The questions submitted to the Court were:—

"(1) Whether the parties of the second part are bound now to denude of the whole funds of which, under the said ante-nuptial contract of marriage, they have become, or may hereafter become, possessed, coming through Mrs Grant, in favour of the party of the first part, as executor of his deceased wife, nominated by the said mutual disposition and settlement, upon his producing a confirmation in usual form, and tendering a discharge for the said funds;

OR,

(2) Whether, notwithstanding the execution of the said mutual disposition and settlement, nominating Mr Grant executor to his wife, and disposing of her whole estate, and the failure of children of the marriage, the parties of the second part are entitled and bound to retain and administer the said funds."

At advising—

LORD PRESIDENT—The question here is, whether the trust created by the marriage-contract is to hold, and the trustees to continue to administer the estate, or whether the trust has been revoked by the mutual disposition and settlement of the spouses? The answer to this question depends—(1) On the power of the spouses to make such a revocation, and (2) upon their intention. I do not doubt that, failing children of the marriage, the spouses were entitled to revoke the provisions of the marriage-contract, and the question is, Whether, in event of there being no children, the spouses really intended to revoke the marriage-contract? The first thing which strikes me in looking at this disposition and settlement is that the granters say that it is in "supplement of, but always without prejudice to the said provisions"—that is the provisions of the marriage-contract. In short, they say that they intend the provisions of the marriage-contract to subsist as regards themselves, as well as regards their children. So the reason for executing the deed must have been that the marriage-contract was not sufficient to dispose of the estate which they might leave in case of death; and as matter of fact, Mrs Grant had an estate in prospect, and her husband had conveyed no estate in his marriage-contract, and so, if he had any, that is sufficient to account for the mutual deed. In that deed both the husband and wife convey their entire estate each to the other in liferent, and "to the child or children of our marriage, and the issue of such as may predecease, equally between or amongst them *per stirpes*, whom failing, to my own heirs, executors, or assignees whomsoever, in fee;" and each appoints the other executor. Mrs Grant under the marriage-contract had a *jus crediti* as regarded her whole estate, which she conveyed to the trustees, except a certain fund which she retained in her own hands. Now this mutual deed raises the question, whether the husband, as executor-nominate under that deed, is entitled to take up the funds which are in the hands of the trustees, as being *in bonis* of his dead wife. I don't think he is entitled to do so, for the funds are already ingathered, and there is nothing for him to do in the character of an executor. If he had been universal legatee, then he would have been entitled to call upon the trustee to denude, or he would have been entitled to do so if power had been specially given to that effect. So the trust still subsists, and the trustees are bound to hold the fund for Mr Grant in liferent, and in event of his death for the heirs of Mrs Grant. So we must answer the first question in the negative, and the second in the affirmative.

The other Judges concurred.

The Court held that the parties of the second part were not bound to denude of the whole funds of which they were possessed under the said contract of marriage, but were entitled to retain and administer the said funds.

Counsel for the First Parties—Marshall and M'Laren. Agents—Horne, Horne, & Lyell, W.S.

Counsel for the Second Parties—Balfour and Mackintosh. Agents—Traquair & Dickson, W.S.

Thursday, February 6.

FIRST DIVISION.

SPECIAL CASE—DENNISON AND OTHERS.

Disposition — Heritable Rights — Feu-duties, Purchase of.

A provided in her trust-disposition and settlement that all "heritable subjects, of whatever nature or denomination the same may be, which I may acquire after the date of these presents," should go to a certain person. A's lands were held direct of the Crown, but certain duties were payable out of the lands to B, who had acquired right to them by a charter from the Crown. Subsequently to the date of her trust-disposition, A purchased the right from B. *Held* that the said duties were not a heritable subject within the meaning of the above clause of the trust-disposition.

This was a Special Case for Mr Jerome Dennison, West Brough, Orkney, and the Trustees of the deceased Misses Barbara and Helena Fea. The facts of the case were as follows:—By trust-disposition and settlement, dated 21st July 1810, the Misses Fea assigned and disponed to each other, and the longest liver of them, and after the decease of the survivor to Mr Patrick Neill, printer in Edinburgh, and James Dennison, of North Myre, in Sanda, and the other persons therein named, as trustees for the purposes therein specified, the whole means and estate, heritable and moveable, then belonging to them, or which should belong to them or either of them at death; and in particular certain lands called Arie and Mussater, situated in the Island of Stronsay in Orkney. The Misses Fea and Messrs Patrick Neill and James Dennison were deceased before this case was brought.

By the eighth purpose of the trust it was declared that after the death of certain liferenters, all of whom are now dead, the farm of Mussater and the farm of Arie, together with the mansion-house of Arie, and park and garden adjacent thereto, should form and constitute a fund or mortification for certain charitable purposes therein specified.

The tenth purpose of the trust is in the following terms:—"*Tenthly*, We hereby appoint our said trustees, after the death of the survivor of us, to assign, dispone, convey, and make over to and in

favour of the said Patrick Neill, and his heirs or assignees, all such lands, houses, or other heritable subjects, of whatever nature or denomination the some may be, which I, the said Helena Fea, may acquire or succeed to after the date of these presents: And further, we appoint our said trustees, in like manner, after the death of the survivor of us, to assign, convey, dispone, and make over all such lands, houses, or other heritable subjects, of whatever nature or denomination the same may be, that I, the said Barbara Fea, may acquire or succeed to after the date of these presents, to and in favour of the said Patrick Neill and James Dennison of Myre, equally betwixt them, and to the heirs of the said Patrick Neill, and on the failure of the said James Dennison, to Janet Traill, daughter of Walter Traill of Westove."

At the date of the said trust-disposition and settlement, the said Barbara and Helena Fea were equal *pro indiviso* proprietors of, and infeft in, the above-mentioned lands of Arie and Mussater conform to the following titles, namely (1) Crown charter of adjudication of the said lands in favour of Charles Erskine, merchant in Kirkwall, and his heirs and assignees, dated 1st June 1799; (2) disposition of the said lands by the said Charles Erskine in favour of the said Barbara and Helena Fea, dated 24th February 1800, containing an assignation to the above-mentioned crown charter; and (3) Instrument of Sasine in favour of the said Barbara and Helena Fea, proceeding upon the said crown charter and disposition and assignation.

By the said charter, the said lands of Arie and Mussater were to be held of the Crown, as superior, in free blench farm, and feu-farm, fee and heritage for ever. The clause of *reddendo* is in the following terms:—"Reddendo inde annuatim, dictus Carolus Erskine ejusque prædict., nobis et regiis successoribus nostris, immediatis legitimis superioribus earundem, respectivas feudifirmæ albæ firmæ aliasque divorias et servitia solubi, pro et ex terris aliisque prædictis uti in prioribus juribus et infeofamertis earundem content."

The feu and other duties referred to in the said charter, which consisted of certain quantities of beer, butter, poultry, and money, formed part of the Earldom of Orkney, and were payable to the late Thomas Lord Dundas, to whom they belonged as in right of the Crown, conform to crown charter in his favour of, *inter alia*, the Earldom of Orkney and Lordship of Zetland, including therein right to the feu and other duties payable by the Crown's vassals within the said Earldom and Lordship, dated 6th August 1787.

In April 1817 the Misses Fea purchased the said duties from Lord Dundas for £695, 10s. In Oct. 1817 the Misses Fea executed a separate testamentary disposition in favour of Charles Goar, tacksman of Arie, whereby they conveyed to him, from and after the death of the longest liver of them, that part of the said lands of Arie called Hescome, with the corn park adjoining thereto, and upon this disposition the said Charles Goar was infeft, of date, 17th Feb. 1818, after the death of both of the Misses Fea. The said disposition contained an obligation to infeft *a se vel de se* in ordinary form, and made no allusion to the duties applicable to the said lands, and included in the purchase from Lord Dundas.

The first party to this case was the eldest son and heir-at-law of Mr James Dennison of Myre, named in the tenth purpose of the trust-disposition, and the second parties are the acting trustees under the said disposition, in virtue of deeds of assumption in their favour.

Shortly after the death of the surviving Miss Fea, a payment of £18, 6s. 9d., on account of the before-mentioned duties, was made by Mr Patrick Neill, as the only acting trustee under the trust-disposition, three-fourths of the said sum being paid to Mr Neill himself, and the remaining fourth to the late Mr Dennison. Thereafter Mr Neill waived any claim which he might have to three-fourths of the said duties under the tenth purpose of the trust-disposition, and no further payment was ever made on account thereof. Mr Dennison's claim to the remaining fourth of the said duties was never waived or abandoned, but no further payment was made on account thereof,

In these circumstances, the first party, Mr Jerome Dennison, called upon the second party to convey one fourth part of the said duties (except as regarded the proportion effeiring to the lands of Hescome, disponed as above-mentioned to Charles Goar) and the arrears due in respect thereof.

The questions submitted to the Court were:—

"(1) Is the first party entitled, in virtue of the provision in favour of the late James Dennison, of Myre, contained in the tenth purpose of the trust-disposition and settlement by the late Barbara and Helena Fea, to one fourth part of the duties purchased by them from Lord Dundas as above set forth, excepting therefrom the proportion of the said duties effeiring to the lands of Hescome and others, conveyed by the Misses Fea to Charles Goar; and are the second parties bound to convey the said fourth part (excepting as aforesaid) to the first party, with entry as at Martinmas 1871, and to make payment to him of the sum of £279, 1s. 2d. as the arrears thereof?

"OR,

"(2) Were the said duties, being at the date of the purchase by the Misses Fea payable from their own lands, extinguished *confusione* by such purchase, and by the disposition by Lord Dundas in their favour?"

It was argued for the first party that these duties were *acquirenda* in the meaning of the tenth purpose of the trust-disposition. The tenure of the lands, though not feudal at first, gradually became so—*Dundas* v. *Officers of State*, M. 15,103—and the Misses Fea held directly of the Crown, but paid the duties to the Earl of Zetland. These rights formed part of the Earldom, in which the Earl was infeft under his charter of erection, and that part of the Earldom was disponed to the Misses Fea. These duties were therefore heritable irredeemable rights connected with the lands, and as such came under the tenth purpose of the trust.

It was argued for the second parties—(1) that these duties were not heritable, but merely money debts due to the superior; (2) that in purchasing these duties the Misses Fea evidently intended to disburden their lands, and not to acquire a separate estate; and (3) that the duties being payable out of lands belonging to the Misses Fea, the debt or obligation to pay duty was extinguished *confusione*—*Robertson*, M. 3044, Bell's Prin. § 854; *Ramsay* v. *Bank of Scotland*, M. 3383; *Burnett* v. *Burnett*, 2 Paton's App. 122; *Wrights* v. *Smith*, M. 5209; *Hogg* v. *Black*, 11 S. 198, 11 Dec. 1832; *Langton* v. *Dove*, 20 D. 1188.

At advising—

LORD PRESIDENT—It appears to me that the answer to the last question here depends on the construction of the trust-disposition of 23d July 1810, and especially upon the intention of the trusters in the tenth purpose of that deed. The Misses Fea in that deed convey their estate, heritable and moveable, to trustees, and after creating certain liferents and giving certain legacies, they provide in the eighth purpose of the deed that after the death of a certain person the farms of Mussater and Arie are to be applied to a charitable purpose; and then in the tenth purpose of the deed they convey to Patrick Neill "and his heirs or assignees, all such lands, houses, or other heritable subjects, of whatever nature or denomination the same may be, which I, the said Helena Fea, may acquire or succeed to after the date of these presents; And further, we appoint our said trustees, in like manner, after the death of the survivor of us, to assign, convey, dispone, and make over all such lands, houses, or other heritable subjects, of whatever nature or denomination the same be, that I, the said Barbara Fea, may acquire or succeed to after the date of these presents, to and in favour of the said Patrick Neill and James Dennison of Myre, equally betwixt them, and to the heirs of the said Patrick Neill, and on the failure of the said James Dennison, to Janet Traill, daughter of Walter Traill of Westove." Now the heir of James Dennison has claimed, in virtue of this tenth purpose, one quarter of certain subjects acquired by the Misses Fea after the execution of this trust-deed. In order to understand the nature of these subjects, it is important to observe under what titles the farms conveyed in the trust-deed were held by these ladies. Whatever was the nature of the original holding, these lands were feudalised before the Misses Fea acquired them. They held the lands under the following titles:—(1) crown charter of adjudication of the said lands in favour of Charles Erskine, merchant in Kirkwall, and his heirs and assignees, dated 1st June 1799; (2) disposition of the said lands by the said Charles Erskine in favour of the said Barbara and Helena Fea, dated 24th February 1800, containing an assignation to the above-mentioned crown charter; and (3) instrument of sasine in favour of the said Barbara and Helena Fea, proceeding upon the said crown charter and disposition and assignation, of date 27th February 1800. These lands were held of the Crown for payment of certain duties, which consisted of certain quantities of bear, butter, poultry, and money. There was no mid-superiority of any kind, and Lord Dundas was entitled to these duties, not as superior, but as coming in the place, or as assignee, of the superior; and he was in use to collect these duties. We know what was the nature of the Earl of Zetland's title from the case of *Lord Dundas* v. *The Officers of State*, for that case shows what the grants made by the Crown to Lord Morton were. The report says that a charter was passed of the Earldom of Orkney, &c., in favour of the Earl of Morton, in which there was a clause disponing to the Earl "in all time coming Her Majesty's right of the feu and other duties, casualties, and services, of all and sundry the heritable vassals and others within the said Earldom, &c., with full and sole power to the said James Earl of Morton, and his foresaids, in Her Majesty's place, as remaining still their immediate superior, to enter and receive the said heritable vassals who actually hold of Her Majesty and the Crown and their heirs; and to grant charters and infeftments to whatever person or persons of the said Earldom, &c., upon resignation or disposition of the said vassals, or decreet of sale, apprising an adjudication from them, and to intromit with, uplift, and dispone, all and sundry the casualties of the said vassals already vacant, or that may happen to become vacant, by single liferent, escheat, &c., or any other manner what ever."

Then the Misses Fea in 1817 purchased from the Earl of Zetland the feu-duties in as far as applicable to Mussater and Arie. It is obvious that they bought them as proprietors of the lands; and if their purpose was to disburden the lands of the duties, it was the most regular and natural mode of doing so. I do not think the Earl of Zetland could have granted a discharge of these duties, for he had no sufficient title to do so; and he could only give a conveyance of, or assignation to, the right which he had. Under these circumstances, the question is, whether the right thus acquired by the Misses Fea was the acquisition of a heritable subject within the meaning of the tenth purpose of their trust-deed? I do not think that it was so; and that the Misses Fea themselves did not consider it so is shown by the way they dealt with the estate after they acquired right to the feu-duties. For they executed a separate testamentary disposition in favour of Charles Goar, tacksman of Arie, whereby they conveyed to him part of the lands; and that disposition contains an obligation to infeft, but makes no allusion to the feu-duties, which it would certainly have done if the disponers had wanted to keep up the right to levy the feu-duties out of the estate. And this circumstance shows that these ladies did not intend to keep up the right against the lands, but that they bought it merely to disburden the land of duties, and not to create a separate estate. This view is confirmed by the conduct of parties, for immediately after the death of the surviving Miss Fea a small payment was made by the trustee, Mr Neill, on account of the feu-duties, to himself and to Mr Dennison. Thereafter Mr Neill waived any claim which he might have to a share in the feu-duties, and no further payment was made to Mr Dennison, although he never waived his right thereto; and so from 1818 until the present day no payment of these duties has been made, and no one has asked such payment on the ground of being entitled to it.

I am therefore of opinion that the first question should be answered in the negative; and in that case it is not necessary to consider the second question.

LORD DEAS—I agree with your Lordship that the whole question turns upon the intention of these ladies — whether they intended the right which they purchased from Lord Dundas to be an acquisition of heritable subjects within the meaning of the tenth purpose of the trust-deed? Now the subject which they did acquire from Lord Dundas is of a very peculiar description. It is perhaps a heritable subject in a certain sense, but not in the ordinary sense of the term as applied to lands and houses. The deed by which Lord Dundas conveyed the feu-duties to them is in the form of a disposition of heritable subjects, but it conveys "all and whole the feu and teind duties

and casualties following, being parts of the Earldom of Orkney, payable to me by the said Helena and Barbara Fea, for and out of their lands and others underwritten, lying in the said Earldom." Now that is not the conveyance of anything which forms the proper subject of a conveyance of heritable subjects, and the subject is not a proper one for infeftment. And so we find, when we come to the precept of sasine, that the symbol to be delivered is earth and stone of the lands—certainly not an appropriate symbol for such a right as this. I do not however say that the deed is not effectual. Looking, then, to the nature of the subject, and to the fact that it was payable out of lands belonging to the purchasers, I cannot think that it is a heritable subject within the meaning of the tenth purpose of the trust-deed. We could only hold it to be so by having clear evidence that such was the intention of the Misses Fea, and I agree with your Lordship that there is no evidence of any such intention. This, coupled with the fact that there has been no payment or claim since 1818, makes it imperative on us to answer the first question in the negative.

Lord Ardmillan—A question has been touched in the discussion in this case which might be difficult, viz. Whether the right to the duties acquired by the Misses Fea is of a heritable character? I do not doubt that the right to exact these duties is in a certain sense of a heritable character. But it is not necessary to consider that matter here, for the real question is, whether the Misses Fea, in purchasing the right, meant to do more than to clear their estate of the burden? And I agree with your Lordships that it appears that they did not intend to do more than this.

Lord Jerviswoode concurred.

The Court held that the first party was not entitled to one fourth part of the duties purchased by the Misses Fea from Lord Dundas.

Counsel for the First Party—Kinnear. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Second Party—Balfour. Agents—H. G. & S. Dickson, W.S.

Thursday, February 6.

SECOND DIVISION.

[Lord Jerviswoode, Ordinary.

HENRY SAWERS' EXECUTRIX *v.* SAWERS' TRUSTEES.

Trust—Beneficiary—Co-Trustees.

Held that a trustee who is also a beneficiary under the trust is entitled to repudiate certain acts of his co-trustees as being calculated to injure his interests, *qua* beneficiary.

This was an action of declarator, count, reckoning, and payment, raised in the year 1862 by the late Henry Sawers, residing near Whitburn in Linlithgowshire, against the trustees of the late Peter Sawers, bleacher at Nether Kirkton, acting under his trust-disposition and deed of settlement, dated 16th day of March 1853. Under that deed Henry Sawers was himself a trustee, but he was also a beneficiary, the truster having directed the trustees, after payment of certain debts and legacies —"to pay and convey the residue and remainder of the said trust-estate to and in favour of the said Henry Sawers (the pursuer) in liferent, for his liferent use allenarly, and to his male issue, if any, lawfully begotten, who shall be in life at the time of my death, in fee." Upon failure of Mr Henry Sawers, the liferent was conveyed in similar terms to the present defender, who was also a trustee, Henry Sawers raised the present action against his co-trustees, to compel them to implement the trust-deed, and the summons contained a conclusion that "the defenders ought and should be decerned and ordained, by decree foresaid, to exhibit and produce before our said Lords a full and particular account of their whole intromissions under the foresaid trust-disposition and deed of settlement with the estate of the said Peter Sawers, who died on the 27th day of November 1859, whereby the true residue and remainder of the said trust-estate, as well as the true amount of the annual produce of the said residue and remainder, may appear and be ascertained by our said Lords." The trustees appeared and defended the action. In the statement of facts for the defenders it was set forth that the accounts and vouchers of the trust were recently placed in the hands of Messrs Wink & Wight, accountants in Glasgow, that a report, in which the present position of the trust affairs should be exhibited, might be prepared for the information of all concerned. And, subsequently, an account (No. 10 of process) prepared by Messrs Wink & Wight, was lodged, which showed the position of trust affairs down to 3d Jan. 1863. By an interlocutor of Lord Kinloch, 21st January 1864, the Rev. Peter Sawers, as a beneficiary, was allowed to compear as a defender, and lodge separate answers, which he accordingly did. These answers contained a repudiation of certain proceedings of his co-trustees with regard to the administration of the trust-estate. An interlocutor of the Inner House, of date Nov. 1864, found that the pursuer was entitled to the whole free income of the residue of the trust-estate, and remitted the case for further procedure to the Lord Ordinary. This judgment recognised the right of the Rev. Peter Sawers to appear and protect his interest, but repelled the whole other pleas stated for him. Accordingly the free annual residue of the estate was paid over to the pursuer, but the action was proceeded with to determine the question of count, reckoning, and payment. After repeated orders from the Lord Ordinary, the defenders, the trustees, lodged a continuation of their intromissions (No. 25 of process) down to 31st Dec. 1864. In October 1867 the pursuer died, and the widow and executrix was sisted as pursuer. She claimed the balance alleged to be due to her husband at the time of his death. The orders of the Court for a continuation of the trust accounts being renewed, the defender, now the liferenter and only surviving and acting trustee, lodged a minute in the double capacity of beneficiary and trustee, in which he referred to the accounts Nos. 10 and 25, already lodged, as the trust accounts, and craved for a remit to an accountant to audit them. On 15th June 1869, however, he lodged a continuation of the trust accounts, in which he stated that "the previous position of affairs in this trust will be found explained in (1) Account of the trustees of the late Peter Sawers, from 27th Nov. 1859 to 3d Jan.