that the children consented to disentail upon favourable terms to their mother, upon an express agreement that the mother was not to diminish the capital of the disentailed estate, then such an agreement, in my opinion, could only be constituted by deed. It is no doubt familiar in experience that children often do consent to a disentail of their parent's estate upon terms more favourable to the heir in possession than a stranger heir would be likely to agree to; and they do so from motives which are very intelligible, but which are never expressed in the deed of consent. That is always given in the statutory form, and is an unqualified consent, but it is not the province of courts of law to inquire into the motives or expectations of the parties who enter into the agreement. We can only look at the agreement itself, and the idea of extending the scope of the agreement, or altering its terms by parole evidence of intention, appears to me to be contrary to our settled principles of law, and altogether inadmissible. In this view of the argument I am also of opinion that the averments are irrelevant, because there is no averment of an agreement constituted in such a way as the law would recognise.

On the whole view of the case I agree that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR—I am of the same opinion, and I only desire to add that there is one branch of the case which the Lord Ordinary has dealt with in his opinion, but which I think we are not called upon to consider, although it necessarily falls within the scope of the judgment which we are affirming. I refer to the Lord Ordinary's judgment, where he is of opinion that the averments of facility and circumvention are irrelevant to support the conclusions of the summons. He says that the law gives a remedy for circumvention when it occurs, but that he has never heard of its interfering to prevent circumvention; and he indicates an opinion that the present pursuers would have no title to pursue the action for that purpose. Now, I think we are not called upon to express any opinion upon that part of the case, and, for my own part, I desire to reserve my opinion upon the question which the Lord Ordinary has decided; because, assuming that there are such averments as would support a reduction of a will, counsel declined to maintain that their averments could or ought to be so construed as importing any such facility on the part of this lady as the Lord Ordinary assumes to have been intended in that part of his judgment to which I refer. We were told that they had declined to maintain that this lady was not capable of managing her own affairs, and they did so for reasons which were stated, and which appear to be quite natural and reasonable. Therefore, for my part, I desire to say that I give no opinion at all upon that part of the Lord Ordinary's opinion.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers—H. Johnston—Clyde. Agents—Hagart & Burn-Murdoch, W.S.

Counsel for the Defender—Jameson—Salvesen. Agents—Bruce & Kerr, W.S.

Saturday, June 8.

SECOND DIVISION.

CLARK'S TRUSTEES, PETITIONERS.

Trust—Trust (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 7—*Advances for Maintenance of Beneficiaries out of Accumulations of Unappropriated Income.*

A testator directed his trustees, *inter alia*, to pay annuities to his widow and sister, and on the death of the last annuitant to hold the whole residue of his estate for behoof of his children in liferent and their issue in fee equally among them, *per stirpes*, declaring that the shares should not be payable to the beneficiaries entitled to the same until majority in the case of males, and until majority or marriage in the case of females, and further declaring that the provisions should vest in the beneficiaries on the arrival of the respective periods of payment. The testator died in 1882 leaving estate to the value of about £98,000. He was survived by his widow and sister and by five daughters. The widow accepted her alimentary provision, but the daughters claimed and were paid legitim. The annual income of the trust-estate remaining after withdrawal of the legitim fund was much larger than was necessary to pay the annuities, and considerable sums of interest accumulated in the hands of the trustees. In 1895 the trustees petitioned the Court, under section 7 of the Trusts Act of 1867, for authority to pay £500 per annum, out of the funds undisposed of by the testator, to each of the two daughters of the testator who were married, for the maintenance and education of their respective families. The Court (*dub.* Lord Rutherfurd Clark) *authorised* the trustees to make the proposed payments for the period of two years.

Peter Clark died upon September 14th 1882 leaving a trust-disposition and settlement dated August 29th 1878, by which he provided, *inter alia*, an annuity of £600 per annum to his widow so long as she remained unmarried (restrictable in the event of her marrying again to £100), and further, desired his trustees to pay her an allowance of £100 for each of his daughters living with her, for their maintenance, clothing, and education. He also left an annuity of £100 to his sister. By the last purpose of his settlement the testator directed his trustees, upon the

second marriage of his wife, should such an event take place, to hold and retain during her subsequent lifetime the remainder of his said means and estate not set aside for securing payment of the foresaid annuities, for behoof of his whole children equally among them, share and share alike, and to pay and apply the free annual proceeds thereof, or such portion of the same as the trustees might consider sufficient, to and amongst the said children equally, share and share alike, and upon the death of the survivor of his said wife and sister he directed his trustees to hold and retain the whole residue and remainder of his means and estate for behoof of his whole surviving children equally among them in liferent for their liferent alimentary use of the free annual proceeds thereof only and their respective lawful issue in fee equally among them, *per stirpes*, declaring that in case any of his said children should decease leaving lawful issue, such issue should succeed always in room of their respective parents, but that the said shares should not be payable to the beneficiaries entitled to the same until they respectively attained the age of 21 years complete in case of males, or, in case of females, until they attained that age or were married, whichever of these events should first happen. The testator further declared that the whole of the foregoing provisions should vest in the beneficiaries at and upon the arrival of the respective periods of payment thereof. The settlement further provided that the provisions in favour of the testator's wife and children should be accepted by them as in full of terce, *jus relictæ*, legitim, and every other claim, legal or conventional, competent to them, or any of them, by or in consequence of his death.

The net value of the estate left by the truster amounted to £97,928, 10s. 5d. The testator was survived by his widow and sister, and by five daughters, of whom two had attained majority.

The widow accepted the provisions in her favour in the settlement, but the two daughters who had attained majority claimed, and were paid legitim, which was found in March 1883 to amount to £5341, 10s. to each daughter. The three remaining daughters also claimed and were paid their shares of legitim as they attained majority.

The testator's second daughter married George Baillie Main in 1883, and his third daughter married Robert Baillie Main in 1885. In 1895 Mrs George Main had five, and Mrs Robert Main six children.

In May 1895 Mr Clark's trustees petitioned the Court, in virtue of its *nobile officium* and of its powers under the Trusts Acts, for authority to pay and apply out of the funds of the trust-estate of the said Peter Clark, left undisposed of by his trust-disposition and settlement, the sum of £1000 per annum, or such other sum as the Court might consider necessary or proper to and for the maintenance, education, and upbringing of the children of the testator's two married daughters.

The petitioners stated — "When the legitim fund was withdrawn the amount of the estate left under the management of the petitioners was £72,221, 0s. 4d. The annuity provided to the testator's sister having lapsed on her death in 1891, and there being no provision in the settlement for the application (during the widow's survival without having entered into a second marriage) of the income of the trust-estate beyond the annuity of £600, a considerable sum has remained in each year in the hands of the petitioners. By the addition of surplus income and the profits derived from the sale of certain of the securities in which part of the trust funds was invested, the amount of the estate at 31st December last is now increased to £104,574, 15s., being fully £6600 more than its net amount at the testator's death. The income of the trust investments for the current year will slightly exceed £3400, and after deducting widows' annuity and other expenses there will be a surplus income of at least £2700 a-year, for the disposal of which in the events which have occurred the said trust-disposition and settlement makes no provision, and which will fall to be accumulated for the benefit of the truster's grandchildren, who are the fiars under the settlement. . . . The petitioners have been applied to by Mr Clark's two married daughters on behalf of their respective families, who will ultimately become entitled to shares of the fee of the estate, for a payment to each of them out of the aforesaid surplus income undisposed of by the testator to assist them in maintaining and educating their children in a more liberal way than their present means enable them to do, and in a manner more suitable to the fortune which the children will inherit. . . . Mr George Baillie Main, who at the time of his marriage was in the employment of Hutcheson & Company, oil merchants in Glasgow, was shortly thereafter assumed as a partner in that business (which is now carried on under the firm of Hutcheson, Main, & Company), and contributed his share of capital therein out of the sum which his wife had received as her share of legitim, the remainder of the sum so received being expended in the building of a residence for his wife and family. Owing to the increased cost of living and education, and to the diminished profits of his business, due to general trade depression, he has been obliged to some extent to encroach on his capital in order to suitably educate the truster's grandchildren for the station in life which they will ultimately occupy. Mr Robert B. Main carries on business as a gas engineer under the firm of R. & A. Main. The greater part of the sum received by his wife as legitim has been expended in the erection of a dwelling-house at Pollokshields to be occupied as a residence for the family, and the remainder has since been sunk in his business. With the view to the development of the business, and the maintenance and education of the children, a sum of £5500 was borrowed by him and his wife on the security of the said house, and of his business premises, and has partly been sunk in the business and partly expended in the upkeep of the family. In

the case of both Mr G. B. Main and Mr R. B. Main it is stated by them that the above-mentioned expenditure upon dwelling-houses and other consequent family expenses, present and prospective, would not have been undertaken but for their belief that within a limited number of years, and without reference to the widow's survivance, the trust income, in whole or in part, would become available for family purposes. Unless some allowance is now made for the children's maintenance it will probably be necessary for their parents to sell their houses, which they state could only be done at a sacrifice. At the same time the accommodation in the houses is no more than sufficient for the respective families, and it would be to the disadvantage of the truster's grandchildren if they were now to be less snfficiently housed and provided for than they have been in the past. In these circumstances the petitioners are satisfied of the propriety of making the payments now asked out of the undisposed-of income of the estate under their management, and that to an amount not exceeding £500 per annum for each family, but they are unable to do so without the authority of the Court."

Section 7 of the Trusts (Scotland) Act 1867 provides—"The Court may from time to time, under such conditions as they may see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for the maintenance or education of such beneficiaries or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced."

Cases cited—*Pattison and Others*, February 19, 1870, 8 Macph. 575; *Baird* v. *Baird's Trustees*, February 24, 1872, 10 Macph. 483; *Ross's Trustees*, July 14, 1894, 21 R. 995; *Duncan's Trustees and Others*, July 17, 1877, 4 R. 1093.

At advising—

Lord Justice-Clerk—The facts in this petition are that the late Mr Clark, who died in Glasgow in September 1882 leaving considerable estate, directed that his trustees were to allow £600 a-year to his widow and an allowance of £100 for each daughter with £500 for the daughters for outfit on marriage, the £500 to be deducted from the share which they were to receive out of his estate. In the event of the marriage for a second time of his widow, the trustees were to hold the whole estate for the children equally, the annual proceeds of such part as the trustees might see fit to be divided, and the residue to the surviving children equally among them in liferent, but which should not be payable to the beneficiaries until they reached the age of twenty-one, the vesting to be when the period of payment arrived. There was an allowance, further, to daughters of a sum not exceeding £1000 above the £500 for the purpose of a marriage outfit. The children, under certain advice which they got at the time, claimed their legitim, expecting that when that which they claimed had been replaced in the fund they would then be entitled to share in the annual proceeds of the estate while it remained in the hands of the trustees. The circumstances in which they stand now are that there are two families, of the truster's second daughter and third daughter Jessie and Catherine Margaret Clark, one of five children and the other of six, and the greatest age of any of these is eleven years, and the youngest are of very tender years, indeed months. Now, in these circumstances, application is made to allow, under the 7th section of the Trust (Scotland) Act, something out of the annual proceeds of the fund as being necessary for the upbringing of these children according to their position, as the estate of Mr Clark is accumulating; that is to say, they want £500 a-year for each of the families. Now, the circumstances under which the application is made as regards the fund, are these—that there has been for a good number of years a very large surplus indeed after meeting the widow's annuity and any expenses that the trustees have to encounter. That surplus amounts now, at the present time, to £2700 per annum, and a very considerable accumulation has been made of capital out of what has been saved of the income during a number of years. The question is whether under this section of the Act of Parliament we should allow the trustees to apply what we may call accumulation of capital out of income to this extent, or to any extent, towards the support and upbringing of these young children. The conditions under which it may be given are that it is given for maintenance and education; that it is not expressly prohibited by the trust deed; and that the rights of parties other than the heirs and beneficiaries shall not be thereby prejudiced; and the circumstances of this case seem to meet all these requirements. The only remaining question is whether we can hold under this clause of the Act, that the advances are necessary for the maintenance and education of such beneficiaries. Now, that is always a question of degree according to circumstances. Absolute necessity is not in question in the case; it is necessity in regard to the condition of the parties on whose behalf the application is made, and looking to the very large discretionary power given by the 7th section of the Trusts (Scotland) Act, I am inclined to think that we may hold that what is proposed is right. The trustees who have considered the case in the interests of parties, think so; and I think we may safely hold that these allowances may be given out of the fund.

Lord Rutherfurd Clark—I hesitate very much. I doubt whether we have power either under the statute or at common

law to make the order which is asked. But as your Lordships are of the contrary opinion, I shall not enter further into the question.

LORD TRAYNER—The section of the Act upon which the present petition is based enables us to authorise advances such as are here prayed for provided that the interest in the fund has vested, and secondly, that the advances are necessary for the maintenance and upbringing of the beneficiaries. I have had some difficulty in holding that this application should be granted. It is not perfectly clear either that the fund has vested or that it is necessary for the maintenance and upbringing of the children. Looking at the authorities cited to us, however, I think we may hold that there is a vested interest in the children as a class.

As to the question whether the advance is necessary or not, I can only reach the result of holding that it is by giving a very liberal construction to this remedial statute. There are also special circumstances in this case, and looking to these, to the position which the testator's grandchildren will be entitled to occupy when they come into possession of the capital, and the very large surplus income yearly accruing, I think we may allow the trustees to make the advances asked for a limited period.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"Authorise and empower the petitioners, as trustees of the deceased Peter Clark, merchant, Glasgow, to pay and apply out of the funds of the said trust-estate undisposed of by the said deceased, for the maintenance and education and upbringing of the children born or to be born of Mrs Jessie Flora Clark or Main and Mrs Catherine Margaret Clark or Main, to the extent of the sum of not more than £500 per annum to each family, and that for the period of two years from the 15th day of May 1895, and decern *ad interim: Quoad ultra* continue the petition: Further, authorise the expenses of this petition, as the same may be taxed by the Auditor, to be paid out of the shares of the estate provided to the said children."

Counsel for the Petitioners—Burnet—Clyde. Agents—Carmichael & Miller, W.S.

Tuesday, February 12.

OUTER HOUSE.

[Lord Wellwood.

MACLEOD *v.* MUNRO.

Reparation—Slander—Statement to Presbytery by One Member concerning Another—Privilege—Malice—Probable Cause—Form of Process, 1707, *cap.* 7, *art.* 3.

In an action of damages by one parish minister against another the pursuer alleged that the defender had made slanderous statements regarding him to the presbytery, of which they were both members, without first acquainting him with the charge against him, or consulting with other members of the presbytery, as required by the law and practice of the Church, and in particular by article 4 of chapter 7 of the Form of Process 1707, which provides that "All christians ought to be so prudent and wary in accusing ministers of any censurable fault, as that they ought neither to publish nor spread the same, nor accuse the minister before the presbytery without first acquainting the minister himself, if they can have access thereto, and then if need be, some of the most prudent of the ministers and elders of that presbytery, and their advice got in the affair." The defender pleaded privilege.

Held (by Lord Wellwood) that this article applied to accusations by others than members of the presbytery, and did not affect the question of privilege; that the defender was privileged in making the statements complained of to the presbytery, and therefore that malice and want of probable cause must be put in issue; but *observed* that failure to take the very proper precautions recommended by the article might go far to establish malice and want of probable cause.

This was an action of damages for slander by the Rev. Donald Macleod, parish minister of Tarbat, in the county of Ross and Cromarty, against the Rev. James Munro, minister of Easter Logie, in the same county. Both were members of the Presbytery of Tain.

The pursuer averred—"(Cond. 2) At a meeting of the Presbytery of Tain, held on Tuesday 2nd October 1894, after the business of the meeting had been transacted, but before the benediction had been pronounced, the defender slanderously stated in the hearing of all the members of presbytery present, that the pursuer had taken to shooting sheep in the parish, taking them home and skinning them and eating them, or used words to that effect. By the said statement the defender implied and intended to convey that the pursuer was in the habit of shooting sheep not belonging to himself, and of appropriating them to his own use, and was a thief. The words used by the defender were so understood by the members of presbytery present.