden." I do not understand his Lordship to use the term *jus crediti* in this definition of the grandson's right in its stricter sense as implying a right to compete with other creditors. It is settled law that where marriage-contract provisions in favour of children are so conceived that the principal is not payable till after the father's death, and does not bear interest from any earlier term, and where no actual benefit or interest can be taken in his lifetime, there is no *jus crediti* vested in the children, who have nothing more than a *spes successionis*. But then that is a hope of succession which is protected by the father's obligations, which he cannot gratuitously defeat, and which therefore gives the children the right of creditors against him and his heirs, although they are themselves no more than heirs, in a question with his onerous creditors. It is therefore against the father and his legatees that the Lord Ordinary has held that the grandson in this case has exactly the same right, as a creditor under the marriage-contract, as the children of the marriage would have had if they had survived their father.

I am unable to agree with his Lordship. The general rule which is applicable to marriage-contracts is, that when the husband settles his property or any part of it upon his wife and the children of the marriage, with a destination to other persons on the failure of children, there is no *jus crediti* given to anyone as against him and his heirs except to the wife and to the children of the marriage, and any clauses of eventual destination to strangers or to remoter heirs must be regarded as mere gratuitous destinations which create no obligation against the granter or his heirs, and which he may therefore defeat at his pleasure. The law is so laid down by Erskine and Bankton, and it has received effect in a series of decisions to which I think it quite unnecessary to refer in detail, both because they are very familiar and because the principle is stated nowhere more clearly than by Lord Watson in the recent case of *Mackie* v. *Gloag's Trustees*. The House of Lords held in that case that an attempt had been made to bring within the scope of the principle a case which did not fall to be ruled by it, but Lord Watson recognises the principle as being perfectly sound and well established, and quotes with approval the statement of the general rule which is made by Mr Erskine—"A father lies under no degree of restraint in favour of the substitutes who are called by the marriage-contract after the issue of the marriage, and who acquire no right by such substitution." That is the general rule of law as quite clearly established by our Institutional writers and by the series of decisions to which I have referred. The learned Lord goes on to explain its origin historically, as arising from the practice of Scottish conveyancers to introduce into dispositions of land made in contemplation of marriage, and afterwards into marriage settlements in the modern form, ulterior destinations which were merely incidental to the true purpose of the deed, and which

in no way partook of its onerous character. The ground of distinction between the right of the children on the one hand, and the substitutes who may be called failing children on the other is very obvious, because the provisions in favour of children are onerous in the highest degree, whereas the ulterior destination in favour of strangers or remoter heirs for whom there is no antecedent obligation on the contracting parties to provide by an antenuptial settlement is purely gratuitous, and may therefore be revoked when the husband is set free by the failure of children to dispose of his estate by will. That the issue of the children of the marriage are in this respect in the same position as any other gratuitous substitutes is settled by the judgment in *Pretty* v. *Newbigging*, and by the precedents on which it was decided. Various questions were involved in that case which have no bearing on the present, but the fundamental ground of judgment is to be found in the distinction which was taken by the majority of the Court between the indefeasible right which arises to the children of the marriage from the obligation of their parents, and the mere hope of succession which may be given, failing children, to their issue.

It is, no doubt, perfectly competent for the spouses, contracting with each other before marriage, to stipulate for benefits to other persons or classes of persons besides themselves and their children, and if a destination to the heirs or to other relatives of one of the spouses is the counterpart of an obligation in favour of the other, it will be just as onerous and irrevocable as the mutual provisions in favour of the spouses themselves. That is perfectly clear. But I am unable to find any indication of onerosity or mutuality in the deed in question, except in so far as it provides for the wife and the immediate children of the marriage. Even as regards their interests, the settlement by the husband is in form testamentary. He remains the undivested owner of his whole estate during his life, with full and unrestricted power of control and disposal, because the condition that the estate which is to be carried by his conveyance shall belong to him at his death is applicable to *acquisita* as well as to *acquirenda* when as in the present case the former are included in the same general words of conveyance as the latter. This was decided in the case of *Somerville* in 1819, that decision was followed in *Fernie* v. *Colquhoun*, and I apprehend there can be no doubt that that is now the legal construction of such a conveyance. Now, that is just the kind of settlement in which an ulterior destination, which is purely testamentary in substance as well as in form, is most naturally to be expected. And accordingly it is not disputed that there is such a destination in the present contract, because the ultimate donees are the heirs whomsoever of the husband. But then it is said that the grandchildren are not in the same position as the husband's heirs, because they would not have been specially mentioned at all, since they would naturally have been the heirs if there were no children of the marriage surviving, unless the intention of the contracting parties had been to raise them to the same level as the immediate children of the marriage, and to give them the same rights. I think the observation upon which that argument is founded is not altogether accurate, because the grandchildren—if there had been more than one—taking as heirs by operation of law, would not have taken the whole mixed estate equally among them as directed by this settlement, but would have taken their several interests in the heritable and moveable estate as heirs and next-of-kin respectively. But the question is not whether the settlor intended at the date of this contract to give the same benefit in the contingency for which he was providing to his grandchildren as he had given to his children if they should survive him, but whether the intention so expressed rests upon contract and is embodied in words of obligation, or whether it is a mere expression of goodwill, and is therefore testamentary and revocable. Now, that is a question of intention which is not to be gathered from the words of gift alone, because as I have said these are in form testamentary words. The form of the settlement is that of a *mortis causa* settlement, and therefore in order to determine whether any particular gift is onerous or not, we must look elsewhere than to the mere words of gift. We must consider whether there is any antecedent obligation irrespective of particular stipulations in the contract itself, or if not, whether there is any express or implied stipulation which makes the provision binding upon the husband. Now, as to the first point there is, as I have said, no antecedent obligation to provide for grandchildren so as to create any presumption of onerosity from the mere character of the legatees, or from their relation to the settlor. And therefore we must look to the remaining clauses of the deed in order to see whether we can discover any stipulation made by the wife that the husband shall leave all his estate to their grandchildren in the event which has happened. The only provision in the contract which seems to suggest any argument to that effect is the clause by which the wife gives everything belonging to her to her husband and his heirs. But the ultimate destination of the husband's property also is to his own heirs, and not to the heirs of his wife. And therefore, while the settlement by the wife is certainly made in consideration of the provisions by the husband for her and her children, there would seem to be very slender ground for holding that the substitution, on the failure of children, was also a material consideration for the wife's settlement. But there are other clauses which have a very important bearing on the question; and it appears to me that the clause immediately following the destination by the husband is altogether inconsistent with the notion that the substitution of grandchildren is matter of stipulation, and is

quite consistent with the notion that the husband intended a testamentary benefit for his grandchildren and nothing more. I agree with the Lord Ordinary in the construction which he puts upon the words of this clause, in so far as regards the condition upon which it is stipulated that the wife's liferent interest shall be restricted to an annuity of £150.

The condition is that in case there be no children procreated of the marriage, or if there shall be no living child or children at the dissolution of the marriage, then the liferent provision to the wife shall be restricted as I have said. I quite agree with the Lord Ordinary that children in that clause cannot mean grandchildren, and therefore that the restriction is to take effect if there be no children alive at the husband's death, even although there be grandchildren alive. But, then, what is the inference from that construction of the clause? It appears to me to be perfectly clear that it is a stipulation in favour of the husband, and not against him. The husband undertakes to give his wife a liferent of his whole estate if there are children alive, to whom the whole estate is to go in fee. But then he stipulates that if there are no children, and therefore no absolute disposal of the fee of the estate, her interest is to be restricted to an annuity of £150 a-year. That is to say, he does not bind himself to give her more, but he certainly does not bind himself not to give her more if he thinks fit. It is a stipulation in his favour. The suggestion that it is a stipulation by the wife as against her husband, that if there be no children but only grandchildren alive at his death, he shall not be allowed to give her more than £150 a-year, however large his estate may be, appears to me to be very hard to maintain. And therefore I am unable to find in that clause any indication of mutuality or onerosity which should prevent the husband from disposing of his whole estate as he may think fit; and I find the strongest possible evidence that there was no such mutuality. The inference which I draw from the construction of that clause is very strongly confirmed by two subsequent clauses of the deed. In the first place, the husband reserves to himself a power of apportionment and division among the children of the marriage, and no such power of apportionment or division among grandchildren. Now, if he had been bound by obligation to give the same interest to his grandchildren as to his children, one does not see why he should not have made the same reservation of a power of apportionment in the one case as in the other, whereas if his gift to his grandchildren was testamentary, and the gift to the children alone obligatory, one can quite understand the reason why he should think it necessary to reserve a power in the one case which reserved itself in the other. But the following clause appears to me to be still more conclusive in favour of the view which I am disposed to take, because I think the contract itself very clearly distinguishes between those provisions which according to the intention of the contract were to be obligatory, and those provisions which according to its intention were to be testamentary only. For the final clause is that execution shall pass upon the contract for implement thereof in favour of the wife and of the children of the marriage, at the instance of certain trustees who are named. Now, I agree again with the Lord Ordinary that when the words "children of the marriage" are to be found alone in any clause of this deed they mean what they say; they mean children, and they do not mean grandchildren. And therefore the parties stipulate that the provisions in favour of children and of the wife are to be enforceable at the instance of trustees for their behoof; and they make no provision for the enforcement of ulterior destinations either in favour of grandchildren or in favour of heirs. That appears to me to afford a very clear indication of an intention on the part of the parties to this contract to distinguish between those provisions which were intended to be testamentary and revocable because they were in their own nature gratuitous, and those provisions which were intended to be obligatory and enforceable by action at law. If that view be taken of the deed, it appears to me that all its provisions are perfectly consistent, and stand together in a perfectly logical and intelligible way. On the other view maintained by the respondent, I think we are involved—as indeed the Lord Ordinary finds himself involved—in serious difficulties of construction. The conclusion therefore at which I arrive upon this main question of construction is, that the deed is onerous in so far as regards the interests of the spouses and of the children of the marriage, and purely testamentary in so far as regards ulterior interests beyond theirs, including among those ulterior interests the destination in favour of grandchildren as well as the destination in favour of the husband's heirs.

But if one could find in the deed a stipulation by the wife that in a certain event the husband's property should be given to their grandchildren, although that would undoubtedly be onerous, and therefore binding as between the contracting parties, I am not persuaded that it would be binding upon both of them so as to make it impossible for both to recal it, because it must be kept in view in considering the legal effect of this deed that while it is irrevocable and requires no delivery as a contract between the parties themselves, it is not delivered to anybody on behalf of any third persons to whom interests under it may have been given. It remained latent, and under the control of the spouses or of the husband. Now, if married persons agree together that they will leave property, or that one of them will leave his property to relations or strangers in whom they may happen to be interested, but towards whom they have no antecedent obligation whatever, and if having so agreed, their contract is retained in their own power and under their own control one does not see why they should not be

allowed to alter and revoke it at pleasure so long as it is not delivered. Now, we are exactly in the same position in considering the effect of the husband's deed as if the wife had formally and expressly agreed to it, because she claims to take benefit under her husband's will, which is said to be inconsistent with their marriage settlement. And therefore we have both spouses concurring in discharging the formal obligation, if any such obligation were to be found in the marriage-contract, to give the property to the grandchildren in the case that has occurred.

The only case which was cited and commented upon in support of the Lord Ordinary's interlocutor to which I think it necessary to refer is the case of *Mackie* v. *Gloag's Trustees*, and it appears to me to be no precedent for the decision of the present case. I think it a very valuable authority, because the principle upon which this case ought, in my opinion, to be decided was there clearly recognised, and is illustrated by contrast. But the decision itself is in no way in point. The marriage-contract in that case did not convey the estate which should belong to the granter Mrs Gloag at her death, nor was its effect suspended till that event should occur. On the contrary, it was a *de præsenti* conveyance of certain specified estate in favour of the existing children of the granter and of the children to be born of the marriage. The granter was entirely divested of that estate by the delivery of the trust-deed to trustees for behoof of beneficiaries therein named, and so soon as it was ascertained that the granter was so divested, the only question for consideration was a question of construction as to whether the purposes for which the trustees were to hold and to exclude the original owner included a benefit to the existing children of the granter of the deed, or whether they were confined to the benefit of the future children of the marriage only. Upon that question of construction it was held in the House of Lords that the children of both marriages stood exactly in the same position, but the ground of judgment of the House of Lords and the ground on which Lord Rutherfurd Clark dissented in this Court was, that this being an immediate *de præsenti* conveyance, divesting the granter could not be brought within the scope of the principle which was recognised by all the Judges as the proper principle for the construction of marriage-contracts containing provisions to children and ulterior destinations. In the present case it appears to me that the question we have to determine is, whether the provisions in favour of the grandchildren are testamentary or contractual and obligatory? There is no question of construction as to the meaning of the destination. The interest which is given to each series of heirs in succession is identical. The only question is, whether the gift beyond the children of the marriage stands on obligation or whether it is testamentary? and for the reasons I have stated I am of opinion that it is testamentary only.

The result must be, in my opinion, that the Lord Ordinary's interlocutor must be recalled, that the claim of the widow must be sustained, and that the claim of the grandchild must be repelled. The grandchild pleads in the third plea-in-law that in the event of his grandmother's claim being sustained, "it can only be on the footing and under the declaration that she is bound to maintain, educate, and support the claimant Andrew Hall Macdonald until he attains majority or is married." I do not think we heard very much in support of that plea, but it is in my opinion unsound, because upon the construction which the Lord Ordinary has put upon the clauses of the deed which relate to the obligation of the widow to maintain and educate children—a construction in which I entirely concur—there can be no obligation at all on the widow to maintain or educate this grandchild. And therefore I think his claim must be repelled.

If I am right in the views I have expressed, it follows that the claim for the trustees is well founded in substance, but I am not satisfied that we can sustain it as it stands. The trustees are entitled under the trust-disposition to a legacy of £500 each in favour of the acceptor or acceptors and survivor or survivors of them for their trouble in connection with the trust. Now, it appears to me that the proper position for these trustees to take in this competition was to claim the fund *in medio* to be administered in terms of their trust, and if that claim had been sustained, then it would follow as a consequence that if the legacy to them is a good legacy, they would pay it to themselves and get the benefit of it. But they make no claim to administer the trust. They put in a separate substantive claim for a legacy as if it were a mere bequest in their favour, irrespective of their acceptance of the trust, and they ask to be preferred in the fund *in medio* to the extent of £500 each without saying anything as to what is to become of the rest of the fund. It does not appear to me that we can sustain that claim as it stands, but if your Lordships agree with me, there can be no great difficulty in the trustees amending their claim.

LORD ADAM—The leading question in this case is whether the claimant Alexander Hall Macdonald has a *jus crediti* in the limited sense which Lord Kinnear has explained, under the antenuptial contract of his grandfather and grandmother Mr and Mrs Hall. Now, marriage-contracts are deeds which contain provisions both contractual and testamentary, and the question in this case is, under which of these categories the provision in favour of the claimant, the grandchild, falls. It appears from the marriage-contract that in contemplation of the marriage Mr Hall disponed in favour of his promised spouse, in liferent for her liferent use allenarly, subject to certain restrictions named in the contract, and to the child or children of the intended marriage and the issue of the bodies of such children, whom failing to

his own heirs and assignees whomsoever, all and sundry his estate, heritable and moveable, as at the time of his death. The question is whether that destination to the issue of the bodies of such children gave these children a *jus crediti* under the marriage-contract, or whether that was a testamentary provision only. Now as regards the children of the marriage it is of course settled law that the provisions in their favour and in favour of the wife in a marriage-contract are contractual in the highest degree, and that the contracting parties, the husband and wife, cannot defeat the rights secured to the children by the marriage-contract. There is no doubt about the law on that subject. What the reason of the law may be is of very little consequence, although it probably originated in the claims which *ex jure naturali* children have against their parents. But the children of such children are in an entirely different position. They have no claim which the law recognises in the same sense as children. They have their own father and mother, and their own father and mother's marriage-contract with reference to any claims they may have, and so far as I recollect there is no case establishing that under such a destination as this grandchildren have a *jus crediti*. No case was quoted to us, and the only case which the Lord Ordinary refers to is the case of *Mackie* v. *Gloag* upon which Lord Kinnear has commented, and the true principle of the decision in which he has explained. That case therefore is not an authority for any such proposition. I am far from saying that a provision in a marriage-contract calling persons after the children of the marriage may not be contractual, but the question would depend on the construction of the whole settlement. If it appears, construing the whole settlement, that it was the intention of the contracting parties that a benefit should be secured to such persons, that will be given effect to. But it must arise upon a consideration of the whole clauses of the contract. The old case of *Kinsman* v. *Scot*, in the Dictionary, 12,980, was an example of that. There the destination of the husband's property after the children of the marriage was to the heirs of the wife, and the Court, considering the whole contract, came to the conclusion that the provision was contractual and not testamentary, and accordingly they preferred the heirs of the wife. In the case of *Mackie*, again, it was held, upon a construction of the whole contract, that the provision in favour of the children already procreated of a previous marriage was meant to be contractual, and numerous cases of the kind might be instanced where the decision proceeded upon a construction of the whole contract. But there is nothing in this contract that I can find to suggest that it was the intention of the contracting parties here to give to the grandchildren a contractual right. There are clauses in the contract which I think point exactly the other way, and particularly those to which Lord Kinnear referred, viz., that the husband has a power of appointment among the children of the marriage, meaning quite clearly the immediate children of the marriage, and he reserved no such power of appointment among the grandchildren, or among the grandchildren along with the children. There is also the clause at the end, where it is directed that execution shall pass in favour of the wife and children of the marriage in the names of certain parties, pointing to this, that the persons having a right to execution of the provisions of the contract were the widow and the immediate children, and not the grandchildren, If that be so, and if the destination in this contract to children is a pure destination to children and nothing else, then the result is, that the objects of the trust having failed, the estate of the husband returns to him unaffected by anything unless in so far as he is restricted from dealing with it by the terms of the contract of marriage itself. If that destination is purely testamentary, the result must be that the husband acquires uncontrolled right to the estate except so far as he has restricted himself by the marriage-contract, for there is no other deed existing that I know of which restricts his power to any extent or effect. Now, by the clause in question he did restrict himself, because he left a liferent of his whole estate to his widow to be restricted in certain events, and in the event of no living child of the marriage being in existence at the dissolution of the marriage the widow was only to receive £150 a-year. If that event had not occurred, it is clear that as between the husband and wife he could not have defeated the right given to the wife. But that event has occurred, and the widow's right is now restricted to £150 a-year. But I do not see why the husband should not dispense with that restriction, for that is really all he has done in this case. He has simply dispensed with the restriction imposed in his own favour, and being unlimited proprietor of the estate, I cannot see why he might not do so. It was entirely a matter between him and his widow, no third parties being concerned in the matter.

The grandchild has no *jus crediti* under the marriage-contract, and I cannot see what title he has to interefere. If he has no such *jus crediti*, what right has he to say to his grandfather and grandmother together, or to the grandfather alone, that he shall not dispose of his own estate without consulting him? Now, I think that is the whole case, and holding the proper construction of the marriage-contract to be as I have stated, I think the husband was quite entitled to dispense with the restriction of the annuity to £150, and that he had the right to dispose of his own estate. I therefore concur with Lord Kinnear.

LORD M'LAREN—I concur in the opinion of Lord Kinnear. I would just say in a sentence that it appears to me that the cases in which a grantee under a marriage settlement can claim an indefeasible right

may be referred to the three categories which Lord Kinnear has fully examined in his opinion. The indefeasible right must arise from the relation in which the grantee stands towards the parties to the contract, or it must arise from express obligation, or again from the circumstances that one of the parties at the time of the execution of the contract, or sometime during their joint lives, has put property into the hands of third parties, trustees for the benefit of the claimant amongst others. Now, the present case appears to me not to fall under any of those heads. A provision to grandchildren is not presumed to be obligatory in respect of relationship because the parents are not at least in the first instance bound to provide for their grandchildren. The primary duty of providing for them lies upon their own parents. Then I find in the clauses which have been examined by your Lordships no evidence of any obligation, and there is not even that inferential obligation which is sometimes held to exist where one spouse promises to do something for the heir or relative of the other spouse. Then again the case is distinguished from *Mackie* v. *Gloag's Trustees* by the absence of any deed of present gift delivered by the parties. The case therefore appears to me to fail entirely, and the result is that the spouses, subject to the right given to one another and to the immediate issue of the marriage, were in my opinion entirely unfettered in the disposal of their respective estates.

LORD PRESIDENT—I concur. We shall allow the claim of the trustees to be amended to the effect of claiming the whole estate to be administered according to the trust, and then we shall rank them in terms thereof.

The trustees submitted the following amendment—(Cond. 5) "The said John Scott, Hugh Ross, and Norman Reid, along with the said Mrs Jane Chisholm Scott or Hall, have accepted office under the said trust-disposition and settlement, and have administered the trust-estate up to the present time. They are prepared to continue their administration and management of the estate, and to pay over the trust funds in terms of the said trust-disposition and settlement."

Claim.—"To be ranked and preferred along with the said Mrs Jane Chisholm Scott or Hall as trustees to the whole fund *in medio* in order that they may administer and pay over the trust-estate in terms of the said trust-disposition and settlement and codicil thereto."

Plea-in-law.—"The claimants and the said Mrs Jane Chisholm Scott or Hall, as trustees under the said trust-disposition and settlement and codicil, are entitled to be ranked and preferred to the fund *in medio*."

The Court pronounced the following interlocutor:—

"Recal the said interlocutor: Repel the claim for Andrew Hall Macdonald and the Rev. Colin Macdonald, his administrator: Sustain the claim for the said Mrs Jane Chisholm Scott or Hall, and rank and prefer her on the fund *in medio* in terms thereof: Allow the condescendence and claim for John Scott, Hugh Ross, and Norman Reid to be amended at the bar, and sustain the said claim as amended, and rank and prefer the said claimants on the fund *in medio* in terms thereof, and decern."

Counsel for the Pursuers and Real Raisers, and for Claimant and Reclaimer, Mrs Hall—Asher, Q.C.—Walton. Agent—Thomas White, S.S.C.

Counsel for Claimants and Respondents, Andrew Hall Macdonald and His Administrator-at-law—D.-F. Balfour, Q.C.—Dickson. Agents—Tods, Murray, & Jamieson, W.S.

HIGH COURT OF JUSTICIARY.

Monday, February 1.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

HOUGHTON *v.* PHYN.

Justiciary Cases—Salmon Fishings—Salmon Fisheries (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 123), *sec.* 23—*Failing to Remove Nets, &c.—Jurisdiction.*

Held that the occupier of a fishery in England, the landing-place of which was in Scotland, could not be convicted of a contravention of section 23 of the Salmon Fisheries (Scotland) Act 1868 by failing to remove and secure all nets, &c., within thirty-six hours after the commencement of the annual close time for the district in which the landing-place was.

Richard Houghton was charged at the instance of Charles Steuart Phyn, prosecutor on behalf of the Annan Fishery Board, upon a complaint which set forth that "being an occupier of a fishery in the Solway Firth, the landing-place of which is Annan Waterfoot, in the parish of Annan aforesaid, and within the limits of the district of the river Annan, he did on 25th September 1891 have two drift or whammel nets in a boat at Annan Waterfoot aforesaid, and did fail within thirty-six hours after the commencement of the annual close time in said district, which commenced on 10th September 1891, to remove from said landing-place and grounds adjacent thereto the said drift or whammel nets which had been used or employed by him in taking salmon, and effectually secure the same, so as to prevent their being used in fishing until the end of the close time, contrary to the Salmon Fisheries (Scotland) Act 1868, section 23;" and was convicted. He took a case.

The case set forth—"The facts proved in evidence were that the accused was the occupier of a fishery in the Solway Firth