question therefore was as to the boundaries of the respective fishings, and whether the portion of the island on which the gallows and bridge had been erected by the defender was or was not within his boundaries. The Court at first decided that the portion of the island in question was not within the defender's boundaries, and ordered the bridge to be removed, but on advising a reclaiming petition, the Court seems to have found that the island was within the defender's boundaries, and that he was entitled to maintain the erections he had set up. It was alleged by the pursuer that the erections were injurious to his rights of fishing, but neither the report of the case nor the pleadings show what view the Court took on this part of the case. The Salmon-Fishing Statutes were not at all referred to. And it therefore appears to me that the case cannot be regarded as an authority in the present case.

I may refer your Lordships to the case of *Viscount Arbuthnott, &c.* v. *Scott and Others*, decided in this House on May 25, 1802 (4 Paton's Appeals, 337). In that case the appellants were proprietors of salmon-fishings in the North Esk. Further down the river, and about two miles from its mouth, the respondents were proprietors of mills on either side of the river. And at this place the respondent Mr Scott had also a right to a salmon-fishing, which he was entitled to exercise either by means of cruives or by net and coble. There had been much litigation in regard to a dam-dyke for supplying the mills with water, and a cruive-dyke immediately adjoining ; and in consequence of a judgment of this House in 1772 Mr Scott could no longer use the cruive-dyke as a means of preventing the passage of the salmon up the river, and therefore he resolved to abandon that dyke in order to furnish a pretence for erecting another dyke. Accordingly, some years afterwards he resorted to the plan of erecting a new dam-dyke. This erection proved much more objectionable to the fishing than the former from its peculiar construction, it being made of a heap of loose stones, so placed together as to allow the flow of water to filtrate through them, at the same time preventing the possibility of the river from flowing over the top. An action of declarator was therefore raised by Lord Arbuthnott, concluding to have it found and declared that the respondents "had no right to erect said bulwark of the extraordinary dimensions above described, and therefore that these new erections ought to be demolished and the said bulwark altogether altered in its dimensions, and of new constructed in such a manner and with such openings or gaps as to admit the free passage of salmon at all times up the river." The Court of Session assoilzied the defenders from the conclusion of the action. But this House, on appeal, reversed the judgment of the Court of Session, and found "that the pursuers, as proprietors respectively of salmon-fisheries in the river of North Esk, are entitled to have as free access of salmon to their several fisheries as can be had consistently with the rights which others have in the lower parts of the river." And the House remitted the same back to the Court of Session to have the dyke altered.

Considerable further litigation followed on this remit in the Court of Session, but ultimately the Court found that the dam-dyke in question must be of new constructed in conformity to a report by an engineer, by and at the expense of Mr Scott, and be thereafter maintained and supported by him. This judgment was appealed against to this House at the instance of Mr Scott, but was affirmed (5 Paton, 750).

I think this case shows that wherever there is in fact what amounts to an obstruction to the passage of salmon, in the sense of Lord Westbury's judgment in the case of *Hay*, it will be ordered to be removed.

On the whole, therefore, I am of opinion that the operations complained of in the present case exceeded what were necessary for repairing the damage done to the island, and restoring the respondent's fishings to the condition in which they were before the erection of the Skibo embankment. I am of opinion that it is proved that the embankment in its present condition is an obstruction to the "free and uninterrupted" passage of salmon up the river, and that it ought to be lowered to the height of the original bank of the island; and that so far as it extends beyond the end of the island as it existed before the Skibo embankment was formed, it should be entirely removed.

Interlocutors appealed from affirmed, and appealed dismissed, with costs.

Counsel for Appellant—Balfour—Mackintosh. Agent—W. A. Loch, Solicitor.

Counsel for Respondent — Lord Advocate (Watson)—Benjamin, Q.C.—Johnston. Agents —Markby, Wilde, & Burra, Solicitors.

Monday, April 15.

SMITHS *v.* CHAMBERS' TRUSTEES.

(Before Lord Hatherley, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

(*Ante*, Nov. 9, 1877, p. 58.)

Trust — Succession — Vesting — Arrestment —Power of Trustees to Postpone Term of Payment and Restrict Right of Beneficiaries.

A truster directed his trustees to hold the residue of his estate for behoof of his children "under the exceptions and modifications to be afterwards stated," declaring that the shares should vest at his death and be payable six months thereafter. He gave his trustees power to postpone payment so long as they should see fit, and to restrict the right of any child to a liferent, creating a new trust if necessary to effect that end. The trustees paid certain portions of the capital and the whole of the income of his share to one of the children. Thereafter certain of his creditors arrested his share of the residue in the hands of the trustees, and raised an action of forthcoming. After this action was raised, the trustees executed a deed whereby they restricted the right of the beneficiary to a liferent, and declared his share of the residue to be vested in themselves as an alimentary fund for behoof of the child in liferent and his children in fee. *Held* (*rev.* the judgment of the majority of the First Division) that the right to his share had vested in the beneficiary subject to the exercise of the powers conferred on the

trustees; that the arresting creditors took the right *tantum et tale* as it was in him; and that therefore the trustees were not barred from executing such a deed of restriction by the arrestments that had been used.

Writ—Testing Clause—Expression of Granter's Will. *Opinion per* Lord Gordon (*contra* unanimous judgment of the First Division) that a substantial provision in a deed may competently be inserted in the testing clause.

The facts of this case and the terms of the documents out of which it arose will be found *ante*, p. 58, of date November 9, 1877, 5 R. 97.

The trustees appealed.

The question as to the insertion in a testing clause of a provision altering or controlling the granter's will as expressed in former parts of the deed was not decided by the House of Lords, as it was not necessary for the determination of the case.

At delivering judgment—

Lord Hatherley—My Lords, the appellants in this case are the trustees under a testamentary disposition of the late Dr Robert Chambers, one of a well-known firm of publishers in Edinburgh, and the respondents constitute a firm of sharebrokers at Sheffield, who claim to be creditors for a sum of £2294, 1s. 10d. on account of principal and interest due on three bills of exchange, and £4 of costs, as against James Chambers, one of the sons of the testator Dr Robert Chambers. The respondents have by due process obtained judgment as against James Chambers, their debtor, and have proceeded to arrest in the hands of the above trustees all funds belonging to James Chambers, and by an action of furthcoming and payment, commenced on the 17th of October 1876, sought to render available the arrested funds for payment of their debts.

The debtor James Chambers became entitled to an interest in the residuary estate of his late father under the deed of disposition of which the appellants are trustees, the nature of which must be carefully examined with a view to the determination of the case raised by this appeal. The Lord Ordinary, by his interlocutor of the 22d February 1877, dismissed the action, but on a reclaiming note being presented against that decision, a majority of the Judges of the First Division, by their interlocutor of the 9th of November 1877, recalled the interlocutor of the Lord Ordinary and decerned in favour of the respondents to the full amount of their claim. The present appeal is against such interlocutor of the Judges.

The trust-disposition of Dr Chambers, dated the 10th of November 1870, after appointing his eldest son Robert Chambers and others (now represented by the appellants) trustees for executing the trusts of the deed, and making several dispositions of property, disposed of the residue in the following words:—"Lastly, in regard to the residue of my means and estate remaining after fulfilment of the foregoing purposes of this trust, I appoint my trustees to hold, apply, pay, and convey the same, and the interest and other annual produce thereof, to and for behoof of the children of the marriage between me and Mrs Anne Kirkwood or Chambers, now deceased, equally among them, with the exception of my son the said William Chambers, and with and under the exceptions and modifications to be afterwards stated, payable, in the case of such as are major, six months after my decease, but in the case of my said daughter Alice, on her obtaining majority or being married, whichever of these events may first happen, but only after the expiry of the said six months, declaring that the whole provisions in favour of my said children shall at my death vest in those surviving me, and that the lawful issue of any of my children who may have predeceased me shall receive equally among them the share which would have fallen to their parents if alive, which share shall in all such cases be held by my trustees in trust for such issue while under age, and the interest, and also if my trustees shall think proper the capital, or any part thereof, shall be applied during their respective minorities to their support and education, which capital so far as not so applied shall be paid to them at their respective majorities; but in case there shall be no lawful issue aforesaid attaining majority, then the share to which such issue would have been entitled shall, so far as remaining unapplied as aforesaid, belong to the survivors of my said children, equally among them *per stirpes*, but excepting always from this provision my son the said William Chambers, and his issue. And notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so the payment of the provisions or shares of residue hereinbefore provided as aforesaid in the case of all or any of my children or grandchildren, and to apply the interest or annual produce of the same during the period of the postponement to or for behoof of such children or grandchildren, or by a deed under their hands to retain the said provisions or any of them vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorised to appoint) with all or any of the powers, privileges, and exemptions belonging to themselves, including the power of appointing factors, so that my children and grandchildren or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children or grandchildren and their lawful issue on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient, of which expediency and the time and manner of exercising the powers and option hereby given they shall be the sole and final judges."

My Lords, James Chambers, the debtor, is one of the children. Dr Chambers died in March 1874. The trustees appear to have realised the property of the testator with the exception of his business, and a paper has been put in, admitted by both sides to be correct, in which the result of an examination of the trust-account is set out. There appear to have been variations in the income, owing to the publishing business being still carried on as a going concern.

Up to the 1st June 1875 the trustees paid sums of money from time to time to Mr James Chambers considerably exceeding the amount of income on his share, his share of income to that date being stated as amounting to £2272, 6s. 3d. and his total receipts to £4358, 19s. 7d., so that £2086, 3s. 4d., the overpayment, is charged in the above paper to capital. He was further paid £474, 17s. 2d. for income up to the 31st March 1876, and £150 on account from that date to the 6th of July 1876. On the 17th of October 1876 this action was raised, and on the 10th of January 1877 the trustees, represented now by the appellants, executed a trust-deed of that date, which recited the main provisions of the testamentary disposition, including the attesting part of that instrument, and the provision contained in the attesting clause as to the legacies being alimentary and not arrestable, and further stating that considering the payments already made to James Chambers, and that his share of the estate under their management was not more than was required as a suitable alimentary provision for himself and his family, they had deemed it fit to retain the balance for the behoof of himself and his children as authorised by the settlement, and in manner after-mentioned they declare that the share shall remain vested in them the trustees in trust only for the behoof of James Chambers during his life, and after his death for behoof of his children (naming them), and that so long as the said provisions shall be retained they shall remain vested in the trustees, and James Chambers or his children shall only be entitled to receive the interest or other proceeds during his and their lives, and that at such times and in such proportions as they, the trustees, might deem expedient. By a second trust-deed, dated 6th, 9th, and 10th July 1877, they again recited the will, and expressly by this deed declared that the share of James should be in trust for him in liferent for his liferent alimentary use, and after his death for his children.

The respondents, the arresting creditors, seek to obtain a decree of forthcoming to the extent of the debt due to them in respect of the interest and principal in the hands of the trustees under Dr Chambers' testamentary disposition at the date of the process of arresting. The question is, whether they are so entitled either as to principal or interest moneys or any part thereof respectively? The majority of the Lords of the First Division, by their decision of the 9th of November 1877, reversed the decree of the Lord Ordinary, and directed payment to the respondents of £2294, 1s. 10d. and of £4, 6s. out of the share of James Chambers and his children.

I will first consider what is the true construction of the testamentary disposition of Dr Chambers as regards his residuary estate. I think that it is carefully and anxiously worded, so as to give the trustees the largest powers over that residue until actual distribution of the respective shares. They are to "hold, apply, pay, and convey the same and the interest thereof to and for the behalf of" his children by his late wife, equally among them, except his son William Chambers, and with, under, and subject to the exceptions and modifications to be afterwards stated.

These modifications will apply to the whole gift, and will modify the interest of every one of the children in that gift. He declares the provision to be payable to such as are major six months after his decease, but in the case of his daughter Alice on her attaining majority or being married, declaring that the whole provisions in favour of his children should at his death be vested in their surviving issue. He then makes provisions for the issue of any child dying in his lifetime to take their parent's share, excepting his son William's issue.

Then follows the most important clause. He declares that "notwithstanding the periods above appointed for the payment of the shares of residue of his moneys and estate, he provides and declares that it shall be lawful to and in the power and option of his trustees, if they see cause and deem it fit, to postpone, as long as they shall think it expedient to do so the payment of the provisions or shares of residue therein provided in the case of all or any of his children or grandchildren, and to apply the interest or annual produce of the same during the period of the postponement to and for the behoof of such children or grandchildren."

Now, my Lords, stopping here, we find a power in the trustees overruling all directions for payment and vesting before given, and directing them during the postponement to apply the interest for the behoof of the children. This must mean that the child is to have no control over the fund at all when the trustees resolve on postponement. If he could demand payment the power of postponement could be pleaded, and if any child were to take legal proceedings to enforce payment into his own hands of the money, it appears to me that, if any meaning is to be given to this clause it would be a good plea to an action against the trustees for payment of the principal and interest, and they might say—"We have postponed such payment to you personally, and intend ourselves to apply the money for your behoof."

But the case does not rest there, for the trustees may by the will either do this, or by a deed under their hands may retain the provisions or any of them vested in their own persons, or vest the same in the persons of other trustees whom they are authorised to appoint, so that the children and grandchildren or any of them, as the case may be, will receive only the interest or other annual proceeds of their respective provisions during their lives or for such times as the trustees may fix, and the capital may be settled on or for behoof of such child or the grandchildren and their lawful issue, on such conditions and under such restrictions and limitations and at such times and in such manner as the trustees may in their discretion deem most expedient, of which expediency and the time and manner of exercising the powers and option thereby given they should be the sole and final judges. Powers are also given to the trustees for settling accounts as to the partnership business in which Dr Chambers was engaged with his surviving partners in winding-up the estate generally.

Now, what is the effect of these two clauses together? It was said in argument before your Lordships that the option was a single option between two courses; that the positive direction was for vesting and payment to the children, but that the trustees might postpone the payment and retain the funds, paying the income to the bene-

ficiaries or for their behoof, on the one hand, or they might at their option execute a deed giving a liferent only to the testator's children or grandchildren, on the other, and that this option should be declared and acted on once for all at the time when payment became due, and this view seems to have received some countenance in part of Lord Deas' judgment.

My Lords, it is an ordinary incident to a power that it may, unless controlled by some provisions of the instrument in which it is contained, be exercised at suitable periods as to portions of the property until the subject-matter of the power is exhausted, and here it seems to me a necessary construction that the power should continue to be exercised from time to time as required. The testator evidently contemplated a discretion in his trustees, for which reason he gives them the option of retaining the moneys and applying them with their own hands, as it were, to the use of the children, or of executing a deed by which they may appoint others to undertake the same duty for the future; and though by such deed the liferent is to be given to a child and the principal to his issue, yet it may be given with such restrictions and conditions and for such uses as the trustees in their discretion may deem most expedient, of which expediency and "the time and manner of exercising the power and option they are to be the sole and final judges."

I do not know any form of words which could more precisely confer on them and those who might succeed to the trust the power at any time of discharging their duty in the distribution of the testator's residue amongst his children and their issue in the manner which they should think proper. The scheme of the testamentary disposition is this—either pay to my children and grandchildren their shares (if they be of age), or hold in your own hands the share of any of them and apply it for his or her behoof instead of paying it to the child.

It appears to me that so long as the trustees retain any part in their own hands they are bound to employ it as they think best for the legatee's benefit, viz., either by paying it at any time they think fit to the legatee, or by paying it for his behoof—that is, for his benefit—in such manner and at such time as they may think proper. This, by the law of Scotland, they could well do.

It will be noticed that in these observations I do not refer to the clause of attestation and the directions therein contained.

What, then, is the position of the trustees when a creditor seeks to arrest the fund in their hands, payment of which they have not yet made. They hold it in trust for the legatee, but subject to the powers conferred on them by the will. And, with great respect, I conceive it to be a leading misconception in the judgment of the Court below that they have held that the arrestment can in any way affect the powers of the trustees even as the learned Judges have thought to the extent of annihilating their trust.

Now, I understand, my Lords, the law of Scotland to be in no way different from that of England with reference to the effect of an arrest of a debtor's interest in the hands of third parties. It has been long settled in England that a judgment creditor must take his debtor's interest subject to all charges and modifications to which it is subject in the debtor's own hands, or, as it is called, "*tantum et tale*," otherwise there would be an act of the debtor conferring an interest on his creditor which he could not acquire for himself. The debtor James Chambers could not, I think, in the case before us insist on payment to himself of any principal moneys or interest, the payment of which the trustees, under the powers contained in the testamentary disposition, thought right to postpone, and for the same reason the arresting creditor cannot make that demand. The trustees might under the will, if they thought fit, pay any given creditor for necessaries, or take any other course to them appearing advisable for the benefit of the legatee, but could not be compelled to pay it as the legatee may direct.

What I have said applies to the position of the parties under the testamentary disposition alone, but by the two subsequent deeds I think the trustees have finally settled the disposal of the shares by giving a liferent to the children and making it an alimentary provision for them.

The maxim "*pendente lite nihil innovandum*" seems to me to have no place here. If I am correct in holding as I do that the trust-powers could not be destroyed by the objects of them becoming indebted, which indeed seems the time at which the testator would have desired them to be brought into action, then the trustees are not innovating, but only exercising their right as conferred upon them by their truster at their own discretion.

It appears to me that under the ample terms of the discretion so conferred they are at liberty to withhold from James Chambers and from any claiming under him the payment of either principal or interest as they may think occasion requires, and that by the operation of the deeds they only limited this their power, which was general as to the times and manner of its exercise, as they themselves being sole judges conceived to be expedient.

This view precludes the necessity of entering upon the somewhat vexed question of law that arises on the attestation clause of the testamentary document. This was held unanimously by the Court below to be incapable of being treated as a provision of the deed. After the cases cited before us as having been decided by this House, I should have taken more time to consider whether I could wholly acquiesce in the decision of the Court in Scotland on this point, but, for the reasons above-mentioned, I am of opinion that the interlocutor of the First Division complained of by this appeal should be reversed, and that we should remit the case to the Court of Session in order that they may assoilzie the defendants from the conclusions of the action, with expenses.

No question will arise as to income, since the last payment, in the view I have taken, extends both to income and principal till actual payment. Neither can there be any doubt that the first of the two deeds executed by the trustees, reciting as it does what they at least supposed to be part of the testator's will as contained in the testamentary clause, rendered the provision in liferent thereby made itself alimentary. No authority has established that the word "alimentary" must be used, and in this case the machinery of the testamentary disposition in effect empowers the trustees to deal with the property as they think best for the sole benefit of the legatees.

I think, my Lords, that the appellants ought to have from the respondents the costs of this appeal.

Lord O'Hagan—My Lords, in this case there is no controversy as to the facts, and they and the documentary evidence have been so fully and clearly stated by my noble and learned friend that I shall not waste any time by detailing them again.

The question is as to the effect of the arrestment, and it must be determined by a consideration of that proceeding in connection with the trust-deed of Dr Robert Chambers, the answer of his trustees to the third condescendence of the respondents, the deed of January 1877, and the deed of July 1877.

In the Courts below there seems to have been some distinction taken between the extent of the interests of the debtor and the creditor using legal diligence, and some attempt to contend that the right of the latter may be something different from and higher than that of the former, but on this point the judgment of Lord Shand seems to me conclusive, and your Lordships are relieved from the necessity of considering it at all by the frank admission of the respondents' counsel that the creditor cannot take more than the debtor had. If he have a vested property and an absolute claim they will of course pass from him, but if the property and the claim are subject to conditions, and liable to be affected by the discretionary action of other people, the creditor cannot escape the fulfilment of the conditions or deny the effect of that exercise of the discretion which would have bound the debtor. We have therefore simply to determine what was the nature of the estate taken by James Chambers, and under the testamentary deed, and what has been the operation upon it of the several acts of the respondents to which I have referred.

The purpose of Dr Chambers in settling his property appears to me manifest on the face of the deed. He had an interest in a large publishing business. He did not contemplate the immediate or the speedy cessation of it. It has in fact been continued for the benefit of his partners and his family—I suppose with changing fortune—as the amount of profit seems to have altered from time to time. It was desirable that his trustees should have such powers as would enable them to maintain, to regulate, or to terminate it, as might best promote the interests committed to their care. Again, Dr Chambers had several children, some of whom were of age, and some were not. In settling his estate he plainly had in view this possibility, that it might be proper to deal with them differently according to the different circumstances which might arise—to have regard to their character, conduct, and necessities, and to control the disposition of their several portions in such a way as might most conduce to the benefit of each. The present position of the son with whose property this appeal is conversant demonstrates that the father had good reason for such anticipations, and only exercised a prudent forethought if he took care to guard against the probable consequences of the folly or improvidence or misfortune of his family.

These purposes seem to me as clearly indicated by the passages of the trust-disposition which have been read by my noble and learned friend as if they had been in terms recited in the commencement of it. It is our business from the whole instrument to ascertain the real intention of the settlor, and having done so to my own satisfaction, I proceed to consider whether it has been carried into effect by apt and sufficient words.

After making various provisions for various people in regard to the residue, the settlor appoints the trustees "to hold, apply, pay, and convey the same and the interest and annual produce thereof to and for the behoof of the children equally" (with one exception), "payable in the case of such as are major" (of whom James Chambers was one) "six months after his decease," with a declaration that the whole provisions in favour of the children shall at his death vest in those surviving him. But all this is to be "with and under the exceptions and modifications to be afterwards stated," and those exceptions and modifications are very clearly expressed, and without limit in their operation on the whole trust-estate. He had made the portions payable six months after his death, and expressly provided for the vesting of them; but he goes on to say that "notwithstanding the periods above appointed for the payment of the shares of the residue," it shall be in "the power and option" of the trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so" the payment of those shares "in the case of all or any" of his children or grandchildren, and to apply the interest or annual produce of the same during the period of postponement "to or for the behoof of such children or grandchildren." And then he declares that the trustees at their discretion may retain the shares "vested in their own persons," or vest them in other trustees whom he authorises them to nominate, with all their own powers, including the power of appointing factors, so that his children or grandchildren or any of them may receive only the interest of their respective provisions during their lives, or for such term as the trustees may fix, the capital to be settled on them or for their behoof on such conditions and under such restrictions and limitations and for such uses "as the trustees may deem expedient," of which expediency and the time and manner of exercising the powers and option hereby given they shall be sole and final judges." I only observe upon this that the settlor must have contemplated a continuance of the trust and of the powers committed to the trustees for an indefinite and a lengthened period. They were to "hold" the residue, to "retain" it for themselves or any other trustees, whom they could appoint at their absolute discretion, and the "vesting" recognised in the children and grandchildren could only be a "vesting" *sub modo,* and subject to their control, inasmuch as they were empowered to vest the estate "in their own persons" or those of their nominees for the purposes of the trust. The provisions are wholly inconsistent with the contention that at the end of the six months, or at any period before the actual payment of the several shares, the authority of the trustees as to the time and mode of distribution of the property was intended to be taken away.

The words of the deed seem to me to give the trustees absolute power to postpone any payment to any of the beneficiaries at any time before the

funds have been disbursed, and the exercise of that power was to them not only a right, but a duty to be performed as long as they continued to hold their fiduciary capacity. They were to observe the condition and the fluctuations of the property, they were to observe the conduct, the character, and wants of the cestuique trusts, and according to their view of these matters they were to exercise the authority and option confided to them, in the time and in the manner of which they were to be "the sole and final judges."

In this way the settlor provided that his purposes should be carried into effect, and the result was that the beneficiaries took an estate vested in them, and, if the trustees thought proper, to belong to them absolutely at the periods indicated, but it was a qualified estate, to be enjoyed by them only on the conditions and at the times which the trustees in their uncontrolled discretion should appoint.

It seems to me that the arrestment could not possibly affect the condition of things. What the debtor had was attached for the benefit of the creditor. What he had not, the arrestment could neither give him nor take from him. It could not make the estate absolute which was qualified. It could not take from the trustees the power which enabled them to deny its liability to attachment. What was his could be taken; what was not his, if the trustees intervened and exercised their right and duty to postpone, could not. *Tantum et tale* as it was, and as he could claim it for himself, it might pass to his creditor or assignee, but no process of a Court could give to him or them that to which he was not legally entitled.

In this respect there is no distinction between English and Scottish law, and both of them are in accordance with reason and justice. James Chambers could not have forced his trustees against their judgment and in disregard of their duty to pay him at once the money the payment of which they deemed it expedient to postpone; and his creditors can have no higher right—neither the debtor nor the creditor can be permitted to disregard the direction and defeat the purpose of the settlor of the property. No special mode of postponement is prescribed by the deed of trust. The manner, as well as the time and the conditions of it, was left to their discretion, and the declaration of their resolution to postpone, however made, was sufficient for the purpose. Three several times they declared that resolution. Still holding the residue, as soon as the creditors made a legal demand they answered to the third condescendence that "the trustees have thought it proper and have resolved to postpone the payment and to pay the interest only to Mr James Chambers for his aliment as provided by the trust-deed," adding that "the interest will be no more than sufficient for Mr James Chambers' aliment." This, in my view, would have been of itself sufficient to bar the claim of the creditors, but it was followed up by the deed of January, more formally setting forth the same resolution, and again by the deed of July, with the same object and effect.

Your Lordships have heard much argument as to the deed of January and its alleged operation in giving James Chambers a right to the benefits of his share without the continuing control of the trustees, who did not reserve in it any power of revocation. This view would make the deed of July, which uses the unequivocal words "for his liferent alimentary use," not employed in the deed of January, of no avail as an answer to the respondents' claim. But looking carefully to the terms of the deed of January, although it might have been made more clear, as was that which followed it, I think that its recitals—its statement that the share of James Chambers is not more than "a suitable alimentary provision for himself and his family," and its provision that the interest only should be drawn at such times and in such proportions as the trustees might deem expedient—are conclusive against the reasoning of the respondents. I agreed with my noble and learned friend that no technical words are necessary to carry out the designs which from these passages and the circumstances of the case we must believe the trustees to have had at heart; and the deed therefore seems to me abundantly sufficient as an exercise of their power to prevent the operation of the arrestment even if, as I do not conceive it to have been, any further exercise of it was needful for that purpose after the declaration of their resolution to postpone which they had made in their pleadings. In this view your Lordships do not require at all to consider the deed of July.

Neither do I think that the delay of making or declaring the resolution until after the institution of proceedings, diminishes its force or affects the rights of the parties. The power of the trustees was to continue until they had actually parted with the shares, and the exercise of it was made necessary by those very proceedings which gave the first occasion for such interference as the settlor had manifestly intended them to make. As the arrestment could not invest the debtor with any interest he had not before, it could not take from the trustees the power rightly or wrongly committed to them, and legitimately called into action by the arrestment itself. This view must, I think, have been adopted by the Court below when by its interlocutor of the 17th July 1877 it allowed the amendment of the record which put in issue the two deeds executed after the raising of the action. With reference to them, however, as I have said, the answer to the third condescendence appears to me sufficient to sustain the appellants' case.

Therefore, my Lords, holding that the intention of the settlor is clear; that the power given to the trustees was ample to carry that intention into effect; that their action was within the scope of that power, and that it was validly executed; I am of opinion that the appeal should be allowed, and the interlocutor of the First Division of the Court of Session reversed, with costs.

In the view I have taken it is wholly unnecessary to decide the question raised as to the testing clause of the trust-deed, and therefore I give no opinion upon it.

Lord Blackburn—My Lords, in this case the respondents, having obtained a judgment in the Court of Exchequer in England against James Chambers, arrested in the hands of Robert Chambers and others, the trustees of the late Dr Robert Chambers (who are the appellants), "the sum of £2500 sterling, more or less, due and addebted by them or any of them to the said James Chambers or to any other person or persons for his use and behoof, by bond, bill, decreet, contract,

agreement, or by any manner of way whatsoever, together also with all goods, gear, debts, sums of money, rents of lands and houses, and every other thing presently in the hands, custody, and keeping of the said arrestees pertaining and belonging to the said James Chambers, all to remain in the hands of the said arrestees under sure fence and arrestment at the instance of the said Charles Edward Smith, Charles George Smith, and Edward Smith, aye and until they be completely satisfied and paid off the sum of £2294, 1s. 10d., with the sum of £4, 6s. for costs of suit, and the legal interest thereof since due and till paid."

The respondents issued a summons asking as the first alternative that the arrestees should be decerned to pay to the respondents the money in their hands—at least such part thereof as shall satisfy and pay the pursuers the sum of £2294, 1s. 10d., with costs and interest.

The trustees were appointed by the late Dr Chambers under a trust-disposition and settlement, dated the 10th November 1870, on the construction and legal effect of which the questions debated at the bar of your Lordships' House mainly depend. I will return to this deed afterwards.

In the condescendence the third answer originally stood as follows:—"Admitted that the defenders, the arrestees, had not at the date of the arrestments, and have not since, executed any deed under their hands with reference to the share of the defender Mr James Chambers in his father's estate. Admitted that a balance of the defender's share of residue is yet in the hands of the trustees. Explained that the amount of said balance has not yet been ascertained, but believed that it would probably be equal to the amount of the pursuer's debt. *Quoad ultra* denied, and explained that the trustees have thought it proper and have resolved to postpone the payment of the said balance, and to pay the interest only to Mr James Chambers for his aliment as provided in the trust-deed. Explained further that the said interest will be no more than sufficient for Mr James Chambers' aliment."

By an interlocutor dated 17th July 1877, which has not been appealed against, they were permitted to amend by adding—"Since the raising of the present action, and of these dates (10th, 13th, and 16th January 1877) the defenders executed a deed restricting Mr James Chambers' interest under the trust as therein mentioned. The said deed was produced in process, and is referred to. Of these other dates (6th, 9th, and 10th July 1877), for the purpose of obviating any doubt as to the meaning and effect of the said deed, the defenders executed a second deed of restriction, which they have produced in process, and which they are about to place on record. The said deed is referred to for its terms."

The pleas-in-law for the pursuers were—"(1) The defender, the principal debtor, being due and owing to the pursuers the sums contained in the said extract-judgment, the defenders, the arrestees, are liable to account to the pursuers for the said principal debtor's funds in their hands in terms of the conclusions of the summons. (2) Assuming that the declaration introduced into the testing clause of Dr Chambers' settlement is effectual to constitute an alimentary provision, the defender's share of residue is attachable to the extent of the surplus in excess of a reasonable alimentary annuity. (3) In any event, the pursuers are entitled to have their arrestments made effectual to the effect of giving them a preference over the fee or reversion of the said share of residue, subject to the burden of the defender's life interest."

The pleas-in-law for defenders were—"(1) The averments of the pursuers are irrelevant, at least as against the defenders the arrestees. (2) Upon a sound construction of the said trust-disposition and settlement, the trustees are entitled to retain in their hands the share of residue belonging to the said James Chambers, and to apply the interest of the same as an alimentary fund for his behoof. (3) The said trustees not being bound to pay the principal of the said share of residue to the said James Chambers, either now or subsequently, the pursuers are not entitled to any decree of furthcoming."

The parties on the 22d February, when the case was before the Lord Ordinary, by a joint-minute agreed to accept the statements contained in a letter of the 31st January 1877 as substantially correct, and concurred in renouncing further probation.

The effect of the statements in this letter is that the share of capital falling to James Chambers, exclusive of his interest in some heritable property in the High Street, was originally £4600, and that he had up to the 1st June 1875 been paid so much as to reduce the capital, exclusive of heritable property, to £2525. Besides this, there was the share of the heritable property, amounting to £530. These two sums together amount to £3050, a sum which, if it is available for that purpose, is more than sufficient to discharge the judgment debt. The statement as to profits and income is not so clear. The income up to 31st March 1875 seems to have been then ascertained, and paid to James Chambers. Between that date and the 31st March 1876 he was paid in all £568, 12s. 2d. This high rate of interest is accounted for by the greater part of the funds being invested in what, judging from this, must be a flourishing business.

It is not expressly stated at what periods the firm were in the habit of ascertaining and dividing their profits, but I think it may reasonably be inferred that it was on the 31st March in each year. On the 6th July 1876 James Chambers was paid £150 on account. I think the reasonable inference is that at least all profits and income due before the date of the arrestment, 29th day of September 1876, had been paid, and certainly the arrestors have not proved that any arrears of income were at that date in the hands of the arrestees and due to James Chambers. But it appears from the same letter that the partnership came to an end on the 31st December 1876, and therefore, probably (though not certainly), a considerable sum for profits became due on that day and before the 10th January 1877. If it becomes material to ascertain how this is the case, it must be sent down again for that purpose, as your Lordships have no materials before you from which to do so. In the view, however, which I take of the construction of the deeds of 10th November 1870 and 10th January 1877, it is not necessary to ascertain this.

The Lord Ordinary (Lord Young) by his interlocutor sustained the second and third

pleas-in-law for the defenders, and by doing so he decided that the arrestees were entitled to retain both principal and income as against the arrestors. The First Division "recall this interlocutor, repel the defences, and decern in the forthcoming in terms of the first alternative." By doing so they decided that the arrestors were entitled to the capital, and as that was more than sufficient to justify the judgment debt, they had no occasion to consider, and did not consider, whether there was any difference as to the income.

Lord Shand, who dissented from that judgment, says—"I am unable to concur in the proposed judgment, being of opinion with the Lord Ordinary that the trustees of the late Dr Chambers are entitled under the powers conferred by his settlement to retain the money to which the pursuers as creditors of Mr James Chambers maintain they have acquired right, and to apply the interest or proceeds towards the maintenance of Mr Chambers and his family. In the view I take of the case it is unnecessary to decide any question as to the effect of the provision in the testing clause, which declares the annuity, legacies, and provisions left by Dr Chambers to be alimentary."

In this opinion of Lord Shand I agree. I will, without expressing any opinion as to the effect of the provision in the testing clause, and treating the deed as if no such provision was there inserted, consider what is the true construction and legal effect of the clause, beginning with the word "lastly,"

The deceased appointed his trustees "to hold, apply, pay, and convey the residue of his estate to and for the behoof of his children (of whom James Chambers was one). His share has now been ascertained to have been somewhat more than £5000," with and under the exceptions and modifications after stated, payable "in the case of such as are majors (which James Chambers was) six months after my decease, declaring that the whole provisions in favour of my said children shall at my death vest in those surviving me;" and James Chambers did survive him. Had the deed stopped there it would have been too plain for doubt that the provision for James Chambers was his to dispose of as he would, from the time of Dr Chambers' death, and that as soon as the six months had elapsed he could have compelled the trustees to pay him both principal and interest. But after some provisions as to children who died in his lifetime leaving issue, and minors, which do not affect James Chambers, the truster proceeds to state "the exceptions and modifications" in the following terms:—"And notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to and for and in the power and option of my trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so the payment of the provisions or shares of residue hereinbefore provided as aforesaid in the case of all or any of my children or grandchildren, and to apply the interest or annual produce of the same during the period of postponement to or for behoof of such children or grandchildren, or by a deed under their hands to retain the said provisions or any of them vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorised to appoint), with all or any of the powers, privileges, and exemptions belonging to themselves, including the power of appointing factors, so that my children and grandchildren or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children or grandchildren or their lawful issue on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient, of which expediency and the time and manner of exercising the powers and option hereby given they shall be the sole and final Judges."

My Lords, I shall not occupy time by examining critically the words of this clause, which has been sufficiently done in the Court below. The words are not very artistically chosen, but I think there can be no doubt that the intention of the truster Dr Chambers was that his trustees should have "a power and option, if they see cause and deemed it fit," to postpone the pay- of James Chambers' share, and to apply the interest during such postponement to or for behoof of James Chambers.

He probably had two motives—one was that a large part of his means being in a business, it might be inconvenient to give his children or their creditors power to insist in the withdrawal of those means from the business at the end of six months from his death, and if the postponement was for that reason only, it would be right to pay the interest of the share to the child. The other motive was that he feared that his children or some of them might prove spendthrifts—in that case the trustees might postpone the payment whilst they were considering whether they would exercise the further power of settling the fee on the issue, and giving the spendthrift child only the life interest. Indeed, in any case some time must elapse before such a deed could be prepared, but during that time at least the payment must be postponed. And whilst it was postponed for such a purpose, it would not be desirable to pay the income to the spendthrift, but to apply it for his behoof. I think it probable that if the present case had been suggested as a possible one to Dr Chambers, and he had been asked whether it was his intention that the income should during the postponement be swallowed up by the Stock Exchange creditors, leaving James Chambers and his family penniless, he would have said—"By no means. I have given my trustees discretion to apply it for his behoof, and they will exercise that discretion by paying the household and necessary expenses first before paying anything to either James Chambers or his creditors. If after doing so there is anything over, James Chambers and his creditors may do what they like with it." But it was for the trustees, and the trustees alone, to decide how the discretion was to be exercised. The truster declares in the most explicit language that of the expediency and the time and manner of exercising the power and option given to the trustees "they shall be the sole and final Judges."

My Lords, where a truster gives discretionary

powers to be exercised by his trustees in order to protect the interests of others, the trustees are bound to exercise their discretion, and cannot in general deprive themselves by anticipation of the power to do so—*Weller* v. *Kerr*, Law Reports, 1 Scotch Appeals, p. 11. In the present case, however, the terms of the trust are such that the trustees might properly pay the whole or part of the share at the end of six months, or any subsequent period—and they in fact did pay a part, and as to that part their discretionary power was gone. It was argued at your Lordships' bar that the trustees must either return and settle the whole fund or none. No doubt there may be and often is a trust where, from the nature of the subject-matter and the objects of the trust or otherwise, it appears to be the intention of the truster that the whole shall be kept together as one entire thing. But here the fund is in its nature divisible, and the objects of the trust are such as to show that it is divisible. I think therefore that as against James Chambers the trustees had power to exercise their discretion as to the postponement of the payment of any part of the fund which remained in their hands at any time up to actual payment.

The truster no doubt has declared that the share of James Chambers should vest on the truster's death, but with and under the exceptions and modifications to be afterwards stated. It is judicious, and is common both in Scotland and in England, to vest a fund subject to be divested in after events, rather than to keep it unvested and contingent till these events happen. Familiar instances are referred to by Lord Shand —as money settled, subject to the life interest of the parents, on the children of a marriage born or to be born, or subject to a power. The interest of each child vests on both, but is subject to be divested in part by the birth of more children, or in the whole by the exercise of the powers.

I do not understand any of the Judges below to say that if there had been no arrestment in this case, and James Chambers himself had taken proceedings to compel the trustees to pay over the principal to him, the trustees would not have had a good answer. Lord Deas seems to admit—or at least does not deny—that the deed of 10th January 1877 would have been good if *tempestive* executed, but to hold it too late after arrestment. And the Lord President expressly says—"The sole question therefore is—How far is the effect of this clause taken off or modified by what follows? It would be strange if the effect of that modification were that in certain events the shares should not vest at death. That would simply undo what has immediately preceded, and that, in my opinion, is not the effect of the modification. But it is quite possible that a provision may vest and yet in certain events be subject to defeasance. An entailed estate, for instance, may vest fully in an heir of entail, and yet be subject to defeasance. There have been instances of that in cases that have recently come before this Court, and if this is possible in the case of an entailed estate, it may certainly take place in other deeds of settlement made with that purpose. If the clauses that follow are resolutive and not suspensive, vesting takes place as fully and completely as if there had been no conditions appended. What is the effect of the conditions and exemptions that follow? As regards the first part of them, they are neither concerned with vesting or divesting. They merely deal with the term at which the provisions are to be payable, and if there had been here a postponement of payment by the trustees in virtue of that power, the effect would be not certainly to make this arrestment bad, but that the right of the arresting creditors to make their arrestment effectual would have been postponed. Passing over that clause, we come to a clause empowering the trustees to create new trustees, or to constitute themselves new trustees, to provide that the beneficiaries are not to be entitled to more than the liferent of the provisions, and that the capital is to be settled on their children "on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient." Now, I quite admit that the effect of the deed which the trustees have executed is to divest the legatee of the right as it then stood vested in him. This deed applies and makes effectual the resolutive condition—it resolves the right in the manner contemplated by the truster—but till it was executed the fee of his share of the residue remained vested in the beneficiary *just as if no such condition existed.* From that it follows that the fee existed in the legatee subject to the diligence of his creditors at the date of the arrestments, and on that simple ground I hold that the deed executed by the trustees had no effect on the arrestment previously used by the creditors."

My Lords, I agree with all of this except the seven words which I have emphasized, namely, "just as if no such condition existed." With deference to the Lord President, he has overlooked the great and fundamental difference between a gift to one either direct or through the medium of trustees, who are mere conduit-pipes to convey the gift to the beneficiary, and a gift subject to a power reserved to trustees to be exercised paramount to the beneficiary and in his despite. I think the arrestment fixes the date at which it is to be determined whether the arresters have a right to attach the fund, and anything that is subsequently done by the debtor, or by those who have rights against the debtor, or by those who claim under him, comes too late after that. But a divesting of the debtor—vested properly by something quite independent of him —is different. If a fund were given to the children born or to be born of A, and the creditors of a person who at the time was the only child of A arrested the fund, the birth of a second child of A would not come too late to divest one-half of the fund. Why? because, as I think, the fund did not remain vested in the only child, just as if no such condition existed, but did remain in him subject to that condition. And I think that the truster having a perfect right to give his son James nothing, had also a perfect right to give him a vested interest in a fund, subject to a condition that the trustees might in their discretion divest that fund. In this I agree with the Lord Ordinary (Lord Young) and Lord Shand. Whether the truster has by the terms of this deed effectually exercised that right is a question depending upon the construction of the instrument. I think he has.

An ingenious argument, which had not been thought of in the Court below, was stated at

your Lordships' bar. It was said that the trustees had exercised a deed of 10th January without any power of revocation reserved, which they could not afterwards alter, and it was said that whatever might be their wish, the terms of that deed were such that on its true construction they had irrevocably given James Chambers an absolute right to draw and receive the interest during his life, and spend it as he pleased, and consequently the arresters were entitled to do so for their benefit. But I do not think this is the true construction of the deed of January 10th. The whole narrative shows an anxious desire to secure that the income, which it is stated is not more than is required as a suitable alimentary provision for James Chambers and his family, should be so applied. And the final clause, that "so long as the said provision shall be retained as aforesaid, the said James Chambers, or his children or issue, shall only be entitled to draw and receive the interest or other annual proceeds of the said balance of his provision during his and their lives," on which alone the argument rests, is followed by the words—"and that at such times and in such proportions as we may deem expedient." There is no rule requiring that any special terms of art, such as "alimentary," should be used, and though the deed might have been more clearly framed, I think the intention to reserve to the trustees a power to control the purposes for which the income was to be spent sufficiently appears, and under the very extensive powers given to them by the truster the trustees had power to do so as far as James Chambers was concerned. What may be the effect as to his children after his death may be settled then.

My Lords, if this view is adopted by your Lordships, it becomes unnecessary to decide whether the proviso inserted in the testing clause is effectual.

Should it in any future case become material, those who have to decide the question must say whether the very powerful reasoning of Lord Deas, agreed to by all the other Judges, is consistent with the *ratio decidendi* of this House in *Dunlop* v. *Greenlees* (3 Macph. 46). I wish to say nothing to bias the decision of that either one way or the other.

I entirely agree in the proposed judgment.

Lord Gordon—My Lords, I also agree in the proposed judgment. The facts of the case have been so fully stated by my noble and learned friends who have preceded me, that I shall endeavour to compress as much as possible the observations that I have to make in supplement to the opinions which they have expressed.

It was of course essential to the decision of this case that the terms of the trust-deed should be read. But they have been read by some of your Lordships, and therefore it is unnecessary for me now to trouble your Lordships, as I had otherwise proposed to do by reading them. I will simply say that the deed contains this clause —"And in order to prevent the failure of the discretionary powers hereby conferred in consequence of the office of trustee lapsing, I request my trustees, as soon as their number is by resignation or otherwise reduced below three, to assume other trustees or trustee according to law, and with the same powers as are hereby conferred on themselves."

There was also inserted in the testing clause of the deed a declaration in the following terms:—"But with and under this express provision and declaration, viz., that the whole of the legacies, annuity, and provisions made and provided by this disposition and deed of settlement shall be strictly alimentary, and shall not be arrestable or attachable for the debts or deeds of the persons in whose favour the same are conceived, or any of them, nor be subject or liable to the diligence of their creditors."

Dr Robert Chambers, the testator, left several children, and amongst others a son James. Under the above-recited provision of the residue of the estate James Chambers became entitled to a sum of about £8000, to account of which he received between March 1871 and 6th July 1876 sums amounting in all to £4982, leaving a balance in the hands of the trustees of about £3000. James Chambers had also an interest in his father's share of the publishing business of W. & R. Chambers. At the time of the truster's death the partnership had five years to run, and the truster authorised his trustees to make arrangements for continuing the business beyond that period. The testator therefore evidently had it in contemplation that the trust might exist for a considerable length of time.

My Lords, this litigation originated in an action of furthcoming at the instance of certain creditors of James Chambers, who claimed in virtue of arrestments which had been placed on certain funds in the hands of the trustees under the will of Dr Robert Chambers.

My Lords, the respondents in the action contended that in virtue of their arrestments and of the action of furthcoming they had attached the funds in the hands of the trustees which had been bequeathed by the testator in favour of his son James. And the trustees (appellants) stated in their defence that they had thought it proper and had resolved to postpone the payment of the balance in their hands, and to pay the interest only to James Chambers for his aliment, as provided in the trust-deed. And they further stated (by permission of the Court after the case went to the Inner House) that since the raising of the action, and of these dates—10th, 13th, and 16th January 1877—they had executed a deed restricting James Chambers' interest under the trust as therein mentioned, and that for the purpose of obviating any doubt as to the meaning and effect of the said deed they had executed a second deed of restriction, dated 6th, 9th, and 10th July 1877, which they produced, and which they stated they were about to place on record.

The second and third pleas stated for the defenders (the appellants) were as follows:—"(2) Upon a sound construction of the said trust-disposition and settlement the trustees are entitled to retain in their hands the share of residue belonging to the said James Chambers, and to apply the interest of the same as an alimentary fund for his behoof. (3) The said trustees not being bound to pay the principal of the said share of residue to the said James Chambers either now or subsequently, the pursuers are not entitled to any decree of furthcoming."

The Lord Ordinary (Lord Young) by his interlocutor, dated 22d February 1877, sustained these two pleas for the appellants, and dismissed the action, but did not assoilzie the defenders—that

is proposed to be corrected by the judgment to be pronounced by your Lordships.

The trustees took the case by reclaiming note to the First Division of the Court, and their Lordships of that Division allowed the record to be amended by the addition of the statement by the trustees of the execution of the two deeds of trust of January and July 1877, that has been referred to by my noble and learned friend opposite (Lord Blackburn).

I need not again call your Lordships' attention to the deed of trust of July 1877, which I had intended to read. This deed was lodged in process, and the case was thereafter debated before their Lordships of the First Division, who on 20th July 1877 appointed the cause to be further argued by one counsel on each side, with a special view to the application and effect, if any, of the declaration contained in the testing clause of the settlement of Dr Chambers, and on 9th November 1877 their Lordships recalled the interlocutor pronounced by Lord Young, and repelled the defences, and decerned in favour of the pursuers for the sums claimed by them, with expenses.

That judgment of the First Division of the Court has now been brought by appeal to your Lordships' House. The appellants maintain their appeal on three grounds—1st, On the terms of the trust-settlement, apart from and exclusive of any effect being given to the special provision and declaration contained in the testing clause of the trust-deed as to the provisions in the deed being alimentary, and on the judicial intimation contained in the record; 2d, On the terms of the deed of trust restriction of the provisions, dated in January 1877; and 3d, On the deed of July 1877. The majority of the Judges of the First Division adopted to a great extent the argument of the respondents. Their Lordships held that the declaration inserted in the testing clause of the trust-deed could not receive effect, and to this part of the case I shall afterwards advert. They also held that the provisions in favour of James Chambers had vested in him at the death of the testator, and therefore these had been validly attached by the respondents, arrestments before any deed of restriction had been executed by the trustees, and that the respondents were therefore entitled to be preferred to the funds in the hands of the trustees to the extent of the debt due by James Chambers. Lord Mure shortly expresses his own opinion and the result arrived at by the majority of the Court in these terms—"Reading the provisions of this deed, as I think we must, without reference to the tenor of the testing clause, I am of opinion that this fund was arrestable at the date of the pursuer's arrestments, and was validly attached. The broad ground on which I go is, that vesting was intended to take place, and did take place, at the date of the granter's death, in respect of the express words and declaration of the deed to that effect, while the provision was made payable six months after that event. If therefore no such deed as that which the trustees have now executed had been before us, I could have had no difficulty in holding that the arresting creditor must prevail. The only question is —Whether the deed executed by the trustees since this case came into Court makes any difference? And I am of opinion that it does not, because it appears to me that as the provision had vested in Mr James Chambers by the express terms of the trust-deed at the date of the truster's death in 1870, it required some distinct act on the part of the trustees to divest him of his right to the fund, and until some such step was taken I am of opinion, with Lord Deas, that the fund remained attachable by creditors, and was validly arrested by the pursuers of the present action." On the other hand, Lord Shand, one of the Judges of the First Division, dissented from the views of the majority, and concurred with the Lord Ordinary in the opinion that the trustees of Dr Chambers "are entitled, under the powers conferred by his settlement, to retain the money to which the pursuers, as creditors of Mr James Chambers, maintain they have acquired right, and to apply the interest or proceeds towards the maintenance of Mr Chambers and his family." And his Lordship stated that in the view he took of the case it was unnecessary to decide any question as to the effect of the provision in the testing clause which declares the annuity, legacies, and provisions left by Dr Chambers to be alimentary, but that on that part of the case he agreed with the opinions which had been expressed by the majority.

I have a very great respect for the opinions of the Lord President and the Judges who composed the majority of the First Division, but I think that in considering the effect of the terms of the trust-disposition (apart from the terms of the provision in the testing clause, to which I shall afterwards refer) they have failed in this case to give due effect to decisions by your Lordships' House, and also to decisions in the Court of Session. I concur generally in the views taken of the case by Lord Shand, with the exception of the view taken by him in regard to the declaration of the alimentary provision in the testing clause. But I concur with him in thinking that it is unnecessary for the decision of the case to decide any question as to the effect of the declaration in the testing clause of the deed. I think that the trust-deed conferred on the trustees the most ample power of securing the provisions of the children of the testator, and that the rights of the trustees to deal with these provisions could not be affected by the diligence of creditors of the children. I do not doubt that the provisions in favour of the children vested in them, but the provisions vested only subject to the conditions of the trust, and specially subject to the power given to the trustees to regulate the payment of the provisions, or to secure them from the rights of third parties contained in the deed. I do not think it necessary to comment at any length on the provisions of the deed. These have been fully examined and commented on by Lord Shand and by those of your Lordships who have already spoken, and as I concur generally in his views in regard to them it is unnecessary to detain your Lordships by a detailed examination of them. I shall advert to only two authorities which I think confirm the views I take of the case.

In the case of *Duncan, &c.* (*Croom's Trustees*) v. *Croom*, November 30, 1859, 22 D. (Court of Session Reports, 2d series) 45, a question arose under the terms of a trust-deed—Whether a legatee, whose share of the trust-estate, it was alleged, had vested in virtue of express words in the deed to that effect, had power to test on the said share?

The testator directed his trustees at the end of twelve months after his death, or on the eldest survivor of John Croom Wallace, Esther, Charlotte, and Mary Keith, and the lawful children of George Croom attaining the age of twenty-one years complete, whichever of these events should last happen, to realise his estate, and to divide and apportion the whole residue of his means and estate equally among the said John Croom Wallace, and Esther, Charlotte, and Mary Keith, and the children of George Croom, subject to the conditions after mentioned, and the survivors and survivor of them, share and share alike, and that *per capita* and not *per stirpes*, and the testator, *inter alia*, directed "the shares or portions before provided to the lawful children procreated and to be procreated of the body of the said George Croom at the period of the division aforesaid, shall be paid equally to and among the whole children of the said George Croom, whether procreated at the said period of division or subsequently procreated, and to the survivors and survivor of them, on their respectively attaining the age of twenty-one years, or on the death of their father, whichever of these events shall last happen, with interest on their respective portions till paid;" and the testator provided that "on any of the said residuary legatees, being children of the said George Croom, attaining the age of twenty-one years, then the interest or annual produce of his or her portion shall be paid to him or her until the death of their said father, when their shares or portions shall become payable: Declaring that on the eldest of the said residuary legatees attaining the age of twenty-one years, then the whole of the said legacies before mentioned shall vest: Declaring, nevertheless, that in case any of the children of the said George Croom shall die after the said period of division, and before the respective terms of payment, without leaving lawful issue, then the share vested in such deceaser shall be paid to the survivors and survivor of them equally, subject always to the same provisions and declarations applicable to their original shares of my said estate."

John Croom Wallace, the eldest of the annuitants, attained majority in March 1848. George Croom died in 1853, leaving five daughters and two sons. One of them, Mary Croom, died in April 1858, before attaining majority. She left a settlement by which she appointed her sister Mrs Adams and Dr William David Adams her executors, and disposed of her estate. Mary Croom's executors asked from John Croom's trustees payment of her share of that portion of his estate bequeathed to the children of her father George Croom, and raised an action of multiplepoinding in the name of the trustees under John Croom's settlement, in which the fund *in medio* condescended on was Mary Croom's share of John Croom's succession, amounting to £1205, under deduction of residue-duty. The executors claimed (1) to be ranked and preferred to the whole fund *in medio;* or (2) if it should be held that the share of the estate of John Croom falling to Mary, and forming the fund *in medio*, had not vested in her, and was not within her power of disposal by will, the claimant Mrs Adams, as Mary Croom's sister, claimed to be ranked *pari passu* with the other brothers and sisters of Mary, five in number.

Lord Benholme (Lord Ordinary) pronounced an interlocutor ranking and preferring Dr and Mrs Adams in terms of the second alternative of their claim, holding that "as the testator has, in the event which has happened, ordered payment to be made to the survivors of George Croom's family, without any qualification, and as he has given this instruction in the very face of the declaration as to the vesting, and, as it were, as a rider upon it, the Lord Ordinary thinks it safest to give effect to that instruction."

A reclaiming note was presented for Dr and Mrs Adams, who maintained that the trust-deed provided that the bequests to the legatees should vest in a certain event—namely, when the eldest legatee attained majority, and that that was the period of division, and they were clearly intended then to vest, as the legatees were to receive interest from that period, and that there was nothing in the deed to take off the effect of the precise declaration as to the date of vesting; and that though the truster provided a substitution in the event of a legatee dying intestate, that substitution was evacuated by Miss Croom's settlement, she having survived the period of vesting.

The Lord Justice-Clerk—the present Lord President (Inglis), then President of the Second Division—said—"The provisions in this settlement are peculiar. I have often thought, and may have remarked, that it would be desirable, in order to avoid the difficulties which arise in the construction of settlements as to the period of vesting, that testators should expressly declare when the vesting is to take place. Here, however, the testator has done so expressly, and thence has arisen the whole difficulty in the case, so I fear that is a very doubtful remedy. We must read this deed as the Lord Ordinary has proposed to read it, not with a view only to the technical interpretation of the words used, but in order to arrive at the true meaning of the testator. There may be clauses creating not only embarrassment but even inconsistency. But when a trust is created the Court is entitled to read the directions to the trustees for the mere purpose of ascertaining the intention of the truster, apart from the technical meaning of particular terms in the deed." And after considering the terms of the deed his Lordship expressed his opinion that though there was an express declaration that the shares were to vest on the occurrence of a certain event, yet that that declaration must be read in connection with and be controlled by the other provisions of the deed.

Lord Wood concurred with the Lord Justice-Clerk, and said—"Although there may at first sight seem to be an inconsistency here, there is no real inconsistency. If the deed be considered as a whole, it is clear that there is no inconsistency in the mind of the testator. He did not mean one thing in one part of it and another thing in another part. He declares, indeed, that the shares shall not vest at the period of division; but then he goes on quite consistently to qualify that declaration by the explanation immediately following. He may appoint a sort of vesting, but it is subject to and restricted by the rights conferred on the survivors at the date of payment."

And Lord Benholme (who had been Lord Ordinary in the case, and was then one of the Judges in the Second Division) said—"I adhere to the

view which I have had all along, that the intention of the truster in his declaration qualifying the provision of vesting is so very clear that I could not allow any argument founded on the mere technical meaning of the words used to override what stood out on the face of the deed as the intention of the truster."

I think that decision is entitled to much weight, and that the principle there laid down is what ought to rule the decision in the present case. It was there held that though the direction as to the period of vesting of the provisions was most precise—just as is contended by the respondents in this case—yet that that direction was controlled by the other provisions of the deed, and that the deed must be read, as the Lord Justice-Clerk (Inglis) said, "not with a view only to the technical interpretation of the words used, but in order to arrive at the true meaning of the testator."

Applying that principle to the present case, I can entertain no doubt whatever that the intention of the testator was that his trustees should have, and should exercise if they thought proper, the very important power of control over the provisions made in favour of his children. The clause conferring the powers is very carefully framed, and the subsequent clause directing the trustees to assume new trustees, "in order to prevent the failure of the discretionary powers hereby conferred," shows how anxious the testator was on the subject. I have no doubt that in this case the clauses declaring the period of vesting and fixing the period of payment of the provisions are overruled and controlled by the subsequent clauses, and that the trustees had power, and were entitled when they thought proper, to exercise that power, and limit the rights of James Chambers as they have done.

The next case to which I shall refer—and the only other case to which I shall refer upon this branch of the case—is one relating to the power and duty of trustees under a clause permitting a restriction of provisions such as occurs in the present deed. The case to which I refer is that of *Kerr's Trustees* v. *Weller*, 19th Dec. 1863, 2 M. p. 371. In that case the trustees were directed by the trust-deed to limit the right of the truster's son in the event of his not conducting himself so as to merit the approval of the trustees to a liferent of an heritable estate, which was to be made over on his attaining the age of 25. The son married when he was 22, and on that occasion the trustees entered in their minutes an approval of the marriage, and the marriage-settlements proceeded on the footing of the son having right to dispose of the fee of the property. It was held by the Lord Ordinary (Lord Kinloch) that the power conferred on the trustees might be exercised at any time before the son attained 25 years, and might be exercised by a majority of the trustees in office at the time, although another trustee who had been in office during a portion of the time when the conduct disapproved of had taken place had died. The case came before the First Division, then presided over by Lord President M'Neill, afterwards Lord Colonsay. The Lord President and Lord Curriehill affirmed the Lord Ordinary's interlocutor, but Lord Deas dissented proceeding chiefly upon the ground that the trustees, by approving of the marriage and the marriage-settlements were precluded from exercising the power in question to the prejudice of the wife and children of that marriage.

This judgment was appealed from—*Weller* v. *Kerr and Others*, 1st March 1866, 1 Law Reports (Scotch Appeals), p. 11. The marginal note bears that "when a power, coupled with a duty, is conferred upon trustees to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power or execute it until the time appointed, nor can they enter into any anterior contract respecting it." It was held to be the duty of the trustees (the husband having in their judgment subsequently misconducted himself) to execute the power so as to restrict him to a life-interest, although the effect was to defeat the provisions for the wife, as well as other claims founded on a confident expectation that the marriage-settlement would not be disturbed."

The Lord Chancellor (Lord Cairns) said—"It seems a very strange proposition that if a testator gives a power to trustees, evidently to be exercised only with reference to the interests of his children, or those for whom he is providing, the trustees shall be able to say, 'We give up that power'—a power which was committed to them, not for their own benefit, but for the benefit of others. But whether they had the power of divesting themselves or not, my clear opinion is that they never did divest themselves of that power."

Lord Chelmsford said that he entirely agreed in the opinion of the Lord Ordinary and of the majority of the Judges of the Court below. His Lordship added—"It appears to me that the trustees could not either abandon or fetter the exercise of the power entrusted to them. It was a power coupled with a duty of a most important character. It was evidently intended that it should be retained and freely exercised down to the time when they were called upon to convey the estate. But even assuming that the trustees might have bound themselves not to interfere with the rights and interests created by the marriage-settlement by giving their consent to it, in point of fact no such consent was ever given. That they consented to the marriage is clearly proved, and this would of course prevent their afterwards making it the ground of objection to the conveyance of the fee to the heir. But it is not correct to say that the consent to the marriage carried with it a consent to the marriage-settlement. The trustees' names were designedly omitted as consenting parties to the settlement. But if they had consented to the settlement it would in my judgment have made no difference. All parties knew, or ought to have known, that the provisions of the settlement could only be contingent and conditional, depending upon the conduct of the son till his age of 25."

Lord Kingsdown said—"I entirely agree with my noble and learned friends."

That decision, my Lords, in my opinion, rules the point which your Lordships have to decide as to the effect of the arrestments used by the respondents in the hands of Dr Chambers' trustees. The power given by the testator was (in the words of the Lord Chancellor) "evidently to be exercised only with reference to the interests of his children," and that being so, I am of opinion with his Lordship in that case that the trustees here would not be entitled to say—"We give up that power—a power which was committed to

them, not for their own benefit, but for the benefit of others." The power was to be exercised by the trustees "if they see cause and deem it fit." Apparently they saw no cause for interfering with James Chambers' provision until his proceedings were brought under their notice by the arrestments used in their hands; but his conduct and the state of his affairs having been brought under their notice, the trustees saw cause and deemed it fit to intervene. They, in the first place, intimated in their defences to the summons of forthcoming that they had thought it proper and had resolved to postpone the payment of the balance in their hands, and to pay the interest only to James Chambers for his aliment, as provided for in the deed; and then the trustees executed the deed of January 1877, by which they retained vested in themselves the whole of the balance of the provisions or shares of the residue falling to James Chambers in trust for his behoof during his lifetime, and after his death for behoof of his children. I am of opinion that the deed so executed by the trustees is a valid deed; that they were entitled to exercise the power vested in them at any time before payment; and that they were not interpelled from the exercise of their powers by the arrestments used in their hands.

A question has been raised as to the power of the trustees, there being no power of revocation in the first deed, to execute the second deed of July 1877, which declares that the provisions were vested in the trustees in trust only "for behoof of the said James Chambers, in liferent for his liferent alimentary use allenarly," and after his death for behoof of his children. I am of opinion that the question so raised does not require to be decided, for I think the effect of the first deed is effectually to secure the whole provisions against the diligence of the creditors of James Chambers, for the deed declares that "so long as the said provisions shall be retained as aforesaid, the said James Chambers or his children shall only be entitled to draw and receive the interest or other annual proceeds of the said balance of his provisions during his and their lives, and at such times and in such proportions as we may deem expedient."

I think the views which I have expressed are sufficient for the decision of the case, and that it is not necessary to consider the question raised as to the validity of the declarations inserted in the testing clause of the deed declaring the provisions to be alimentary, and therefore I would prefer that your Lordships should leave the point to be disposed of in some case where it is really necessary to be decided, and where the authorities are more fully discussed than I think they were in the Court of Session or before your Lordships. But as the Court below has dealt with that question, and it has been discussed at your Lordships' bar, it is right that I should state my views in regard to it.

The Lord Ordinary (Lord Young) was of opinion that the declaration inserted in the testing clause must be read and receive effect as part of the testamentary deed of the testator, but their Lordships of the First Division were unanimous in holding that as the proper function of the testing clause was to state the particulars required by the testing statutes in regard to the subscription of the granter and authentication of the deed by the subscribing witnesses, the insertion of a substantial provision going beyond this was ineffectual, and consequently that the declaration in question could not be regarded as part of the deed.

There can be no doubt that the testing clause is not a proper place for the insertion of an important clause, or for any clause unconnected with the testing of the deed. But I think the decisions to be afterwards referred to show that words of much importance to the validity and effect of a deed may be so inserted. The late Professor Montgomerie Bell, Professor of Conveyancing in the University of Edinburgh, in his Lectures on Conveyancing, says at page 235—"As a general rule, all matter foreign to the proper purpose of the clause ought carefully to be excluded. Sometimes, however, it is unavoidable to introduce in the testing clause an addition to the deed not appropriate to that clause, and if the addition be made in competent form and duly authenticated effect is not denied to it as part of the deed." I think this passage shows that it was not considered by practitioners to be incompetent to insert in the testing clause "an addition to the deed not appropriate to that clause." If it was averred that the addition so inserted was done without authority, or that it was not duly authenticated, there might be room for inquiry. But there was no such allegation made in the present case. The declaration in question is part of a probative deed, and the deed is founded upon by both parties.

There are decisions not only of the Court of Session but of your Lordships' House which appear to sanction the validity of a declaration inserted in a testing clause. I may refer to the cases of *Johnston* v. *Coldstream* and *Dunlop* v. *Greenlees*. With reference to the case of *Johnston* v. *Coldstream*, Lord Deas says, in his opinion in the case now before your Lordships, that in the case of *Dunlop* v. *Greenlees* "I am correctly reported to have said—'The first point (whether the wife's signature bound her as a party to the first deed) was decided in the case of *Johnston*, and I concur with your Lordship that we cannot go back upon that case, which, moreover, I think was rightly decided.'" And then he goes on to say—"I do not think I require to impugn either my own opinion or that of the House of Lords in *Dunlop* v. *Greenlees* in order to come to the conclusion that the 'express provision and declaration' introduced into the testing clause of the present deed is beyond the proper functions of a testing clause."

The case of *Dunlop* v. *Greenlees* was decided in your Lordships' House on 2d June 1865. It is to be found reported at page 46 of the House of Lords Reports in 3 Macpherson (3d series, Court of Session Cases). The Lord Chancellor (Lord Westbury) said—"The first point which presents itself is one entirely affecting the practice of Scotland as to the execution and attestation of settlements, and it is a point unquestionably of the utmost possible importance. The point has arisen and been decided in Scotland before, and your Lordships are asked by the appellant to reverse that decision pronounced by four of the most eminent Judges in Scotland, and acted upon for the last 23 years. The point arises in this way—Matthew Greenlees, by deed dated the 18th of February 1835, declared that a provision for his wife of an annuity of £40 should be accepted by

her in satisfaction of all terce of lands, half or third of moveables, and every other claim competent to her by and through his decease in any manner of way. The testing clause is conceived in these words, after the formal introductory words, and the mention of the fact of subscription by Matthew Greenlees, 'and by me, the said Janet Brackenridge or Greenlees, in token of my consent to and approval of the foregoing settlement,' and at the foot her signature is appended. It was contended that these words introduced matter foreign to the purpose of a testing clause. It was said that the clause should be confined to the statement of the formalities of execution and of the fact of execution. The same objection was urged before the Court of Session in a case determined in June 1843, and in that case the Lord Ordinary (Ivory) entertained it for the first time. That case, my Lords, is hardly distinguishable from the one now before your Lordships. The Lord Ordinary stated that he was not aware of any instance in which the testing clause was made use of for such a purpose. His interlocutor was carried to the Inner House and made the subject of deliberate consideration. The Lord Justice-Clerk delivered a very long and elaborate judgment, in which Lord Medwyn and Lord Meadowbank concurred, and Lord Moncreiff considered the objection of the Lord Ordinary a mere attempt to introduce a doubt where no doubt had previously existed. The whole objection is rested on a radical error. The testing clause is by the law of Scotland a part of the deed, and if that is so, then it is as much in the body of the deed as any other part of it. The statutes of 1574 and 1681 are quite in accordance with that view. If that is so, my Lords, the whole objection falls. There can be nothing more dangerous than in a question concerning the proper form of a testing clause that your Lordships should now reverse the solemn decision arrived at by the Courts of Scotland. Infinite mischief would arise were that decision to be reversed. I think therefore that your Lordships will not for one moment entertain the idea of departing from it. It is a satisfaction to be able to say that had I been called upon to determine this question for the first time, I would have arrived at the same conclusion as that in the present case."

Lord Cranworth expressed an opinion to the same effect; and with reference to the argument that the case of *Johnston* was a case of the same kind, as indicating the express confirmation of the wife, he says—"That provision was however not superfluous, because the validity of the consent depended on the provision being remuneratory. That shadow of an argument therefore entirely fails."

Lord Chelmsford also concurred, saying—"I entirely concur in the opinion of your Lordships. I may add that from the moment the case was opened I could not bring my mind to entertain the slightest doubt on the question. I concur in the regret expressed by my noble and learned friend (the Lord Chancellor) that the appellant did not submit to the four decisions against her in Scotland, but has proceeded to impose large expenses on the respondent in defending this appeal. The matter is hardly worthy any observation. There appear to be three points. The first is whether Mrs Greenlees is bound by her signature to the deed of 1831. That she was so bound is clear from the decision in *Johnston* v *Coldstream;* and though Lord Ivory said the testing clause must be confined to the immediate objects of attestation, yet after careful consideration the Judges came to a different conclusion, and decided that a consent expressed in a testing clause was sufficiently binding. There is no doubt as to the propriety of that decision. In *Leighton* v. *Russell*, and in the present case, not one of the Judges expressed a doubt of its correctness. The present decision has been sanctioned by the Sheriff-Substitute, the Sheriff, and the unanimous decision of the Court of Session, and under these circumstances it would be a very dangerous thing to evince a disposition to throw a doubt upon it, and thereby affect the validity of many deeds executed on its faith."

I think it would not be right that your Lordships should disregard a case which received the sanction of these noble and learned Lords so late as 1865, and which had previously received the sanction of some of the most able Judges of the Court of Session, and which must have regulated rights of property for about a quarter of a century before the date of your Lordships' judgment. If it had been necessary for the decision of this case, I would have been prepared, as at present advised, to hold that the declaration introduced into the testing clause was entitled to receive effect as part of the settlement of the testator. But, for the reasons already given, I do not consider that it is necessary for the decision of the case to determine whether effect can be given to the declaration in the testing clause or not.

On the whole matter, my Lords, I am therefore of opinion that the judgment pronounced by the First Division of the Court of Session should be reversed, with costs.

Interlocutor appealed from reversed; cause remitted to the Court of Session to assoilzie the defenders from the conclusions of the action, with expenses; respondents ordered to pay to the appellants the costs of the appeal.

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