AUGUST 9, 1872.

MRS. MARIA ANSTRUTHER or SMITH CUNINGHAME, and Others, *Appellants*, *v.* MRS. ANNABELLA ANSTRUTHER, and Others, *Respondents; et è contra.*

MRS. ANNABELLA ANSTRUTHER, and Others, *Appellants*, *v.* MRS. ANNIE ANSTRUTHER or MERCER, and Others, *Respondents; et è contra.*

Succession—Marriage Contract—Provisions to Children—Apportionment—Discharge of legitim, etc., in Daughter's Marriage Contract—*A., on his marriage with Mrs. A. in* 1828, *bound himself to provide* £4000, *and take the rights thereof "to himself and wife in conjunct fee and liferent for Mrs. A.'s liferent only, and to the children, whom failing, to A.'s own heirs and assignees, in fee." Mrs. A.'s own means and estate, present and future, were also made over to "A. and herself and the survivor, in conjunct fee and liferent, and to the children, whom failing, to Mrs. A.'s own nearest heirs and assignees, in fee." Mrs. M. during the marriage acquired* £60,000. *There were three children (daughters) of the marriage; and there was power to apportion. One daughter, Mrs. C., was married when a minor, and her father and mother settled on her* £5000, *with a clause, that she accepted the same in full satisfaction of all legitim, etc., and all claims by or through the death of her father or mother, or under their marriage contract. After Mrs. A's death, another daughter, Mrs. M., was married, who also had* £5000 *settled on her with a like clause of discharge. A. next, on his own second marriage, settled* £20,000 *on Lucy, the third daughter, with a like clause of discharge. No other apportionment was ever made by either A. or Mrs. A.*

HELD 1. (reversing judgment), *That the settlements of* £5000 *each upon Mrs. C. and Mrs. M., and of* £20,000 *on Lucy, were apportionments under the power to that effect in the deed of* 1828; (2) *that the clause of release in the marriage contracts of Mrs. C. and Mrs. M., and in the deed as to Lucy's portion, was no bar to their respective rights to share equally in the undisposed of residue of the funds consisting of the* £4000 *and the* £60,000, *after deducting the said sums so apportioned.*

HELD FURTHER, *That at the death of Mrs. A., A. became fiar in trust of all the property brought in by Mrs. A. to the settlement of* 1828; *that there was no difference between the case of Mrs. C. and Mrs. M., owing to the former being married while a minor during her mother's lifetime; and that a contract of purchase and release or discharge was not constituted between parent and child by the marriage contracts of Mrs. C. and Mrs. M., such a notion being inconsistent with the relation of parent and child; and that under such deeds the parent may exercise the power of apportionment from time to time.*[1]

These were appeals from judgments of the First Division of the Court of Session. The late James Anstruther, W.S., married Miss Marian Anstruther, daughter of Sir John Anstruther of Anstruther, the marriage settlement providing a sum of £4000 on his part, and all his wife's fortune, present and future, on her part, as the fund which was settled on the children, with a power of apportionment in the parents, or the surviving parent. Before Mrs. Anstruther's death she had succeeded to large funds from time to time, amounting to about £60,000; while Mr. Anstruther's means were small. In 1866, he married a second wife, namely, Miss Annabella Anderson; and being then in possession of the bulk of his first wife's estate, made a settlement whereby the funds were mostly given to trustees for the benefit of the second wife. He died about seven months after the second marriage. The children of the first marriage were three—Mrs. Cuninghame, Mrs. Mercer, and Miss Lucy Anstruther. The eldest daughter married, while a minor, in the lifetime of her mother, and in her marriage settlement she had a portion of £5000, but this was stated by the settlement to be in full of all her legitim, and all she could claim under her parents' marriage contract. Mrs. Mercer married after her mother's death, and she got a similar sum of £5000, which was also stated by the settlement to be in full discharge of all other claims. The third daughter, Lucy, was unmarried, but on her father's second marriage he settled upon her a sum of £20,000—also stated to be in full discharge of all claims. The two eldest daughters had raised actions to have it determined, that their marriage portions

[1] See previous reports, 7 Macph. 689; 8 Macph. 1013; 9 Macph. 619: 41 Sc. Jur. 359: 42 Sc. Jur. 579. S. C. L. R. 2 Sc. Ap. 223: 10 Macph. H. L. 39: 44 Sc. Jur. 407.

were not payments in full, but merely apportionments, and that, as there was a large surplus of their mother's estate still undisposed of, they were entitled to equal shares of it. The Court of Session decided, that Mrs. Cuninghame had, by her marriage contract, given up all claims to any further share, but that Mrs. Mercer's marriage contract, being made in ignorance of her rights, she was not prevented from claiming more, and that the surplus fell to be divided equally between her and Lucy Anstruther, after deducting certain sums. The parties appealed, so far as prejudiced by the interlocutors.

The *Solicitor General* (Jessel,) *Dean of Faculty* (Gordon,) and *A. S. Kinnear*, for the appellant (Mrs. Cuninghame).—The interlocutors were wrong in excluding Mrs. Cuninghame from a share in the undisposed of property. The children of the marriage by the contract of 1828 acquired an absolute right of property in the whole of their mother's estate, and in the £4000 provided by their father, and the right of their parents in either estate was restricted to a bare liferent, with no other power than one of apportionment—*Miller* v. *Miller*, 12 S. 31; *Rollo* v. *Ramsay*, 11 S. 132; *Mein* v. *Taylor*, 5 S. 779; 4 W. S. 22; *Myles* v. *Calman*, 19 D. 408; 1 Bell's Com. 56; Menzies' Lect. 434.

No legal and effectual apportionment had ever been made among the children of the funds provided in that deed—*Baikie's Trustees* v. *Oxley*, 24 D. 589; *Irvine* v. *Thom*, 5 S. 534; *Weller* v. *Ker's Trustees*, L. R., 1 Sc. Ap. 11; *ante*, *p.* 1379; *Watson* v. *Marjoribanks*, 15 S. 586; *Eccles* v. *Hunter*, 18 D. 778.

If Mr. Anstruther's trust disposition is to be deemed a deed of division and apportionment, it ought to be set aside as an illegal transaction between parent and child—*Daubeny* v. *Cockburn*, 1 Meriv. 626; *Alleyn* v. *Belchier*, 1 White & Tudor, L. C., 415; *Pryor* v. *Pryor*, 2 De G., J. & S. 205. The clause of discharge in Mrs. Cuninghame's marriage contract did not apply to the funds, while the parents had power to apportion, and even if it did it was no bar to the present claim—Stair, iii. 8, 45; Ersk. iii. 9, 23; M. 5043, 5044, 5056; *Fisher* v. *Dixon*, 2 D. 1121.

At all events it was invalid as being made under essential error—*Ross* v. *Mackenzie*, 5 D. 151; *Ross* v. *Masson*, *Ibid.* 483; *Hope* v. *Dickson*, 13 S. 222; *Johnston* v. *Johnston*, 19 D. 706; 3 Macq. Ap. C. 619; *ante*, *p.* 909; *Dickson* v. *Halbert*, 16 D. 586; *Pickering* v. *Pickering*, 2 Beav. 36; *Purdon* v. *Rowat*, 19 D. 206; *Forbes* v. *Forbes*, 2 Paton, Ap. 36, 84; *Cooper* v. *Phibbs*, L. R., 2 H. L. C. 149.

Even if the discharge in the marriage contract of Mrs. Cuninghame be valid and applicable to her share in her mother's estate, the effect of the discharge, so far as regards that estate, was merely to enable the mother to dispose of one third unrestricted by the obligations in her own marriage contract, and as she did not dispose of it *mortis causâ* or otherwise, it became on her death intestate succession, and the appellant was entitled to share in it as one of the next of kin —*Anderson* v. *Anderson*, M. 5054; *Hepburn* v. *Hepburn*, M. 5056.

In *Mrs. Marcer's case* the same arguments are applicable as in the case of Mrs. Cuninghame, the fact of the one being married before the mother's death being immaterial.

The *Lord Advocate* (Young), *Sir R. Palmer*, Q.C., and *J. T. Anderson*, for Mrs. Anstruther. —The children had, under the contract of 1828, no right of fee in the sum of £4000, nor even a *jus crediti*.—Stair, i. 9, 15; Ersk. iii. 8, 40; 1 Bell, Com. 639, 640; *Wilson's Trustees* v. *Pagan*, 18 D. 1096. Mr. Anstruther was sole fiar of the sum of £4000, and also of the means and estate of Mrs. Anstruther, down to her death, or at all events they were joint fiars during the marriage, and after the wife's death Mr. Anstruther was sole fiar.—*M'Donald* v. *M'Lachlan*, 9 S. 269; *Gairns* v. *Sandilands*, M. 4230; *Angus* v. *Ninian*, Elchies, "Fiar," No. 1; *Neilson* v. *Murray*, 1 Paton, Ap. 65; *Anderson* v. *Bruce*, M. 4232; *Bruce* v. *Henderson*, M. 4215; 3 Paton, Ap. 686; 1 Fraser, D. R. 777. The discharge in the marriage contract of Mrs. Cuninghame and Mrs. Mercer was valid and competent, *Fotheringham* v. *Ogilvie*, M. 12,991; *Moodie* v. *Stewart*, 1 Paton, 20; *Pringle* v. *Pringle*, Elchies, "Mut. Contract," No. 15; *Johnstone* v. *Miller*, 9 D. 1389; *Panmure* v. *Crokat*, 18 D. 703; *Fisher's Trustees* v. *Dixon*, 2 D. 1121. All the claims in the present action are excluded by that discharge. Until that discharge is set aside, the appellants had no claim and no sufficient grounds for reducing the contract as stated. Even if the discharge were reduced, the marriage contract of Mrs. Cuninghame will operate as an apportionment, and enure to the benefit of the two other sisters, Mrs. Mercer and Lucy, and exclude Mrs. Cuninghame from any further share—*Milne* v. *Milne*, 4 S. 679; *Hyslop* v. *Maxwell*, 12 S. 413; *Dickson* v. *Dickson*, 13 D. 1291; *Grierson* v. *Miller*, 14 D. 939; *Foster* v. *Cautley*, 6 De G., M. & G. 55. As *regards Mrs. Mercer*, the same arguments apply, and the effect of her discharge was to carry the right to the settled funds to Lucy. It has not been proved, that the whole of the settled funds were not apportioned among the objects of the power, and the whole of such funds were in fact apportioned among those objects.

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case great litigation has unfortunately arisen with reference to the provisions of a marriage settlement, made as long ago as the year

1828, upon the marriage of Mr. and Mrs. Anstruther. The provisions of that settlement may be very concisely stated. They were to this effect: That the husband provided a sum of £4000, which he engaged should be invested in the manner therein described. And the effect of the dispositions made as to that sum of £4000 was this: That the husband and the wife had the benefit in conjunct liferent, and then there was a provision for the children of the marriage or their remoter issue, in such manner as the intended husband should apportion, and if his wife survived him, as she should apportion, and in the event of no apportionment being made, then it was to be for the benefit of all the children of the marriage, in equal shares, whom failing, it was to be for the absolute benefit of the husband, who was to take for him and his heirs the benefit of the £4000 so settled.

With regard to the intended wife, Mrs. Anstruther, the case was somewhat different. No specific sum was settled, but the whole of her property, then present or future, was disposed of in this way: There was a similar limitation in conjunct fee and liferent. There was then a similar provision for the benefit of the children of the marriage or their issue, if the spouses were so minded, proportionately, and then the apportionment was to be made by the spouses conjointly during their joint lives, and by the survivor after the death of one. And in regard to that portion of the property, it was settled that, on failure of children of the marriage, it was to go to the wife and her heirs.

Now the events which subsequently took place were these: There being three daughters, the issue of the marriage, the eldest daughter, now Mrs. Cuninghame, married in 1847. On her marriage a trust disposition by way of settlement was made, which was in this form: Mr. and Mrs. Anstruther, the father and the mother, concurred in the settlement, and the father of the intended husband concurred in it. The father of the intended husband made a considerable provision, amounting to £10,000, I think. With that, however, we have nothing to do in this present controversy. And Mr. and Mrs. Anstruther conjointly engaged to pay £5000 for the benefit of Mrs. Cuninghame, on this her intended marriage, and for the benefit of the children of the intended marriage.

Then upon this arrangement being made, nothing being specifically stated in that part of the settlement on Mrs. Cuninghame's marriage with regard to the previous settlement which had been made in 1828 on the part of the father and mother, but the father and mother concurring in this settlement, a discharge is taken, and that discharge is in these words: "And which said sum of £5000 is hereby declared to be, and the said Maria Anstruther hereby accepts of the same, in full satisfaction of all legitim, portion natural, or bairns' part of gear, and of all claims whatsoever which she, the said Maria Anstruther, has in any manner of way, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th March 1828, and as the share or division hereby allotted to her, of her said father's and mother's property settled by the said contract, all which claims are hereby settled accordingly."

A similar instrument exactly was executed subsequently on the marriage of the second daughter, Mrs. Mercer, but in the interim between the two settlements this difference had occurred in the position of the family, namely, that Mrs. Anstruther, the original spouse referred to in the marriage contract of 1828, had died, and that the settlement of £5000 made on the marriage of Mrs. Mercer was of course made by the father alone (Mr. Anstruther); but he took a discharge which may be described as being in substance identical with that which I have read as having been made upon the marriage of Mr. and Mrs. Cuninghame.

Some years after that, the father married again in 1866, and on his marriage a trust disposition was again executed, and by arrangements which he there makes, in effect £20,000 is apportioned by him, or made over by him, to Lucy, the third and only remaining daughter, and there is a similar discharge contained in Lucy's settlement. Provisions are also made for his intended second wife. And Lucy, in the second instrument, in a similar form of words, discharges her interest under her father's and mother's settlement.

Now that being the state of the circumstances of the family, the question arises as to what is the legal effect to be given to these several instruments, to the original marriage settlement of 1828, and the two settlements executed on the marriage of Mrs. Cuninghame and Mrs. Mercer respectively, and the £20,000 made over to Lucy for which she gave her discharge.

There appears to have been considerable difference of opinion in the Court below with reference to the position of Mrs. Cuninghame as contrasted with the position of Mrs. Mercer, and in the action in the present case which we are first considering, Mrs. Cuninghame's (Mrs. Mercer's case is, however, really in substance extremely similar to it, if not identical)—I say in the action brought by Mrs. Cuninghame she sought to have a declarator, that she was entitled to regard that £5000 as an apportionment of a part of the fund included in her father's and mother's settlement, and that it was not competent to her father to aver that discharge which was contained in her settlement as a discharge of the whole fund from all possible claims upon it, in the event of there being no further appointment by him but that; what was taken by her (the £5000) was taken only as a partial apportionment of the whole fund which had been provided by the

settlement of 1828. And in so far as it did not exhaust that fund, and in so far as the fund was not exhausted by any other apportionment of the property made to the children of the marriage, there would remain a surplus divisible as provided by the original settlement amongst the children according as each parent had the power of apportionment, because it might have been made by either of the parents. She sought to have a reduction of that discharge, if she was to be prevented by it from thus having such an apportionment as she desired to have made to her.

Now the case has been argued very fully before us, first upon the effect of the original settlement of 1828, and next upon the effect of the apportionments made, or rather the sums provided in the first instance to Mrs. Cuninghame and Mrs. Mercer, and ultimately, to Lucy. And that being the first point, it will be right to say a few words (and they shall be very few) upon the subject of the first settlement, first premising, that the fortune of Mrs. Anstruther, which does not seem to have been so large at the time of the settlement of 1828 as it afterwards became, did become very considerable, so much so, that the whole of Mrs. Anstruther's fortune in present or future, including the whole which had been realized ultimately before her death, is said to amount (we have not got the exact data to go upon, but it is said to amount together with the £4000 which was provided by the father) to a sum of nearly £60,000; at all events it was a very large sum, and a sum considerably exceeding the two sums of £5000 provided for the two elder daughters and the £20,000 provided for Lucy. Now, after the settlement of 1828, what is to be considered as the position of the parents with reference to the fund? The Lord Ordinary, before whom the matter came in the first instance, conceived that the father, Mr. Anstruther, became, by virtue of the instruments of 1838, fiar as to both funds, both the fund of £4000 which Mr. Anstruther had supplied, and the sum that was provided by Mrs. Anstruther. The Court of Session, on an appeal from that decision of the Lord Ordinary, recalled his interlocutor and held, that the husband was a fiar of the £4000, but that he had only a liferent in the sum coming from Mrs. Anstruther; that she in effect was the fiar of that sum subject to her husband's liferent, and subject (as all the learned Judges held) as to both the sum provided by the father, and the sum provided by the mother, to the rights of the children, whatever they may be, which rights could not be put lower, and it is quite sufficient for the conclusion, that I have come to in this matter, to put them as high as I am about to state, — they could not be put lower than at least a *spes successionis* in each fund, which expectancy could not be defeated gratuitously; for, if defeated at all, it could only be defeated by some alienation for onerous or good cause.

Those being taken to be the rights of the parties when the settlement of Mrs. Cuninghame came to be executed, what is the effect of that settlement? Upon that point some degree of doubt existed among the learned Judges in the Court below. Four of them were of one opinion, and three of another opinion as to the case of Mrs. Cuninghame, although they were more united as to the case of Mrs. Mercer, for a reason, that I shall have afterwards to mention, but the ultimate conclusion come to in Mrs. Cuninghame's case by the majority of the learned Judges was this, that the sum of £5000 provided in her settlement, coupled with the release or discharge which she gave in the terms that I read from the settlement itself, operated as a complete extinguishment of the right of Mrs. Cuninghame to any portion of the fund, and therefore, of course, the consequence was an absolute failure of her action, and accordingly the defenders were assoilzied absolutely.

On the other hand, it was contended, and it was held by three, I think, of the learned Judges in the Court below, that that could not be taken to be the right view of the case; that the £5000 was in reality to be taken as an apportionment of the fund *pro tanto* to that daughter upon her marriage, and that that sum so apportioned would of course operate to the extent of that apportionment, as handing over to her a share in the fund which she would take, subject to the possibility of her having another portion—a third portion falling to her in the event either of the whole residue of the fund, or of any part of it, remaining unapportioned. In the one case she would take a third of the whole remainder, in the other case she would take a third of whatever might remain unapportioned.

It appears to me, that that is the true and right conclusion to come to upon the whole case. The question is, whether that sum of £5000 was really to be taken as an intended apportionment or not. I apprehend, that there can be no doubt upon one point which seems to have excited some doubt in the minds of some of the learned Judges—I say, that there can be no reasonable doubt, that in Scotland, as here, there is no necessity, where there is a power of apportionment of this description existing in the parent, for him to apportion the whole fund at one time; he may apportion it at intervals as the exigencies of his family require. Of course, the very object of such a power of apportionment is to provide for such exigencies as they occur.

One argument which was pressed upon us for a different consideration is this, that the interest being a *spes successionis*, one which was wholly contingent during the lifetime of both the father and the mother, it might have failed in both of the funds had Mrs. Cuninghame predeceased the distribution of the fund, and the period of her acquiring a complete and absolute interest in it,

and that therefore, the payment of the £5000 on the part of the father might be regarded (as some of the learned Judges, who were in fact the majority, decided) as a purchase by the father, of the absolute right to all the interest of the child in the fund, and not as an apportionment of the fund itself. Now it appears to me, that there are two reasons very strongly weighing against such a conclusion. In the first place, the very notion of a parent bargaining with his child, in the language used by the learned Judges in Scotland, entering into a transaction with his child, for the purpose of purchasing her share in this species of expectancy, would be a notion inconsistent with the law which has prevailed, I apprehend, in every country as to the protection of a child's interest, that is to be expected on the part of a parent, such a protection as makes it very difficult indeed for a parent under any circumstances to deal with a child, and certainly does not render it possible for him to deal with a child, without the child being fully protected and fully informed of all the rights vested in him. Therefore one would hesitate at any time to give to any instrument the construction of a bargain on the part of the parent in respect of an expectant interest on the part of his child.

Now in the particular case before us it is undoubted, that the child herself was not of full age. She was only eighteen years of age, and the child herself had to look to that parent, and that parent only, for protection. Some of the learned Judges say, that the intended spouse might have afforded her sufficient protection. They seem to think, that that actually was the case, and that she was so protected. But I think, according to any system of law, that can be administered in any civilized country, it could not be permitted, that a parent, without the fullest evidence of such being the intention, and the circumstances of the case warranting the intention, and warranting the transaction, should become the purchaser of an unascertained interest in the child, an interest which could never be ascertained if the child died in the mother's lifetime, for a sum of money paid down when the child's necessities required it at the period of her marriage.

But putting that aside, I think there is quite abundant evidence to shew, that the parties did not intend anything of the kind. In the first place, the father and mother joined. If it was an interest to be acquired by the father, why did the mother join at all? In the next place, there is no previous recital of the settlement until we come to the discharge, and when we come to the discharge we find it to be an express discharge of all rights, in the words I referred to just now, and refers expressly to the contract of marriage. It says, "all claims whatsoever by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, and as the share or division hereby allotted to her of her said father and mother's property settled by the said contract."

Now it seems to me, that there is quite plain and sufficient reference to the instrument, and to the object and interest of the parties, in the very form there used, and though it is quite true, that it goes on to give a general release of her father's property under any circumstances whatever, yet even that is not inconsistent with the original settlement, because in the original settlement whatever portions the children were to take under the settlement of 1828 are there expressed to be in discharge of whatever share they might be entitled to of the parents' property either by way of legitim, portion natural, or otherwise, so that it is only repeating the effect intended to be given to the original settlement and to the taking under that settlement.

Now, as matters stood thus, even taking that £5000 as a part of the money that was to be settled, was it to be considered, that Mrs. Cuninghame would have her £5000 out and out, and she was disposed of, and, as some of the learned Judges expressed it, was she to be treated thereupon as if she were dead, as if she were wholly taken out of all interest under the settlement of 1828, and that whatever remained of that fund would fall to the remaining daughters, Mrs. Mercer and Lucy. The argument was pressed upon us to that extent, that it operated as an appointment to her of the £5000, and a discharge by her of all further interest in the existing fund; and that thereupon, by force of the appointment so made to her, there was an actual handing over of the residue of the fund to the other two children operating by way of appointment, as if the whole residue of the fund had been given to the remaining two children.

Now certainly I do not think, that the instrument bears at all that construction, and it is a construction which one would not place upon the instrument, unless one found some very clear and concise words to that effect. For observe what might happen, and what in fact really did happen, so that there is no need to put it hypothetically, as that which probably might occur. On the next daughter marrying, Mr. Anstruther does the same thing; he gives £5000 in the same form, and with the same discharge, and there is very little doubt, that if Lucy had married the form would have been exactly the same in her case, or at least it might have been so. So that he might have made three appointments of £5000 each, taking all the daughters on that theory out of the case, as if each daughter were dead, depriving them of all further interest in the fund. And having thus provided £15,000 out of the £60,000, he might have said—Everybody is now swept out of the fund; the whole fund is clear, and the consequence is, that it will go back to the parties who provided it, the father having his share, and the mother having her share, so that the provisions originally contemplated would never have taken effect. But that would be an entire contradiction of the whole scope and frame of the original settlement, which

was, that the children were to take the whole except where it was disposed of for onerous consideration.

Now that being so, it appears to me, that this dealing with this sum of £5000 could only take effect as an apportionment *pro tanto* of the fund, leaving the rest of the fund to be apportioned. It was said even by those who opposed Mrs. Cuninghame's claim, that they could not put their argument so high as to say, that the parent had no right to increase her portion if he thought fit.

It was conceded as regarded the father, that however he might be himself protected by the discharge, he was not himself prevented from making a further apportionment if he thought fit.

When we come to Mrs. Mercer's case, the sole difference is this: The mother having died, that interest which was a *spes successionis* had become absolute in Mrs. Mercer as regards the mother's property, subject only to the liferent of the father. The learned Judges were unanimous, I think, upon this case of Mrs. Mercer, in setting aside the discharge in Mrs. Mercer's settlement.

LORD CHELMSFORD.—Lord Deas differed.

LORD CHANCELLOR.—But the other Judges, I think, all concurred, because they said, that in Mrs. Mercer's case the discharge was made in ignorance of her position; that there was ignorance as to the true state of the case as regarded her, namely, that she would be placed in a much more favourable position than Mrs. Cuninghame by the circumstance of her mother's death, and her having acquired a positive interest in this fund with which she was parting to so large an extent. I need not deal now with Mrs. Mercer's case, because, according to my view of the case, it was, if anything, *a fortiori*, it could not possibly be weaker than Mrs. Cuninghame's case, and I have already stated the view that I take of Mrs. Cuningham's case. I apprehend, that what has happened is this: An apportionment was made first of £5000, part of the fund to Mrs. Cuninghame, and her discharge has not prevented her having any other part that may be unapportioned, and Mrs. Mercer is placed in the same position. So that the two sums of £5000 having been taken out of the fund, it now remains to be seen what is to be done with the rest of it.

Then there is the dealing with Lucy, which is subject to the same remarks as I have made upon Mrs. Cuninghame's case and Mrs. Mercer's, namely, that there is an express recital, that it is intended to operate by way of apportionment of the fund, and there is a discharge by Lucy as in the other deeds; therefore, it appears to me, that the proper conclusion to come to on that part of the case is, that the £20,000 made over to her upon the occasion of Mr. Anstruther entering into his second marriage, must be taken as an apportionment of the fund *pro tanto*, so that you find that £30,000 out of the whole fund has been apportioned. It is not said, or it is not denied—it is not proved, and it must be a matter of inquiry—that the £30,000 exhausts the whole fund. We have every reason to suppose that it does not, but that must be a subject of inquiry. If the precise amount cannot be ascertained by the parties without inquiry, inquiry and investigation must be made into the whole fund, taking the two amounts together, the £4000 of Mr. Anstruther's, and Mrs. Anstruther's whole property, included in that settlement of 1828; when you have added those two funds together, you have to consider, that the £30,000 has been paid out of that fund, and Mr. Anstruther's estate is of course discharged entirely to the extent of that £30,000. Then the remainder will have to be ascertained, and when ascertained it will have to be divided among these three ladies in equal proportions. I think that in substance really reaches the whole of the case we have before us.

It is a case which, when analyzed, may I think be reduced to these simple propositions, the first proposition being, that the children, in the event of the fund not being alienated for onerous cause, clearly had the right which has now accrued in the two funds, that of the father, and that of the mother; that the sum paid over to the first child of the marriage, and accepted by her as her allotted portion, does not operate to bar and sweep her out of the whole benefit to be derived from the settlement, but only operates *pro tanto* as far as that £5000 goes; and that the sum allotted to Mrs. Mercer in effect amounts to a similar appropriation or apportionment of the £5000 apportioned to her; and therefore, what your Lordships have to do in this case will be this: to make a declaration, that the settlements of Mrs. Cuninghame and Mrs. Mercer are respectively appointments or apportionments (the Scotch call it apportionment; I shall have a word to say upon the language presently,) under the power contained in the settlement of 1828. But the alleged release contained in each of those settlements does not amount to or effect any bar to the right of participation in any portion of the property, subject to the power of apportionment which may not be apportioned under that power; and that the release given by the third child in the same way, does not operate as barring her from taking any share in the remaining fund; and that the gift, made by the trust settlement of 1866 of £20,000 to the third daughter Lucy, is also an appointment to Lucy under the power which it was fully competent to the donee to make; and then to order, that if the two sums of £5000 and £20,000 do not in the aggregate amount to the whole of the funds brought into the two settlements, the balance of those funds is unappointed property, and is distributable, under the trusts of the settlement of 1828, among

the three children in equal shares, and that there must be an inquiry in order to ascertain of what those funds consist. That will be in substance the whole of the decree. We should desire to take a little time to frame the exact form of the decree, in order to put it in a complete and correct form. But the rights of the parties, I apprehend, taking the view of the case which I have taken, if that be the view of your Lordships, will be expressed by what I have already stated.

I ought to add, with reference to another noble and learned Lord who was present at the hearing of this case, LORD O'HAGAN, that he expressed his desire, that the judgment should not be postponed on account of his absence, and he also expressed his concurrence in the views I have expressed, that the sums advanced to Mrs. Cuninghame and Mrs. Mercer were in effect appointments made, and that the parties to whom the appointments were made were not debarred from sharing in the fund which might remain unappointed and unappropriated. I am not of course able to say, that he has known absolutely all that I have now stated, in giving my reasons for this judgment, but he concurs in the conclusions to which I have come.

LORD CHELMSFORD.—My Lords, the questions upon this appeal may be conveniently considered under the following heads :—(1.) What is the nature of the right or interest which the children of Mr. and Mrs. Anstruther took under their parents' marriage contract? (2.) Was the power of appointment amongst their children, contained in that marriage contract, duly exercised by the obligation which the parents jointly took upon themselves in Mrs. Cuninghame's marriage contract, and Mr. Anstruther alone in Mrs. Mercer's marriage contract, to pay £5000 to trustees in trust for them and their children respectively, and by the acceptance by each of them of that sum in satisfaction of all claims which they had under the marriage contract of their parents? (3.) Is there any ground for the reduction of the clause of discharge in Mrs. Cuninghame's and Mrs. Mercer's marriage contract, or either of them? (4.) Assuming, that the sums of £5000 paid to the trustees for Mrs. Cuninghame and Mrs. Mercer on their respective marriages were proper exercises of the power of apportionment, and the £20,000 given to Lucy Anstruther by her father upon his second marriage was also a good apportionment of that sum to her, and these several sums did not exhaust the fund over which the power existed, how is the unappropriated fund remaining after the apportionment to be dealt with?

The nature of the right and interest of the children under the marriage contract of Mr. and Mrs. Anstruther seems to me to admit of little dispute. In each case of the property brought into settlement the fee was in the party from whom it proceeded, subject respectively to a liferent in the other surviving, and the children had a succession which has been indifferently called a *spes successionis* and a protected interest; but whatever its proper name, it was a contingent right which could have been defeated by a disposition for onerous causes, not by a gratuitous alienation. The Dean of Faculty argued, that the question, whether the fee was in the parents or the children, was one of intention, and that where there is a power of division among children the parent necessarily becomes fiduciary fiar for behoof of the unborn children. If this is the law, it is rather extraordinary that it was not adopted by any one of the learned Judges of the Court of Session. They were unanimously of opinion, that the fee of the £4000 provided by Mr. Anstruther was in him, and they did not agree with the Lord Ordinary as to the fee of the provisions made by Mrs. Anstruther; but with the exception of Lord Deas, who thought that the question did not require to be determined, they held, that it passed upon her death to the children.

Upon the death of both their parents the children would have been entitled equally to the whole of the property, whether derived from their father or their mother, unless the power of apportionment amongst them contained in the marriage contract were duly exercised. That power as to the father's £4000 is reserved to him, to divide and proportion as he should think proper the provisions in favour of the children; and the mother surviving him was to have the same power, and as to the property divided by the mother the power to divide and proportion it among the children was given to the parents during their joint lives, and afterwards to the survivor; and in both cases, failing any division, the provisions were to be divided among the children equally, share and share alike.

The next question, therefore, to be considered is, whether this power of apportionment amongst the children was duly exercised by the obligation to pay £5000 to trustees under Mrs. Cuninghame's and Mrs. Mercer's marriage contracts respectively, and their acceptance of those sums in satisfaction of all their claims under the marriage contract of their parents. There is no difference in the cases of these two children, except that at the time of Mrs. Mercer's marriage her mother was dead, and the obligation to pay the £5000 was undertaken by the father surviving. The clause of discharge of their claims is in the same terms, *mutatis mutandis*, in the marriage contracts of each of the daughters.

Taking Mrs. Cuninghame's as the example, it runs thus :—"And which said sum of £5000 is hereby declared to be, and the said Maria Anstruther hereby accepts of the same, in full satisfaction of all legitim, portion natural, or bairns' part of gear, and of all claims whatsoever which she, the said Maria Anstruther, has in any manner of way, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated

24th and 26th days of March 1828, and as the share or division hereby allotted to her of her said father and mother's property, settled by said contract, all which claims are hereby settled accordingly.

It was argued on the part of the appellants, that this could not have been intended as an execution of the power of apportionment, because there was no reference to the power, and because of the release not only of the daughter's claim under the marriage contract of her parents, but also of her legitim, portion natural, and bairns' part of gear; but that it was a transaction between the father and daughter, by which the paying the £5000 not out of the trust funds, but from his own money, purchased the release of his daughter's claims for his own benefit, and that this opened to the appellants the grounds of reduction of the clause of discharge upon which they insisted.

It appears to me, that the obligation to pay the £5000 was intended to be, and was understood by all parties to be, an execution of the power of apportionment. Little reliance can be placed upon the circumstance that the clause contains no express reference to the power. As Lord St. Leonards says in his book on Powers (8th edition, p. 289),—"A donee of a power may execute it without referring to it or taking the slightest notice of it, provided, that the intention to execute it appears. And the reason of this is given in *Scrope's case* (10 Co. Rep. 143 C.) to which he refers, "*quia non refert an quis intentionem suam declaret verbis an rebus ipsis vel factis.*"

It appears clearly that the power must have been in the contemplation of the parties from the words of acceptance of the £5000 by Mrs. Cuninghame in satisfaction (*inter alia*) of the share or division thereby allotted to her, of her said father and mother's property, settled by their marriage contract. It seems difficult to put any other construction upon these words, than that of an acknowledgment that the £5000 was the share or division which Mr. and Mrs. Anstruther had the power to allot by their marriage contract. The acceptance of this sum, not only as the allotted share, but also in satisfaction of the legitim, portion natural, or bairns' part of gear, which is used as an argument against its being an exercise of the power, strengthens my opinion, that it must have been so intended. For the creation or reservation of the power in Mr. and Mrs. Anstruther's marriage contract is immediately followed by the words "which provisions conceived in favour of the child or children of the said marriage, shall be in full satisfaction to them of all bairns' part of gear, legitim, portion natural, executry, and everything else that they should ask or claim by and through the decease of the said James Anstruther, their father, except what he may think fit to bestow of his own good will only." The satisfaction of these rights and interests would have followed upon the due execution of the power; and therefore it was unnecessary that it should have been expressly mentioned, but having been so, it shews, that the clause must have been framed with direct reference to the power; and it leaves no doubt in my mind that it was intended to be an exercise of it.

An objection was made to the execution of the power, that the appointment of the £5000 to the daughters respectively was not confined to them but made to others who were not objects of the power. This is answered by the case of *White* v. *St. Barbe* (1 Ves. & B. 399), in which it was decided, that under a power to appoint among children, interests may be given to grandchildren by way of settlement with the concurrence of their mother (an object of the power) and her husband.

Having shewn that the £5000 given to the daughters upon their respective marriages was in exercise of the power of apportionment, and not a transaction with their parents, the next proposed question as to the reduction of the clauses of discharge in their marriage contracts, and all the evidence given as to their ignorance of their rights at the time of their acceptance of the £5000 in satisfaction of their claims, fall to the ground, because if a parent has a power of appointing a fund amongst children in such proportions as he may think proper, he may exercise that power at his own will and pleasure, and whether the child who has a share allotted is a minor or of full age, or whether he knows or is ignorant of the extent to which he might eventually become entitled in succession, or whether he expressly accepts or not the provision which is made for him, is wholly immaterial, as he can by no possibility control the parent in his discretion to distribute the fund amongst the children as he thinks proper.

Mrs. Mercer's case differs in no respect in the character of the provision made for her upon her marriage from that of Mrs. Cuninghame. Both were in exercise of the power of apportionment or neither. Mrs. Mercer's release of her claims could only be reduced upon the ground of its being a transaction with her father in ignorance of her rights in the succession to her mother's property; and if it were of that character, the clause in Mrs. Cuninghame's marriage contract is precisely similar. I cannot understand, if, in *Mrs. Mercer's case*, it was a transaction which ought to be reduced, why the same conclusion was not adopted in favour of Mrs. Cuninghame. The Lord President draws this distinction between the two cases: "When Mrs. Smith Cuninghame was married in 1847" (he says) "she had nothing but a contingent claim against either her father or mother under their marriage contract, and she was receiving a present consideration in money for a discharge of that contingent claim. But when Mrs. Mercer was married in 1861 she had much more than a contingent claim, she had a joint fee along with her sister, Lucy, in the whole

estate of which her father was liferenter." But, with great respect, the question in the case of both the daughters was not as to the nature of their rights, but as to their knowledge or ignorance of them, and in this view it seems to be immaterial whether the interests with which they were respectively dealing were contingent or vested. If they are to be considered as transactions which may be reduced on the ground of ignorance of facts, which disabled the daughters from exercising a right judgment whether they should accept the £5000 in satisfaction of their respective claims, the case of Mrs. Cuninghame seems to be stronger in favour of reduction than that of Mrs. Mercer, as she was a minor, and her natural guardian, her father, does not appear to have afforded her the protection which she was entitled to expect from him. I could not avoid making these remarks upon the interlocutors of the Court of Session reducing the clause of discharge in Mrs. Mercer's marriage contract, and refusing to do so with respect to a similar clause in the marriage contract of Mrs. Cuninghame, although, as I have already shewn, these clauses being in both cases introduced into the contracts in the exercise of the power of apportionment contained in Mr. and Mrs. Anstruther's marriage contract, reduction of them is out of the question.

There only remains to consider what is to be done with the trust fund which, after all the allotments made in exercise of the powers of apportionment, is left unappropriated. I do not think that by these allotments the parents put it out of their power to increase the provisions made for the daughters, nor was the joint power in Mr. and Mrs. Anstruther so exhausted by their exercise of it in Mrs. Cuninghame's favour, as to render it incompetent to Mr. Anstruther surviving to make an addition to what had been before given to her.

Out of the unappropriated residue of the fund, a sum of £20,000 was given to trustees by Mr. Anstruther, for his daughter Lucy, upon the occasion of his second marriage. There was a doubt suggested in argument whether this ought to be regarded as an appointment of the fund, over which the power existed, or was not rather a bargain with Lucy out of Mr. Anstruther's own property. He certainly entertained the idea, that after the death of his first wife he had the absolute fee in her property, and was entitled to transact with it at his pleasure. And the trust disposition and settlement, upon his second marriage with Miss Anderson, proceeds upon this supposition. He thereby assigns, dispones, conveys, and makes over to trustees his whole means and estate heritable and moveable, real and personal, in trust after payment of his just and lawful debts, death bed and funeral charges, and the expenses of carrying the trust into execution, to pay over or invest the sum of £20,000 for the sole use and behoof of Lucy Anstruther and her heirs and assignees. And his trustees are to hold and invest the sum of £30,000 for the payment to his promised spouse of the interest during her lifetime, and after his death, the principal to the children of the marriage. The whole of the settlement has more the appearance of a disposition of his own property than of the exercise of a power by which his authority was limited. But as in the allotment of the shares of the two other daughters the provision for Lucy is declared to be in full satisfaction of all claims she may have for bairns' part of gear, legitim, portion natural, or through the marriage contract between her father and mother, and Lucy, in token of accepting the provisions in full of all such claims, subscribes the settlements, I think that, if it had been to Lucy's interest to reject this provision as not being an exercise of the power of apportionment in her favour, it would not have been competent for her to do so, nor can her sisters successfully contend, that there has been no due exercise of the power to the extent of this £20,000, and, consequently, that it is part of the unappropriated residue. But the £30,000 given to the second wife could only be a valid disposition, if Mr. Anstruther were fiar of the fund remaining unapportioned amongst the children of his first marriage, because it would be, as the Lord Ordinary said, "subject to his disposal for onerous causes or just and rational considerations." But he only having a power to divide and proportion the fund amongst the children of the first marriage, the disposition to the second wife was clearly void, as she was not an object of the power. The result is, that the whole remaining fund, beyond the two sums of £5000 to Mrs. Cuninghame and Mrs. Mercer, and the £20,000 to Lucy Anstruther, comes to be distributed equally amongst the three sisters, share and share alike, according to the provisions of the marriage contract of Mr. and Mrs. Anstruther. I agree with my noble and learned friend in the judgment which he has proposed to your Lordships.

LORD WESTBURY.—My Lords, I cannot part with this case without adding a few observations to what has been said by my noble and learned friends. It is matter of regret, no doubt, to observe the uncertainty and variety of opinions upon what, in this country, would be deemed a very simple case. Here, however, our courts of justice would not proceed upon any grounds that are not common to the jurisprudence of Scotland in this matter.

I must first advert to the notion that seems to have been entertained by some of the learned Judges of the Court below, that the language of this power required an execution *uno flatu*, once for all. Some of them appear to have imagined, that the language required entire apportionment, and that it did not admit of appointments from time to time. That would be to put an interpretation on the words utterly at variance with the object of the power, and utterly subversive of any useful application to be made of the power. No appointment could be made to a child settled in life

or married until all the other children had also become of such an age that their future destination could be ascertained and fixed. It is quite clear, that the reason of the thing demands, that the power given to the parents, in any instance to the father, in the other instance to both parents, to apportion at any time, must be interpreted so as to warrant the appointment being made from time to time, and so in truth it appears to have been conceded at the bar, because it was admitted, that after the appointment to Mrs. Cuninghame and to Mrs Mercer, further appointments might have been made.

The next difficulty that was felt by the learned Judges in the Court below was on the words which have been denominated a release in the appointment to Mrs. Cuninghame and in the settlement for Mrs. Mercer, and various effects have been ascribed to these alleged words of release. Some learned Judges appear to have imagined, that they operated as an assignment by contract to the father or the donee of the power, of the whole extent of the portion which in an equal division of the entire fund might have been attributed to the object of the power. Now it is quite clear, that that would destroy the very foundation upon which the powers given to the parents are rested. If it were possible to admit any contract between a father and a child as the reason for the exercise of the power, fraudulent transactions might be introduced destructive of the interests of the child, and giving to the father that which he ought not to obtain. It is clear, therefore, that, in accordance with the settled principles of equity, it is impossible to hold, that the father could gain any benefit to himself in the residue of the trust fund by having made an appointment of one part of it as to one of the children.

Well, but then some of the Judges imagine, that the release might enure to the benefit of the two other sisters who were the object of the power. Sometimes it was imagined, that the release of Mrs. Mercer's settlement might enure to the remaining sister. It is utterly impossible to find in either settlement any contract to that effect, or that the words contained in the settlement should receive that interpretation, even if it were possible that such a transaction should have force given to it, and consisted with an honest exercise of the power. The truth is, that what are called the words of release amount to no more than this, that the sum appointed to the child should be taken as part of the settlement or provision in which the child under the trust settlement had an interest. The whole, therefore, assumes a very simple aspect as soon as the ordinary suggestions of common sense are applied to the interpretation of the words, and to the effect which then, having regard to the intention of the power, ought to be attributed to it.

Now that being the state of the case, the relative position of the children is perfectly clear. They stand on an equality with regard to the undistributed and unappointed parts of the funds. The father's right to determine the quantity is thereby acknowledged so far as he has exercised that right. He thought proper to appoint £5000 to Mrs. Cuninghame, reserving, of course, the right of making a further apportionment. In like manner he has given £5000 to Mrs. Mercer, and in like manner he has given to Miss Lucy £20,000. But supposing these sums not to exhaust the fund, the residue falls under the disposition contained in the settlement, and will be divisible equally among the three sisters. The conclusions, therefore, are perfectly plain. I am only anxious that it should not be considered, that the form of the account to be directed is now finally concluded upon, and I should be glad if an opportunity were to be given to counsel to see the form of this account, not for the purpose of argument, but in order that any suggestion that might occur to counsel might be handed in to the House as to the form of the account before the final order is made.

With these prefatory observations, I will read what I have written, and the conclusions at which I have arrived, and which have been sanctioned by what has fallen from the noble and learned Lords who have preceded me. I consider, that the settlements of Mrs. Cuninghame and Mrs. Mercer are respectively appointments under the power contained in the settlement of 1828. I prefer the word appointment because the word apportionment seems to imply a dealing with the entirety of the funds. But the alleged release contained in each of the settlements does not amount to or effect any bar to the right of participation in any portion of the property subject to the power of appointment which may not be appointed under the power. Neither does the release given to the third child operate by implication as an appointment to the third child of the residue of the funds which were subject to or comprised within the power. The gift made by the trust settlement of 1866, (that is, Mr. Anstruther's will,) of £20,000 to the third child Lucy is in my opinion an appointment to Lucy under the power, and which it was fully competent to the donee of the power to make. But if (as in this case) the two sums of £5000 and the £20,000 do not together equal the aggregate amount of the funds brought in by Mr. Anstruther under the settlement of 1828, and of the funds of Mrs. Marian Anstruther, also brought into that settlement, the balance of these funds (after deducting £5000, £5000, and £20,000, that is to say, £30,000) is unappointed property, and is distributable under the trust of the settlement of 1828 among the three children in equal shares, for I do not think the children are bound in this division of the surplus to bring into hotch potch the sums appointed to them respectively. The right of the children to the provisions brought in by Mr. and Mrs. Anstruther under the settlement of 1828 was not defeated by the provisions of the second Mrs. Anstruther under the settlement of 1866. On

the death of Mrs. Marian Anstruther her surviving husband became fiar in trust of all the property brought in by Marian, and could not defeat the interests of the children.

Therefore the interlocutor of 11th July 1870 was totally wrong. The judgment in Mrs. Mercer's case is wholly inconsistent with it, inasmuch as it finds, that Mrs. Mercer was entitled to share with her sister, Mrs. Cuninghame, in the estate and effects of their mother so far as not settled and appropriated by their father and mother jointly, or by their father after their mother's death. It will be observed, that my construction would give the surplus to *the three* sisters. The difference of the decision in *Mrs. Cuninghame's case* from that in *Mrs. Mercer's case* cannot be supported by any difference in the wording of the alleged releases in the two settlements, for they are identical. And it is evident that the question as to the fee of the settlement funds is wholly immaterial, it being admitted, that the power of apportionment remained unaffected, and that, *subject to that power*, the effect of the settlement of 1828 was to give the whole of the settlement estate to the three children as substitutes to their parents in equal shares.

There is no question with any creditor or alienee for value of Mr. Anstruther.

I think it expedient that the order of the House shall be made in both appeals, and cover the whole of the subject matter. Subject to any alteration in the language of the order that my noble and learned friends may hereafter suggest, I will read what I should propose as the form of the order for the information of the counsel at the bar at present. It may be as follows: "Reverse the interlocutor of the 11th July 1870: Reverse such parts of the other interlocutors appealed from in either appeals as are inconsistent or at variance with the declarations and findings hereinafter expressed; and this House doth declare and find, that the marriage settlement of Mrs. Cuninghame and the marriage settlement of Mrs. Mercer were respectively valid appointments of the two sums of £5000 in exercise of the power contained in the settlement of 1828, but that such appointments do not exclude Mrs. Cuninghame or Mrs. Mercer from participating in so much of the funds or property comprised in the deed of 1828 as have not been appointed under the power or powers therein contained: Declare and find, that the trust disposition and settlement of Mr. Anstruther, of 8th October 1866, was a good appointment under the power or the deed of 1828 to Lucy Anstruther of the sum of £20,000, part of the funds comprised in the deed of 1828, but that she is not thereby debarred from participating equally with Mrs. Cuninghame and Mrs. Mercer in the residue of the settlement funds of 1828 (if any) remaining unappointed or unexhausted by the said three appointments: Declare and find, that according to the true construction of the powers contained in the settlement of 1828, the same admitted of being validly exercised from time to time by several appointments: Declare and find, that the estate of Mr. Anstruther is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs. Cuninghame and Mrs. Mercer's settlement, and for any sum received by Miss Lucy Anstruther on account of the sum of £20,000: Declare and direct, that a reference be made to such person as the Court of Session shall appoint under the remit hereby made to take the following account: An account of all the funds, moneys, and properties that were comprised in or became subject to the trust disposition expressed or made in and by the said settlement of 1828, and of the manner in which the same have been from time to time invested, and what were the particular values or amounts of all such funds and property at the death of the said James Anstruther, and to ascertain and state what, if anything, was at the time of his decease due from the said James Anstruther (subject as aforesaid) in respect of any trust property or principal trust money received by him and applied to his own use, and to ascertain and state the balance due from the estate of the said James Anstruther to the settlement of 1828, and, if necessary, let an account be taken of all the estate of the said James Anstruther not comprised in or subject to the trusts of the settlement of 1828." This may not be necessary. It is only to ascertain what free general personal estate of James Anstruther there now is to answer what will be the demand against him under the provisions of the settlement of 1828, and with the receipts and payment of his trustee or representatives in respect of such estate not subject as aforesaid, and to ascertain what estate of the said James Anstruther is applicable to the payment of the balance that may be found due from him to the settlement of 1828 as aforesaid.

There is then a point which I must submit to your Lordships' attention, and that is the question how the enormous amount of the costs that have been incurred in this unfortunate litigation are to be met. Now, considering how the decisions in this case have varied, the wanderings of the parties themselves may in some degree be excused, and I shall, therefore, humbly submit to your Lordships, that the costs of all the parties should be paid out of the free estate of Mr. Anstruther.

I am desirous that, if possible, we shall dispose of this matter in such a way as not to leave any door ajar that may be pushed open in the Court below, so as to admit of further litigation in this matter. Whether we can do this or not may be very problematical. I understand that your Lordships wish to reserve to yourselves the power of considering the exact form of your order. I am not at all sure, that the words I have now read comprehend the whole of the matter, but in case any alteration therein should be desirable, perhaps your Lordships will approve of the form of account being given, before the order is made, to the counsel on either side, not to afford any

opportunity for any further argument at the bar, but that they may be at liberty to send in such amendment in the form of account as they may think desirable in this case.

With these declarations, findings, and directions, I would submit to your Lordships to remit the causes to the Court of Session.

LORD CHANCELLOR.—My Lords, with reference to the last remark that my noble and learned friend has made regarding the expense of this litigation, I should go so far with him as to think that ultimately Mr. Anstruther's property, he being really the cause of the mode in which those instruments were executed, and therefore the source of the vexation and intricacy that have subsequently occurred in solving the various questions which have arisen, might be charged with that expense; but one does not know how the course of events may turn out with reference to the proportion of property in the several estates. As between the three sisters, I apprehend, that all costs should come equally, if they are obliged to have recourse to their own funds, out of that free fund which is left out of the apportionment, but having recourse to the father's estate in the event of that estate being sufficient to answer them in order to recoup the diminution of the fund. The father's estate, therefore, will pay the costs in the first instance, if sufficient to do so. If not, the costs will necessarily have to come out of the fund to be divided.

LORD WESTBURY.—I have not the least objection to that.

LORD CHANCELLOR.—Then the question will be, that the interlocutors complained of, so far as they are inconsistent with the declaration afterwards to be contained in your Lordships' order be reversed. We will postpone the exact form of the declaration, though, I believe, we agree in substance with the proposal of the noble and learned Lord, and as to the expenses, that they be borne in the manner prescribed in the form of order as it will be finally drawn up.

Interlocutors reversed, and orders made accordingly.

Appellants' Agents (Mrs. Mercer), Hamilton, Kinnear, and Beatson, W.S.; Grahame and Wardlaw, Westminster.—*Respondents' Agents* (Mrs. Anstruther), A. and A. Campbell, W.S.; Loch and Maclaurin, Westminster.

FEBRUARY 14, 1873.

JAMES GOWANS, Railway Contractor, Edinburgh, *Appellant*, *v.* BRAITHWAITE CHRISTIE, ESQ. of Baberton, *Respondent*.

Lease—Minerals—Reduction on the ground of sterility—*G. obtained a lease for 21 years of the freestone and all minerals and substances whatsoever under C.'s lands. No rent was to be paid the first year, and there was a break at the end of the third, seventh, and fourteenth years. G. spent four years in trying experiments, and found he could not get sufficient freestone to work the lease at a profit.*

HELD (affirming judgment), *That he was not entitled to reduce the lease on the ground of sterility, as the risk of quantity is with the lessee.*

SEMBLE, *The rule as to sterility does not apply to a mineral lease.*[1]

This was an appeal from a decision of the First Division of the Court of Session. An action was raised to reduce a lease of minerals in the defender's lands, to have it found that its obligations were no longer binding, and for count and reckoning. The condescendence set forth, that in 1866 the pursuer, James Gowans, on the representation by the owner that there was a large stratum of freestone capable of being worked at a profit, took a lease of the freestone and minerals in the estate of Baberton for 21 years, at a rent of £200 a year, subject to certain breaks. The tenant entered into possession in February 1866, and energetically bored and searched for the freestone for four years, but, though some freestone was found, it was not in sufficient quantity to be worked at a profit either by itself or in conjunction with any other material. At the first break in the lease—namely at Candlemas 1869—the tenant had not quite exhausted his preliminary researches, and did not avail himself of the break, but in the following year he made up his mind, and gave notice to the landlord, that he could not go on, and requesting him to name an arbiter to determine the question between landlord and tenant, as provided by the terms of the lease. The landlord

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[1] See previous reports 9 Macph. 485: 43 Sc. Jur. 229. S. C. L. R. 2 Sc. Ap. 273; 11 Macph. H. L. 1; 45 Sc. Jur. 229.