Nov. 17, 1830. Lordships, that the interlocutors of the Court below be affirmed, with L.50 costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed, with L.50 costs.

Appellant's Authorities—20 Ersk. 1. 56.
Respondents' Authorities—Fletcher *v.* Lord Londes, April 9, 1827.—(1 Bligh, 144.)

J. CHALMER,—A. DOBIE,—Solicitors.

No. 41.

MRS ELIZABETH EWEN or GRAHAM, Appellant.—*Wetherell—Lushington.*

MAGISTRATES OF MONTROSE, (Trustees of the late JOHN EWEN,) Respondents.—*Spankie—Robertson.*

Fraud.—Discharge.—Where a daughter had rights under her father and mother's contract of marriage, and the father, at a time when she and her husband had just attained majority, were in pecuniary distress, and the husband was about to sail to India, obtained a discharge from them without the assistance of an agent on their part; and the discharge narrated that it was granted in consideration of L.315, agreed to be given by the father out of his own free-will, and from regard to his daughter and husband, (whereas he entertained different sentiments,) and that one half had been instantly paid, (whereas he retained a large part in extinction of an alleged debt, and only gave a promissory-note at twelve months for the balance;) and the other half was to be payable at his death. Held (reversing the judgment of the Court of Session) that the discharge was not binding.

Testament—Writ.—Where a trust-deed of settlement for the foundation of an hospital for boys, was blank as to the sum to be provided, and the number of boys to be admitted—Held (reversing the judgment of the Court of Session) that it was inept.

Nov. 17, 1830.

1ST DIVISION. Lord Newton.

JOHN EWEN married Janet Middleton in 1766; and on the 7th of December of that year, they executed a post-nuptial contract, by which it was, inter alia, declared, 'That 'the residue of his whole subjects, whether heritable or mo-'vable, shall belong to his children equally; declaring hereby, 'that in case the said child or children shall afterwards die 'in minority, without lawful issue of their bodies, and during 'the lifetime of the said Janet Middleton, their mother, then the 'general disposition before written, conceived in her favour, shall 'revive and return to its full force and effect, and she shall have 'the entire and free disposal of the whole effects and subjects, 'whether heritable or movable, hereby conveyed, alike as if

'there had not been a child of the marriage in life, at the disso- Nov. 17, 1830.
'lution thereof. And in like manner, in case the said John Ewen
'shall survive the said Janet Middleton, his spouse, and there
'should be a child or children of the marriage in life at the disso-
'lution thereof, he binds and obliges himself to aliment, main-
'tain, and educate the said child or children suitable to their
'station, until they are put in a way of doing for themselves, and
'that the subjects, whether heritable or movable, shall belong
'to them equally at his death.' About the period of the execution of this deed the appellant was born—she having been baptized on the 1st of January, 1767. Her mother died soon thereafter, and there was no other child of the marriage. In 1787 she married James Graham, second son of William Graham, Esq. of Morphie. They were both at this time about twenty years of age. In the course of the following year (1788) they had a son, and Mr Graham had resolved to go to India for the purpose of improving his fortune, leaving his wife and child in Scotland. On the evening of the 16th December of that year, a deed denominated a post-nuptial contract was executed by Mr Graham, the appellant, and her father, Mr Ewen. It was alleged by the appellant that this deed was prepared by the agent of her father, without the intervention of any agent on her part, and that it was brought by him ready extended, and the immediate subscription of her and her husband required, and they accordingly did so, without having seen the post-nuptial contract which had been made between her father and mother.

The deed proceeded on the narrative of the marriage between the appellant and Graham—that he intended to go abroad, where he might remain for some time, and that it was proper that he should make a provision for his wife and child. It then set forth that 'in like manner, the said John Ewen, out of his own free-will,
'and from the regard he bears to his said son and daughter, the
'parties have, with mutual advice and consent, concerted and set-
'tled upon the post-nuptial contract underwritten; therefore, in
'pursuance thereof, the said John Ewen hath instantly, at the
'making thereof, satisfied and paid to the said James Grahame,
'the sum of L.157, 10s., as one moiety of L.315 sterling, which
'he has agreed to give in name of tocher or dowery with his said
'daughter, of which moiety the said James Grahame and his said
'spouse hereby grant the receipt, and discharge the said John
'Ewen, his heirs, executors, and successors, thereof, renouncing
'the exception of not numerated money, and all other exceptions
'and objections on the contrary. And sicklike, the said John Ewen
'binds and obliges him and his foresaids to satisfy and pay to the

Nov. 17, 1330. ‘ said James Grahame, his heirs, executors, or assignees, the re-
‘ maining moiety or half of the said tocher, being the like sum of
‘ L.157, 10s. sterling, and that at the first term of Whitsunday or
‘ Martinmas next, and immediately following, year and day after
‘ the decease of the said John Ewen, with a fifth part more, &c.
‘ and which whole sum of L.315 Sterl. is hereby declared to be in
‘ full satisfaction to the said Mrs Elizabeth Grahame, alias Ewen,
‘ and her said husband, and they do hereby accept of the same, in
‘ full contentation to them of all goods, gear, debts, sums of money,
‘ and other movables whatsoever, which they might anywise ask,
‘ claim, or crave by and through the decease of the said Janet
‘ Middleton, her mother, by virtue of her contract of marriage
‘ with the said John Ewen, her father, or of any clause, article,
‘ or condition therein contained, which is hereby discharged, to
‘ all intents and purposes, as fully and effectually as if the same
‘ was particularly engrossed; or by any other manner of way;
‘ or by and through the decease of the said John Ewen, her
‘ father, whenever the same shall happen at the pleasure of God,
‘ either as bairn's part of gear, dead's third, portion-natural, or
‘ on any other cause or account whatsoever, good-will only ex-
‘ cepted.’ The deed then concluded with a provision by Grahame of L.500 in favour of his wife and child.

The first moiety of the L.315 was settled by Ewen, discharging an account of L.61, 9s. 3d., which he alleged was due to him by the appellant and her husband, and by granting a promissory-note for L.96, payable twelve months after date. In regard to the other moiety, no other security than the personal obligation contained in the deed was granted for payment of it.

It was alleged by the appellant that at this time her father was in opulent circumstances, and in a profitable trade as a merchant, drawing upon an average about L.700 a-year—that he was possessed of heritable property, and that he had never accounted to the appellant for her mother's share of the goods in communion. These, as well as many other allegations made by the appellant, to the effect of establishing fraud on the part of her father, were denied, and no proof was taken in regard to them. It was, however, admitted that the deed was executed on the evening previous to the departure of the appellant's husband for India, and that it was prepared by Mr Ewen's agent; but it was alleged that ample means for deliberation and consideration were enjoyed by the appellant and her husband before the execution of the deed. It was also admitted that they were little more than twenty-one years of age at the period of its execution.

Mr Ewen survived till 1821, by which time he had accumulated

a fortune of about L.14,000, of which a small part was heritable. Nov. 17, 1830.
On the 19th of October, and while on death-bed, he executed a trust-disposition and deed of settlement in favour of the respondents and others, by which he conveyed to them his whole estates, heritable and movable, for payment of various legacies, and in particular, of an annuity of L.40 in favour of the appellant, and

'5thly, for payment to the magistrates and town council of the 'town of Montrose, the place of my nativity, and the ministers 'or clergymen of that town, of whatever sect or denomination 'of Christians they may be, or to any one or more of their number who may be appointed by them, the said magistrates and 'council, and clergymen, to receive the same, of the sum of 'L.6000 sterling, for the foundation and establishment of an 'hospital in Montrose, similar to Robert Gordon's hospital in 'Aberdeen, for the maintenance, clothing, and education of the 'lawful sons and grandsons of decayed and indigent burgesses 'of guild, and craftsmen burgesses of the said town of Montrose; 'and which sum, and interest and profits arising therefrom, shall 'remain vested in the said magistrates and town council, and 'clergymen, and be laid out or managed by them for the purposes aforesaid, under such rules, regulations, and directions 'as I shall establish and appoint, by any separate deed or writing 'under my hand; and failing such deed or writing, under rules 'and regulations similar to those now existing for the government and management of Robert Gordon's hospital in Aberdeen aforesaid; with such additions to, or alterations thereon, 'as may be made by my said trustees, and which they are hereby 'empowered to do; and which rules, regulations, and directions, 'the said magistrates and town council, and clergymen, shall 'be bound strictly to abide by and observe: And, with respect 'to the rest, remainder, and residue of my means, property, and 'estate, including, as a part thereof, the foresaid legacy to the 'said Baron Grahame, my grandson, in the event of his death 'before his receiving the same, and also the sums to be secured 'and set apart by my said trustees for answering and paying the 'foresaid annuities to my said daughter and the said Elizabeth 'Wallace, after the said annuities shall cease and determine, and 'be no longer payable, I hereby will, direct and appoint such residue and remainder to be paid or conveyed and made over by 'my said trustees to the said magistrates and town council, and 'clergymen of Montrose, or to any one or more of their number 'authorized by them to receive the same, as an addition to, and 'to be employed for the same ends and purposes with the foresaid legacy of L.6000: Declaring, that the said sum and residue

Nov. 17, 1830. ‘ shall be payable by my said trustees at the first term of Whit-
‘ sunday or Martinmas that shall happen twelve months after
‘ my decease, or as soon thereafter as the funds under trust can
‘ be realized: Also declaring, as it is hereby specially provided
‘ and declared, that neither the said sum and residue, nor any
‘ part thereof, shall be diverted at any time from the uses and
‘ purposes for which the same is hereby destined, or applied to
‘ any other use or purpose whatever; and the said magistrates
‘ and town council, and clergymen, shall lend out the free balance
‘ of the interest and profits arising from the said sum and residue
‘ every year, on such heritable or personal security as they may
‘ deem sufficient at the time, so as the same may accumulate,
‘ with the additional interest arising thereon, until the principal
‘ sums, and accumulated interests, shall amount to the sum of
‘ L. , sterling, when the same shall be stocked, secured,
‘ and employed upon lands, bonds, obligations, or other sufficient
‘ security, from time to time, for erecting and maintaining the
‘ foresaid hospital, and for the maintenance, clothing, and educa-
‘ tion of boys of the description above mentioned:
‘ It being always in the power of the managers of the said funds,
‘ if they shall continue to increase, to augment the size of the
‘ hospital, and number of the boys to be maintained therein, as
‘ above mentioned; and they are also hereby empowered to pay
‘ such sums of apprentice-fees for the said boys, and for fitting
‘ them out after their apprenticeships are expired, as shall from
‘ time to time be payable, for these purposes, to boys educated
‘ in Robert Gordon's hospital aforesaid.’

Two days thereafter, Mr Ewen died.

Of this deed, and also of the post-nuptial contract executed by her and her husband, the appellant brought an action of reduction, on the ground, 1st. That supposing the discharge was applicable to her rights as heir of provision under the marriage-contract of her father and mother, (which she disputed,) it had been obtained by fraud and deception, and therefore ought to be set aside. 2d. That if it did not import such a discharge, then the deed of settlement was in fraudem of her rights as heir of provision. 3d. That as the deed of settlement contained blanks in essentialibus, it was an incomplete deed, so that her father had died intestate, and she was entitled to succeed to him as his heir at law and next of kin. And, 4th. That as the deed of settlement was executed upon death-bed, her rights as heir of provision could not be affected by it, and that a discharge by an heir of a right to reduce a death-bed deed was inept.

On the other hand, the respondents maintained, 1st. That the

discharge embraced her rights as heir of provision. 2d. That the allegations on which the charge of fraud was founded, were not true, and were not relevant. 3d. That the blanks were unimportant, because the deed in other respects afforded sufficient means for effectually carrying it into execution. And, 4th. That although the appellant was no doubt entitled to have the deed reduced as to the heritable property, yet the law of death-bed did not apply to movables, or to the right of an heir of provision to such species of property. Nov. 17, 1830.

The Court reduced both the discharge and the deed of settlement; but, on a petition by the respondents, while they so far adhered to their interlocutor as to reduce the trust-deed, 'as 'having been granted in fraudem of Ewen's marriage-contract 'with Janet Middleton,' they altered their interlocutor 'in so 'far as it may be construed to extend to the reduction of the 'marriage-contract entered into betwixt the respondent (appel-'lant) and James Grahame, her husband: And found it unne-'cessary to reduce the said contract, in respect that the same 'does not import any discharge of the rights competent to the 'pursuer (appellant) on the death of her father, as heir of pro-'vision, under her father and mother's contract of marriage.'*

Against this judgment the respondents appealed; and, on the 28th of June, 1825, the House of Lords found that 'the mar-'riage-contract entered into between the respondent and James 'Grahame, her husband, imports a discharge of all the rights 'competent to the pursuer as heir of provision under her father's 'and mother's contract of marriage;' and, therefore, reversed the interlocutors in so far as inconsistent with that finding, and remitted the case back to the Court of Session.†

When the case returned to the Court of Session, decree of reduction on the head of death-bed was (of consent) pronounced as to the heritable property; and the remaining points as to the fraud, the blanks in the trust-deed, and the effect of death-bed in regard to the movables came to be discussed. With reference to these points, the Lord Ordinary found 'That there is no evidence 'produced in process sufficient to establish that the subscrip-'tion of the pursuer (appellant) or of her husband to the post-'nuptial contract of marriage was obtained by the fraud of her 'father, the late Mr John Ewen, or that the consideration given 'by that deed, in return for the pursuer's discharge of her rights 'under her mother's contract of marriage, was, considering the 'probable amount of Mr Ewen's fortune at the time, unfair or

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* 2 Shaw and Dunlop, p. 612. † Ante I., page 595.

Nov. 17, 1830. ‘ inadequate: That there is nothing condescended on by the ‘ pursuer which is relevant to infer such fraud, in opposition to ‘ the evidence to the contrary already in process: That the dis- ‘ charge contained in the said deed bars the pursuer from making ‘ any claim in the character of heir of provision under her ‘ mother's contract of marriage, and that it is only in the charac- ‘ ter of her father's heir at law that it can be competent to her to ‘ challenge his trust-settlement on the head of death-bed, in ‘ which character her right of challenge is limited to the heri- ‘ tage: That as these blanks do not occur in that part of the deed ‘ which gives directions to the trustees, pointing out the uses to ‘ which they are to apply the trust-funds, they cannot have the ‘ effect of annulling the trust-conveyance, whatever they may ‘ have in vacating the bequest to the magistrates and clergy of ‘ Montrose, for the purpose of erecting and maintaining an hos- ‘ pital: But, further, That the omission to fill up the said blanks, ‘ is not sufficient to vacate the said bequest, and that the same ‘ is notwithstanding effectual.’ His Lordship therefore assoil- zied the respondents; and, with reference to the question as to the blanks, issued the subjoined Note.*

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* Note.—It appears from that part of the trust-deed which is intended to mark out the powers and duties of the managers of the hospital, that the testator had been aware that the funds destined for this purpose might not be sufficient for carrying his object into immediate execution, and that he intended to allow them to accumulate for a certain time. It appears farther, that he intended to limit this accumulation by fixing the sum at which it was to stop; but that, not having made up his mind when the deed was executed, the sum was left blank, and that he died without having had it filled up. The question, and it is one of considerable difficulty, comes therefore to be, whether or not is the uncertainty thereby created, as to the period of the accumulation, and, of course, as to the size and extent of the hospital at its commencement, or the consideration that the testator's intention of fixing these himself, has not been carried into effect, sufficient to render void his declared purpose and object of founding an hospital? The Lord Ordinary thinks it can scarcely be maintained that the testator's failure to complete any direction, however minute and trifling, as to the management of the hospital, which it may appear he had intended to give, can have such an effect. Thus, suppose (to take the cases put by the defenders) that in pointing out the dress to be worn by the boys, he had declared that they were to wear cloth of a colour, or that they were to have a flesh dinner on days of the week, and that he had died before filling up these blanks, it will not surely be held that such an omission would have totally defeated his main purpose, and carried the funds to his heirs at law. But if this cannot be maintained, then some other criterion must be resorted to, and the Lord Ordinary cannot see any line of distinction but one founded on the importance of the omission. He conceives such blanks will only be fatal which render uncertain either the object and purpose of the bequest, the person in whose favour it is made, or the amouut of the sum bequeathed, or, at least, that the direction which was intended to be given, must be of that nature and importance that it is reasonable to presume the testator would not have inclined to leave the legacy unless accompanied by the direction. In the

The appellant reclaimed, but the Court, on the 5th of Feb- Nov. 17, 1830.
ruary, 1828, adhered.*

Mrs Ewen or Grahame then appealed.

Appellant.—1. Independent of the allegations as to which no proof has been allowed, there is sufficient evidence from the admitted facts, and what is set forth in the deed itself, to establish that it was obtained by fraud Under the marriage-contract of her father and mother, valuable rights were secured to the appellant, and which it now appears were worth upwards of L.14,000. These rights she is made to discharge in consideration of L.315, of which one half was not to be payable till after her father's death, and for which no security was given; while the other half was not paid in full, but the amount of a pretended account set off against it, and a promissory-note granted for the balance. Besides, the deed sets forth a falsehood calculated to mislead and deceive the appellant. It states that the payment was made, not in respect of the obligation of which her father was truly seeking a discharge, but 'out of his own free-will, and from the regard 'he bore to his son and daughter.' If this statement were true, and the L.315 was given animo donandi, then no consideration whatever was paid to the appellant for the discharge.

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present case, it does not appear to the Lord Ordinary that the blanks in the deed are of that importance. The amount of the legacy to be paid by the trustees is clear and certain; the persons who are to reap the benefit are distinctly specified; and the nature and the quality of the maintenance, clothing, education, and apprentice-fees which they are to receive are fixed by reference to another hospital, to which the new one is, in all these respects, to be similar. Even had the clause as to the extent of the accumulation been altogether omitted, there seems to be direction sufficient to regulate this matter in a previous part of the deed, where the testator directs that the sum bequeathed, with the interest and profits arising from it, shall remain vested in the managers, 'and be laid out and managed by them for the purposes foresaid,' under such rules and regulations as he should afterwards make; or, failing such, under rules similar to those existing for the management of Gordon's Hospital, 'with such 'additions to, or alterations thereon, as may be made by my said trustees, and which 'they are hereby empowered to do.' So that there does not appear to be much necessity for the interference of a Court of Equity to supply the defect. It may be further observed, that the uncertainty of the period of accumulation is reduced within comparatively narrow limits, by the operation of the Act of the 39th and 40th Geo. III. cap. 98, by which such accumulation is restricted to the period of twenty-one years from the time of the testator's death. The blank as to the number of boys seems of little moment, as this fell to be regulated by the ultimate amount of the fund, and the number is allowed by the testator to be afterwards augmented, as the funds may permit.

* See 6 Shaw and Dunlop, p. 479.

Nov. 17, 1830. And if, on the other hand, it was not true, then the deed was obtained by falsehood and misrepresentation, and so was liable to be set aside.

2. The blanks in the trust-deed are fatal to it, being in essentialibus. The grantor had two objects in view—the accumulation of a certain sum of money with the view of founding an hospital, and the specification of the persons who were to enjoy the benefits of that hospital. To give legal effect to these objects, it was necessary to specify the amount of the sum with which the hospital was to be founded, and the number of persons who were to have the benefit of it. Unless this were done, it would be impossible to execute the will. The grantor might either have done it himself, or by means of third parties. In the present case, he had evidently intended to do so himself, because he leaves blanks to be filled up, and confers no power upon any one to fix either the one or the other. The deed, therefore, is incomplete, and being so, the grantor has died without duly executing his will.

3. It is admitted that the deed of settlement was executed upon death-bed, and it is settled law, that no discharge previously granted by the heir can prevent him from challenging the deed on that ground. The question therefore comes to be, whether the appellant is entitled to challenge the deed on the head of death-bed. It is said that this right is confined to heritable property; but this is a mistake. It is competent to an heir of provision, to the effect of maintaining his rights, of whatsoever nature, unaffected by any deed executed on death-bed.

Respondents.—1. Both the appellant and her husband were quite capable of judging of the value of their rights when they granted the discharge, and the price paid by Mr Ewen was with reference to the actual state of his circumstances, and, considering the contingent nature of the appellant's rights, perfectly fair. He might have died utterly insolvent, in which case her right would have been worth nothing at all, whereas she got a present payment of L.157, and an obligation for a sum of equal amouut. But supposing that there had been an inequality in the bargain, that circumstance is not relevant to set it aside; neither can any weight be put on the introduction of the expressions as to the payment having been made out of Mr Ewen's own free-will, and from regard to the appellant and her husband. That statement was quite consistent with the truth. He was under no obligation to pay them a single fraction, and it depended

entirely upon a contingency whether they could ever derive any benefit from the provision under the contract. Nov. 17, 1830.

2. The blanks in the deed are immaterial, for although the grantor himself has not specified the amount of the capital or the number of boys, he has not left these involved in uncertainty. He has committed them, with the other details, to the discretion of the trustees, and he has specified the mode in which they are to be carried into effect, by declaring that the hospital is to be similar to Robert Gordon's hospital in Aberdeen, and that the same rules that exist in regard to that hospital are to be applied to his hospital; so that, having that model before them, the trustees have sufficient directions as to the money to be expended and the number of boys provided for. Even if the amount had been left uncertain, it would be fixed and ascertained by the statutes 39 and 40 Geo. III. c. 98.

3. The plea on the head of death-bed is totally unfounded. It has been already decided that the appellant has discharged her rights as heir of provision, and therefore she cannot found upon them. But even if she could, the law of death-bed does not apply to movables.

LORD WYNFORD.—My Lords, The father of the appellant made a settlement on his marriage, which contains the following clause:—'That 'the residue of his whole subjects, whether heritable or movable, shall 'belong to his children equally; declaring hereby, that in case the said 'child or children shall afterwards die in minority, without lawful issue 'of their bodies, and during the lifetime of the said Janet Middleton, 'their mother, then the general disposition before written, conceived in 'her favour, shall revive and return to its full force and effect, and she 'shall have the entire and free disposal of the whole effects and subjects;' but in case there is a child which survives her, then all the property which these parties then possessed, *or which might be acquired by him*, previous to his death, was to belong to those children. This instrument left to the settler, perhaps, the power of squandering his property in his lifetime; but whatever he left at his death, whether possessed by him at the time he made the settlement, or subsequently acquired, became the vested property of his child or children. The appellant was his only child, and on the death of her father and mother she became entitled, under this settlement, to all the property of which he died possessed—to what he left behind him. The appellant married James Graham. No settlement was made by these parties at the time of their marriage. About a year after their marriage they were about to proceed to London; at ten o'clock of the night preceding their departure, when they were on the point of leaving their country and all that was dear to them, perhaps for ever,—when, in addition to the anguish that such a separation must occasion, they must have been agitated by the hopes and fears that the

Nov. 17, 1830. journey they were about to undertake could not fail to excite,—the deed to which I am about to call your Lordships' attention was for the first time presented to them by Ewen, the father, for execution. The parties, 'considering that the said James Grahame and Elizabeth Grahame, alias 'Ewen, his spouse, were lawfully married to each other upon the day 'of November 1787, and have lived together since that time as married 'persons, and that now a son is born, lawfully procreated of the said 'marriage, called John, and also considering that there was no contract of 'marriage entered into between them prior to the celebration of the mar-'riage, and the said James Grahame intending soon to go abroad, where 'he may remain for some time in the prosecution of his affairs, he is desi-'rous to make some suitable provision for his said spouse and family, 'according to his ability; and in like manner, the said John Ewen, out 'of his own free-will, and from the regard he bears to his said son and 'daughter, the parties have, with mutual advice and consent, concert-'ed and settled upon the post-nuptial contract underwritten; there-'fore, in pursuance thereof, the said* *John Ewen hath instantly, at the 'making thereof, satisfied and paid to the said James Grahame, the 'sum of* L.157, 10s., as one moiety of L.315 sterling, which he has 'agreed to give in name of tocher or dowery with his said daughter, of 'which moiety the said James Grahame and his said spouse *hereby 'grant the receipt, and discharge* the said John Ewen, his heirs, executors, 'and successors, thereof, renouncing the exception of not numerated 'money, and all other exceptions and objections on the contrary. And 'sicklike, the said John Ewen binds and obliges him and his foresaids to 'satisfy and pay to the said James Grahame, his heirs, executors, or as-'signees, the remaining moiety or half of the said tocher, being the like sum 'of L.157, 10s. sterling, and that at the first term of Whitsunday or Mar-'tinmas next, and immediately following, year and day after *the decease 'of the said John Ewen*, with a fifth part more of liquidate penalty, in case 'of failure, and the annual-rent of the said moiety during the not payment, 'after the term of payment thereof, above-written; and which whole sum of 'L.315 sterling is hereby declared to be in full *satisfaction to the said Mrs 'Elizabeth Grahame, alias Ewen, and her said husband*, and they do hereby 'accept of the same in full contentation to them of all goods;' and so on. If this instrument is to be permitted to stand, it gets rid of the settlement made on the marriage of the appellant's mother, and gives to her father the power of disposing of his property as he thought proper at his death. If this deed be a fraudulent deed, it is void, and all the rights secured to the appellant by the settlement on her mother, remain to her. Fraud is matter of fact, and proper to be submitted to a jury; but that transaction took place so long ago, that all the persons who could depone to any facts that would be proper for the consideration of a jury in trying a question of fraud, must be in their graves, or their recollection must now be so imperfect, that their evidence would not be

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* The passages in italics underscored by his Lordship.

worthy attention. Besides, if fraud be apparent, Courts of Equity (and Nov. 17, 1830.
the Court of Session, and your Lordships reviewing the decisions of the Court of Session, are Courts of Equity) will set aside or dismiss fraudulent deeds, without referring them to a jury. I humbly submit to your Lordships, that it appears from these deeds, and from facts which cannot be disputed, that old Ewen took advantage of his influence over his daughter, and of the situation of her husband at the time that deed was executed, and fraudulently obtained from them a renunciation of the right that was secured to his daughter by the settlement. The appellant, who was only just twenty-one years of age, gave up a reversionary right to prospects amounting to L.14,000. For what? For L.315; half, as the deed falsely states, paid at the time of the execution of the deed, and an engagement to pay the remainder at Whitsuntide, or Martinmas, after one year and a day after Ewen's death. Now, as to the moiety that was to be paid after Ewen's death, the appellant was not in a better situation under this deed than she was under the settlement. If Ewen left money to that amount behind him, the appellant would have taken it under the settlement. If he did not die worth so much, she could not obtain it under the deed, for that deed gave her no other security than what she had under the settlement. If any property had been pledged as a security for the payment of this L.157, 10s. such a pledge might have been regarded as a consideration for the relinquishment of the chance of what the appellant might succeed to on her father's death under the settlement. As no additional security is provided by this deed, it must be taken that she relinquished her right for the L.157, 10s. said by the deed to be actually paid at the time of its execution. But this allegation of the deed is false; for instead of L.157 being then paid in money, no money whatever passed. Instead of the payment of money, a pretended claim of L.61 for goods furnished to these young persons was discharged, and a promissory-note was given by the father to his daughter for the payment of L.96, that being the remainder of L.157, 10s., declared by the deed to have been paid. Courts of justice consider false allegations in deeds as strong proof of fraud. In fair transactions there is no occasion to resort to falsehood —that is only done when the real facts will not bear the light. It should be observed also, that no account of the goods, for which L.61 was charged, was ever furnished. The appellant and her husband relied on old Ewen's statement, that a sum was due for goods, without knowing at what prices the particular goods furnished had been charged to them. But it has been said, that although the father died worth L.14,000, he was only worth, at the time of the execution of this deed, L.400. Was L.61 worth of goods, and a promissory-note for L.96, a sufficient consideration for the appellant giving up her reversionary interest on L.400, and what more her father, by his industry, might add to his fortune? But all the circumstances of this case show, that the appellant had no opportunity given to her of considering whether it was a prudent bargain for her to make or not; that advantage was taken of the situation which she and her husband were in at the time the deed was execu-

Nov. 17, 1830. ted, and of their want of the means of raising money for their intended voyage. I shall advise your Lordships to reduce this deed. If this deed be reduced, then the marriage settlement remains in force, and old Ewen had nothing to dispose of, and all the property that he left at his death belongs to the appellant.

I think, however, that the deed of October 1821 is void for uncertainty, and that the property which by that deed Ewen attempted to give for the support of a charity which he intended to establish, did not pass to the trustees appointed by that deed, and would therefore become the property of his daughter, the appellant, as his only child. After making some trifling provision for some members of his family, the deed contains these words:—'5thly, For payment to the magistrates 'and town council of the town of Montrose, the place of my nativity, 'and the ministers or clergymen of that town, of whatever sect or deno- 'mination of Christians they may be, or to any one or more of their num- 'ber who may be appointed by them, the said magistrates and council, 'and clergymen, to receive the same, of the sum of L.6000 sterling, for 'the foundation and establishment of an hospital in Montrose, similar to 'Robert Gordon's hospital in Aberdeen, for the maintenance, clothing, 'and education of the lawful sons and grandsons of decayed and indigent 'burgesses of guild, and craftsmen burgesses of the said town of Montrose; 'and which sum, and interest and profits arising therefrom, shall remain 'vested in the said magistrates and town council, and clergymen, and 'be laid out or managed by them for the purposes aforesaid, under such 'rules, regulations, and directions as I shall establish and appoint by any 'separate deed or writing under my hand'—he did not make any such deed;—'and failing such deed or writing, under rules and regulations 'similar to those now existing for the government and management of 'Robert Gordon's hospital in Aberdeen, aforesaid; and with such addi- 'tions to, or alterations thereon, as may be made by my said trustees, and 'which they are hereby empowered to do. And, with respect to the rest, 'remainder, and residue of my means, property, and estate, including, as 'a part thereof, the aforesaid legacy to the said Baron Grahame, my grand- 'son, in the event of his death, before his receiving the same, and also the 'sums to be secured and set apart by my said trustees for answering and 'paying the aforesaid annuities to my said daughter and the said Elizabeth 'Wallace, after the said annuities shall cease and determine, and be no 'longer payable, I hereby will, direct, and appoint such residue and re- 'mainder to be paid or conveyed and made over by my said trustees to the 'said magistrates and town council and clergymen of Montrose, or to 'any one or more of their number authorized by them to receive the same, 'as an addition to, and to be employed for the same ends and purposes *with* '*the foresaid* legacy of L.6000; declaring, that the said sum (that is the 'L.6000) and residue shall be payable by my said trustees at the first term 'of Whitsunday or Martinmas that shall happen twelve months after my 'decease, *or as soon thereafter as the funds under trust can be realized:* 'Also declaring, as it is hereby specially provided and declared, that neither 'the said sum (that is the L.6000) and residue, nor any part thereof, shall

'be diverted at any time from the uses and purposes for which the same is Nov. 17, 1830
'hereby destined, or applied to any other use or purpose whatever; and
'the said magistrates and town council, and clergymen, shall lend out
'the free balance of the interest and profits arising from the said sum (that
'is the L.6000) and residue, every year, on such heritable or personal
'security as they may deem sufficient at the time, so as the same may
'accumulate, with the additional interest arising thereon, until the principal
'sums and accumulated interests shall amount to the sum of L.
'sterling.' Therefore, your Lordships will perceive that the L.6000, and the L. , is to be put out, in the manner directed, to raise interest upon it, and that that interest is to go on accumulating till it amounts to the sum of pounds blank; and till it has amounted to the sum of pounds blank, the trustees can build no hospital, and they can do no act whatever in the execution of this trust. Now, my Lords, when does it amount to the sum of pounds blank? No human being can possibly tell. If your Lordships cannot give some meaning to the blank, it is a trust which cannot by possibility be executed. But, my Lords, let us go on with the rest of the deed. 'When the same shall be stocked, secured, and employ-
'ed'—(when what shall be stocked, secured, and employed?)—when the same pounds blank 'shall be stocked, secured, and employed upon
'lands, bonds, obligations, or other sufficient security, from time to time,
'for erecting and maintaining the foresaid hospital, and for the main-
'tenance, clothing, and education of boys.' How many boys? One? one hundred? or one thousand? The sums constituting the provision are uncertain, and the objects to be provided are equally uncertain. Now, my Lords, although, undoubtedly, supposing these sums were certain, and supposing the objects to be provided for were certain, the rules and regulations themselves are sufficiently provided for, yet those rules and regulations can never be called into existence, till you get rid of the other difficulty; till you can make that certain which is left so uncertain in the deed. I agree with one of the learned judges in the Court of Session, that ambiguity will not render a deed void, unless it be such that no construction can be put on it. I also think, that although one part of the deed be quite unintelligible, the other parts of the deed may be good. But how can any part be carried in effect, when nothing is to be done in execution of the trust until a sum is raised which is nowhere specified; and no authority is given to any one to determine what is to be the amount of that sum which is to be realized before any thing is done? My Lords, we have been referred upon this subject to one case, and to one only. That case was decided by your Lordships' House, when you were assisted by a learned judge, whose decease we all lament —I mean that excellent man, the late Lord Gifford. I entirely subscribe to every syllable said by Lord Gifford on that case. It was the case of Hill and Others, appellants, v. Burns and Others, respondents.
'Alexander Hood, of the Island of Mountserrat, after bequeathing cer-
'tain legacies, conveyed the residue of the estate, real and personal,
'amounting to about L.30,000, to his sister, Mary Hood, of Glasgow,
'and her heirs, for ever. Thereafter, she executed a trust-settlement in

Nov. 17, 1830. 'favour of the respondents, as trustees, in which, after leaving legacies 'to different individuals, she appointed the residue of her estate,'—the residue as it existed at that time, which makes a great distinction between that case and the present,—'to be applied to charitable purposes, in these 'words: "I appoint the residue of my said estate to be applied by my said 'trustees and their aforesaids, in aid of the institutions for charitable and 'benevolent purposes, established, or to be established in the city of 'Glasgow, or neighbourhood thereof, and that in such way or manner, 'and in such proportions *of the principal or capital, or of the interest or 'annual proceeds of the sums so to be appropriated, as to my said trustees, 'and their aforesaids, shall seem proper: Declaring*, and I hereby ex-'pressly declare, that they shall be *the sole judges of the appropriation of 'the said residue for the purposes aforesaid.*"' My Lords, what was the question in that case? It was said, it is necessary for this lady distinctly to state who are the objects of her bounty. Lord Gifford answered, No; it is not necessary for this lady distinctly to state who are the objects of her bounty. She says it is in aid of all the charitable institutions existing, or which hereafter are to exist; and in order that there may be no uncertainty as to what charitable institutions now exist, or as to what may hereafter exist, it was left to her trustees to say who were to be the objects of her bounty. Now, your Lordships perceive, that in that case, there is not the uncertainty which there is in the present. There the extent of the fund given was ascertained, for it was what the deed expressed; and the mode in which that fund was to be managed, was left to the discretion of the trustees. In the judgment in that case, Lord Gifford goes into a learned argument, and refers to a vast number of cases, (which I will not trouble your Lordships with reciting,) every one of which stands upon the same principle as that case which Lord Gifford decided, namely, that there was a certain fund, and that the ambiguity as to the appropriation was got over by the discretion vested in the trustees.

Now, no discretion is vested in the trustees here. If it had been said in this deed, 'the trustees shall begin to build as soon as they shall have ac-'cumulated such a fund as they think equal to the purpose I have in view,' that would have obviated the difficulty; because then the time when the hospital was to be built would be left to their discretion. But there is no such discretion left with them, or with any body else; and it is quite uncertain what the testator's own intention was upon the subject.

My Lords, under these circumstances, it is with regret that I feel it my duty to advise your Lordships to reverse the decision of the Court below, for which I have the greatest respect, but I must conscientiously exercise my own opinion. I have done so in this case; and after having given to it the most attentive and anxious consideration, I feel myself bound to recommend to your Lordships to reverse the decision of the Court below; and to declare that both these deeds should be reduced.

The House of Lords accordingly reversed the interlocutors complained of, and reduced the deeds.

Appellant's Authorities.—M'Diarmid, 28th March, 1828, ante III. p. 38. Trinch

18th Feb., 1669 (4958.) Leiper, 9th July, 1822. (1 Shaw and Dunlop, p. 552.) Nov. 17, 1830.
3 Ersk. 8. 99. 3 Ersk. 9. 16. 4 Stair, 20. 37. 3 Ersk. 8. 97 and 98.

J. BUTT—A. M'CRAE—Solicitors.

JOHN M'TAGGART and OTHERS, (Executors of M'TAGGART,) No. 42.
Appellants.—*John Campbell—J. Wilson.*

WILLIAM JEFFREY, (M'KERLIE'S Trustee,) Respondent.—
Lushington—Robertson.

Discharge.—Held (reversing the judgment of the Court of Session) that a discharge 'of all and sundry claims and demands, debts, and sums of money indebted and owing,' did not include a right of relief from a cautionary obligation existing prior to the date of the discharge, but on which the cautioner had not then been distressed;—there having been executed unico contextu with the discharge, a disposition in security to the cautioner of whatever sums of money, principal, interest, and expenses, he might advance and pay in consequence of 'any cautionary obligations, letter of guarantee, or other such obligations granted, or that may be granted.'

Process.—Held (reversing the judgment of the Court of Session) that under the A. S. 12th November 1825, it is imperative to remit a petition and complaint against the judgment of a trustee on a Bankrupt estate to the Lord Ordinary, where facts require to be investigated.

Nov. 24, 1830.
1ST DIVISION.

MR M'TAGGART of Ardwell, merchant in London, had given very extensive support—said to have been to the amount of thirty thousand pounds—to the house of M'Kerlie and M'Taggart of Glasgow, the partners of which were his brother-in-law and brother; but that house having failed, these advances were lost.

He also, in 1807, became guarantee for M'Kerlie as an individual to Fermin de Tastet and Co. for L.6000, and to Dennison and Co. to a similar amount.

In 1810 M'Taggart visited M'Kerlie, who was then engaged in a spinning concern at Glasgow, called the Gorbals Spinning Company, and the following arrangement took place:—M'Kerlie executed a disposition, dated 23d August, by which he conveyed 'to and in favour of John M'Taggart, Esq., merchant in 'London; whom failing by decease, without having otherwise 'conveyed or assigned the property hereinafter disponed, then 'to John M'Taggart, jun. Esq., merchant in London, his son, 'and his heirs or disponees, heritably but redeemably, always 'and under reversion, in manner after expressed; in the first 'place, all and whole, &c., all in real security to the said John