of community) may be legally and competently proved, as has been done in the present case by facts and circumstances.

But I think the compact between the members of this family is really a case of partnership, and falls under that category of the law. No doubt it is much wider and broader than mercantile partnerships usually are. It embraced the whole property of all the partners, at least all the property to which they had right by succession from their father and mother, with all its increments, and all which each of them had earned or contributed to earn from their early youth upwards. This may be a very uncommon kind of partnership, but there is nothing illegal in it, and all the incidents of partnership are equally applicable to it as to the ordinary case where each partner only contributes a specified portion of the special capital upon which the trade is to be carried on. Indeed, community is just a name for a wide and universal partnership, which includes the whole lives and the whole property and earnings of all the *socii*.

Again, it may be difficult or impossible to say at what precise date each member of this family partnership acquired the rights or incurred the liabilities of a partner, but this may often happen even in strict mercantile partnerships, when such are constituted not by formal agreement but by long actings of the partners *inter se*. When once sufficient proof by actings and circumstances has accumulated, the law may affirm the partnership, though it may not be possible to fix the precise date of its commencement. It is quite established law that a pupil or a lunatic who is adopted as a partner, and whose funds are employed in a partnership business, will be held as a partner to the effect of sharing in the whole profits, although from his inability to consent he will not be liable as a partner to third parties, and will not be answerable if the concern proves unsuccessful and results in loss.

It may also be quite true that if any question had arisen with third parties, such third parties might have been quite unable to establish this partnership so as to bring home personal liability to the pursuer or to his sister or to some others of the less prominent members of the family. But this would be simply from the difficulty of the proof as undertaken by third parties in the case supposed. It would be an accident, not of the contract, but of the difficulty of proving it, and this often happens even in strict mercantile partnerships. There are often sleeping partners who lie so quiet and are so concealed that the public creditors of the firm cannot discover them so as to bring home liability to them, and yet in questions *inter socios* their rights as partners may be made perfectly clear.

In short, I am prepared to hold, although at first I had great difficulty in doing so, that the present is a proper case of universal partnership between all the members of the Aitchison family, Alexander of course being excepted after 1851—that the stock of the partnership consisted of the whole patrimony or succession of all the members of the family, with the whole increment and accumulations which resulted either from the employment of that patrimony in the various businesses in which the members of the family engaged or from the investments in the acquisition of which from time to time parts of the common stock were expended.

But after all I am not sure whether there is any necessity for defining with logical accuracy the precise legal category under which the present case falls. The Lord Ordinary has not done so, and I think it will be sufficient if we adhere to the interlocutor which he has pronounced.

The Court adhered.

Counsel for the Pursuer—Muirhead—Asher—Keir. Agent—L. Thomson, S.S.C.

Counsel for the Defender—Balfour—Mackintosh. Agents—Wotherspoon & Mack, S.S.C.

Tuesday, July 24.

FIRST DIVISION.

[Lord Curriehill, Ordinary

GIBSON'S TRUSTEES *v.* ROSS AND OTHERS.

Succession — Fee and Liferent — Alimentary and Inalienable Provision—Protected Right against Gratuitous Alienation.

A testator left his whole means, heritable and moveable, to trustees, directing them, when his only daughter should marry, to pay to her "for her alimentary use the whole annual proceeds or income;" and further directing them to convey the whole residue, upon a child being born of such marriage, "to her and to the child or children of the marriage," subject to a power of division by the daughter. It was further declared that "neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life." *Held* (by a majority of seven Judges—*diss.* Lords Deas, Mure, and Gifford—*rev.* Lord Curriehill) that the fee of the estate was in the daughter, but that the children had a right to the succession protected against any gratuitous alienation by their mother but subject to her power of division.

This was an action of multiplepoinding and exoneration at the instance of Robert Gibson, residing in Portobello, and others, the whole trustees nominated and accepting under the trust-disposition and settlement of the late William Walker Gibson, corn merchant, Leith, pursuers and nominal raisers, against Mrs Ellen Percival Gibson or Ross, wife of William Ross, C.A., and only child of Mr W. W. Gibson, and also against William Walker Gibson Ross and Reginald Carew Ross, her pupil children, and Robert Dobbie Ross, W.S., and others, trustees under Mr and Mrs William Ross' marriage-contract, and against Mr Gibson's next-of-kin. The circumstances under which the action arose were as follows:—Mr Gibson, a partner in the firm of Gibson & Walker, Bonnington Steam Mills, died on 1st

April 1875. He left a trust-disposition and settlement, dated 18th October 1866, and recorded 9th April 1875. The whole of his means were by this deed conveyed to his trustees. By the first purpose the truster provided for payment of his debts and funeral expenses and the expenses of the trust. The second purpose authorised the trustees to retain in the business of the copartnery such part of the capital thereof as might be provided under the contract of copartnery in operation at the date of the truster's death. Further, the trustees were directed to conform to the said contract of copartnery in all respects. By the third purpose each accepting trustee was to receive £100; and the fourth and fifth purposes directed the payment of certain legacies and annuities. The legacies had at the date of this case all been paid; and the only annuitant who survived the truster was his brother John Gibson, to whom the trustees were paying an annuity of £400. The sixth purpose of the trust provided that the trustees should make offer to sell to the surviving partners of the firm of Gibson & Walker the truster's interest in the property of Bonnington Mills and whole plant thereof, in the manner therein directed. This offer was made by the trustees, and refused by the surviving partners. By the seventh purpose the trustees were empowered to sell or feu the lands belonging to the truster, or to convey, as they might see fit, to the beneficiaries after named, all the truster's other estate and effects. And the eighth and ninth purposes of the deed were as follows:—"In the eighth place, I direct and appoint my trustees to retain in their own hands the whole residue of my estate and effects, including the said mills, or the price thereof, and the said lands retained for feuing, until my only child Ellen Percival Gibson, at present residing with me, shall be married, and a child shall be born of her marriage; and I further direct and appoint that until my said daughter shall attain majority or be married, my trustees shall pay to her, or apply for her behoof and benefit, the whole, or such part as may be required for her maintenance, education, and upbringing in a manner suited to her station, of the annual proceeds or income of my estate and effects; and upon my said daughter being married, my trustees shall pay over to her, for her alimentary use, the whole annual proceeds or income thereof: And further, I direct and appoint that, upon a child being born of her marriage, my trustees shall convey and dispone to her, and to the child or children of her marriage, or of any subsequent marriage into which she may enter, equally among them, if she shall not otherwise appoint (but subject always to a power of division by her among said children), and failing a child or children of my said daughter, then to my own nearest heirs and assignees whomsoever, the whole residue and remainder of my said estate which may then be vested in them: And I hereby declare and direct and appoint that neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction. In the ninth place, in the event of my daughter, the said Ellen Percival Gibson, dying without leaving a child or children, and before said conveyance shall be executed, I direct my trustees, at the first term of Whitsunday or Martinmas after her death, to make payment of a legacy of One thousand pounds to the Royal Infirmary of Edinburgh, and of another sum of One thousand pounds to or among such other charitable institution or institutions as I may direct by any codicil hereto, or by any other writing under my hand however informal, and to divide, convey and dispone the whole residue of my estate equally among the whole persons then alive who would by law succeed to my personal estate." Then followed clauses as to investments of the trust-funds, and assumption of additional trustees, and other usual clauses.

Mr Gibson's child, Miss Ellen Percival Gibson, was married in 1874 to William Ross, chartered accountant in Edinburgh, and on March 23, 1874, an antenuptial contract of marriage, to which the truster was a party, was entered into between them. By this contract certain provisions were made by Mr Ross for his wife should she survive him; and Miss Gibson on her part assigned to Robert Dobbie Ross, W.S., John Ross junior, W.S., William Walker, and James Graham Walker, as trustees, the whole means and estate, heritable and moveable, belonging to her, or to which she might acquire right during the subsistence of the marriage, "but excepting always from the above conveyance all such estate and effects as the said Ellen Percival Gibson may succeed to under any destination or provision which may settle the same upon herself or her heirs exclusively, or which may otherwise exclude the same from falling under the above conveyance." Moreover, by the marriage contract Mr Gibson conveyed to the trustees various feu-duties and properties, to be vested in them for certain specified purposes. Then followed clauses as to the application of the trust-funds by the trustees, which were to the following effect:—1st, Mrs Ross was to receive the free income, excluding the *jus mariti* and right of administration of her husband; 2d, Mrs Ross, if her husband predeceased her, was also to receive the free income, and if there were no issue of the marriage the capital was to be paid to her on its dissolution; 3d, Mr Ross was to enjoy the liferent if she died before him leaving issue; and 4th, if she predeceased him without issue he was to have the half of the free income, and the capital was to pass to her assignees. The provisions to the children of the marriage were also declared to be in full of all legal claims arising on the death of their parents, "excepting only their goodwill, and that the said children may succeed to them or either of them in the event of their not otherwise disposing of any estate or property belonging to them and at their disposal and at their respective deaths." Ample powers of management were conferred on the trustees, who were further appointed tutors and curators to the issue of the marriage. The contract also excluded from all funds falling under the trust the *jus mariti* and right of administration of Mr Ross.

There are two children born of the marriage, namely, William Walker Gibson Ross, born on 23d January 1875, and Reginald Carew Ross, born on the 5th of June 1876.

An important part of Mr Gibson's estate consisted in his interest under the copartnery of the firm of Gibson & Walker. That firm was constituted by deed of copartnery dated 29th September 1866, and was to terminate in March 1877. On 15th April 1875 a meeting of the trustees was held, Mr Ross being present, and a minute was then agreed to, of which the following are the important portions:—"The Messrs Walker stated that it was not their intention to purchase Mr Gibson's share of the mill property and machinery, and that they dispensed with any offer of the property being made to them by the trustees. They further stated that it was not their intention to take over the copartnery concern under the provisions in the fourth article of the contract, and that the copartnery concern would therefore fall to be wound up, under such arrangements as might be agreed on between them and Mr Gibson's representatives; and that, as a heavy loss would undoubtedly arise to all parties interested from a forced and immediate realization and winding-up, they were quite ready to concur with Mr Gibson's representatives in any arrangements in regard to the copartnery affairs that might be deemed most advantageous for the interests of all concerned.

"All the parties present expressed themselves quite satisfied that the copartnery could not be immediately wound up without a heavy loss. The mills and machinery do not form a property which would readily sell in the market, and a forced or hurried sale of them would entail a certain and heavy loss. If the business were to be discontinued and the mills closed, a large loss of rent would immediately ensue, besides which the value of the mills in the market would be very greatly deteriorated, as they could not thereafter be offered for sale as a going work in connection with an established business, and the value of the business would also be sacrificed. . . . and further, that the account in the books as a guarantee against fire also formed a difficulty in the way of an immediate winding-up. Looking to these considerations, all the parties concurred in opinion that the only course that could be followed to avoid a heavy loss is to continue the business on the same footing as it has hitherto been carried on, till the termination of the contract in March Eighteen hundred and seventy-seven.

"Mr Ross, on behalf of Mrs Ross and himself, and of his child, stated that it was Mrs Ross' desire and his own that this course should be followed, and consented thereto; but in respect they consider that Mr Gibson's trustees are bound, under the eighth article of his deed of settlement, to convey the trust-estate to Mrs Ross, they reserve entire their right to vindicate their claim to said estate—all answers thereto being likewise reserved. Mr Gibson, on behalf of his brothers and himself, for all interest they might have in the estate, expressed the same desire and consent. The Messrs Walker stated that they, as surviving partners, quite concurred in the above, and are quite willing to continue the management of the business on the footing above set forth. The trustees therefore, with this consent and concurrence of all the parties interested, resolved that the business should continue to be carried on in the meantime by the Messrs Walker, as surviving partners, for the joint behoof—the capital of the parties and the share of profits remaining in the same position as if Mr Gibson's death had not occurred, and the trustees and their factor having full access to the books and papers, and being advised with generally in regard to the copartnery affairs."

Following upon this meeting and minute, a formal agreement was entered into on June 20 and 22, July 21, and September 5, 1876, between —(1) Mr Gibson's trustees, (2) the surviving partners in the firm, (3) Mr and Mrs Ross and their children, (4) Mr Gibson's next-of-kin, giving effect to the arrangement, and agreeing as follows:—"*First*, the copartnery and business of Gibson & Walker shall continue to be carried on subsequent to March Eighteen hundred and seventy-seven, under the existing contract of copartnery, and on the same footing as at present in all respects, until a favourable opportunity shall be found of disposing of or letting the mills and machinery, or, failing such opportunity occurring, until any of the parties hereto shall give notice to the others of his or her or their desire that this arrangement shall be terminated and the copartnery affairs wound up. *Second*, During the subsistence of this agreement the business shall be carried on and managed by the Messrs Walker, as surviving partners, in the same manner as hitherto, the capital of the parties and their shares of profits remaining the same as if Mr Gibson's death had not occurred, and as if the period of dissolution specified in the contract of copartnery had not arrived, the first parties having at all times full access to the books and papers of the copartnery, and being advised with generally in regard to the copartnery affairs. *Third*, The third parties, without prejudice to their rights under the said trust-disposition and settlement of the said William Walker Gibson, and the said William Ross as administrator, and taking burden on him as aforesaid, hereby bind and oblige themselves to indemnify the said William Walker Gibson's trustees against all liabilities which they may incur to creditors of the firm during the continuance of the said business," &c.

This being the position of matters, Mrs Ross in the present action claimed to be ranked and preferred (under burden of the annuity of £400 already mentioned) to the whole fund *in medio*, in accordance with the provisions of her father's settlement.

Claims also were put in (1) for the trustees of Mr Gibson, (2) for Mr and Mrs Ross' marriage-contract trustees, and (3) for the pupil children of Mr and Mrs Ross, by the *curator ad litem* appointed to them. The trustees of Mr Gibson claimed to be entitled to retain in their own hands the trust-estate so far as it consisted of the partnership interest, and that until it could be realised advantageously, or, at least, without serious loss. As to the other portions of the trust-estate, heritable and moveable, they claimed the right, under the eighth purpose of the trust-deed, to "insert in the dispositions, assignations, or other deeds of transfer to be granted by them, words of destination limiting the interest of Mrs Ross to a liferent allenarly, and exclusive of the

jus mariti and right of administration of her husband, and of the diligence of his or her creditors, and settling and securing the fee upon the child or children of her marriage, or of any subsequent marriage into which she may enter, equally among them, if she shall not otherwise appoint, but subject always to a power of division by her among the said children, and failing such child or children, then to the truster's own nearest heirs and assignees whomsoever."

The marriage-contract trustees of Mr and Mrs Ross claimed the whole residue of Mr Gibson's estate, to be administered and disposed of in accordance with the provisions of the marriage-contract.

Lastly, The pupil children of Mr and Mrs Ross, by their *curator ad litem*, claimed that Mr Gibson's trustees should be ordained forthwith to execute a conveyance such as that claimed on behalf of the trustees themselves, but without including the destination to the next-of-kin.

The pleas-in-law for the trustees of Mr Gibson were:—"(1) On a sound construction of Mr Gibson's trust-settlement, his intention was that his estate should be conveyed under the eighth purpose, in a realised form, and the direction to be construed is in effect a direction to convey and dispone such estate as and when realised, and after a child should be born of the marriage of Mr and Mrs Ross. (2) The claimants having, in a fair and proper course of administration, and at the request of the beneficiaries, agreed to postpone the realisation of the truster's interest in the firm of Gibson & Walker, they are not entitled, nor are they under obligation, to execute a conveyance of that part of the trust-estate in its present state of investment. (3) In respect of the expression of the truster's desire that the conveyance or conveyances to be executed shall contain full provisions for securing an alimentary and inalienable interest to his daughter during her life, it is the duty of the claimants to insert a destination in said deeds limiting Mrs Ross' interest to a liferent allenarly, and also in such terms as will secure and settle the fee of the said residue upon the pupil children and any other children of the present or any subsequent marriage of Mrs Ross, equally among them, if she shall not otherwise appoint, but subject always to a power of division by her among said children. (4) In respect of the truster's directions, the trustees are not entitled to convey to Mrs Ross in such terms as would place the property within the power of her husband or his creditors."

Mrs Ross pleaded—"(1) Upon a just construction of the said trust-disposition and settlement, the claimant is entitled to demand from Mr Gibson's trustees an absolute conveyance of the residue of his whole means and estate. (2) The claim for the nominal raisers being untenable and without sufficient foundation, should be dismissed."

The marriage-contract trustees pleaded that they were entitled to be ranked and preferred in terms of their claim, and the *curator ad litem* pleaded that he was entitled to have Mr Gibson's trustees ordained to execute a conveyance in terms of his claim.

The record having been closed, the case was debated on 22d December 1876, and on 27th December the Lord Ordinary appointed the cause to be further argued by one counsel for each of the parties other than Mr and Mrs Ross' marriage-contract trustees. To this interlocutor the following note was appended:—

"*Note.*—The questions raised in the present action as to the sound construction of the settlement of the late Mr Gibson appear to me to be attended with much difficulty. The main questions are—(1) Whether the trust-estate of the late Mr Gibson now belongs to his daughter Mrs Ross in liferent only and her child or children in fee, or truly belongs to Mrs Ross in fee? and (2) Whether her right, if it be one of fee, is an absolute right in favour of herself, the children having a mere *spes successionis*, or is to be qualified so as to protect her child or children against her gratuitous acts?

"I do not think that the real difficulties of the case were fully brought out in the argument submitted before the recess, and I have therefore appointed the case to be put to the roll for further argument. I may suggest for the consideration of the parties two points, viz.—(1) Whether, seeing that the truster directed that, until the marriage of his daughter and the birth of a child of her marriage, she should have right only to receive from the trustees the annual proceeds of the estate for her alimentary use during her life, and that no conveyance of the trust-estate should be made until a child should be born by Mrs Ross, the direction then to convey to her and her child or children, when read in connection with the clause declaring the provision to her to be an alimentary and inalienable provision for her during her life, is or is not equivalent to a direction to convey to her in liferent, and to her child then born *nominatim*, and to her other children *nascituri*, in fee? and (2) Whether, assuming a right of fee to be intended to vest in Mrs Ross on the birth of a child, the trustees are or are not bound to protect the interests of the child or children in the way directed by the Court in the case of *Lady Massy*, 5th December 1872, 11 Macph. 173, or in any other manner."

The case was further argued on 13th January 1877, and upon 20th January 1877 the Lord Ordinary pronounced the following interlocutor and note:—"The Lord Ordinary . . . Finds that at the death of the truster the deceased William Walker Gibson, his only child Ellen Percival Gibson or Ross was a married woman, and that a child had been born of the marriage and is still in life, and that another child has since been born of said marriage: Finds that in respect of the birth and existence of said children, and in accordance with the sound construction of the trust-disposition and settlement of the said William Walker Gibson, the nominal raisers and pursuers, as trustees under said trust-disposition and settlement, are bound, after providing for the annuity of £400 per annum payable to the truster's brother John Gibson, to convey and dispone the residue of the trust-estate to the said Ellen Percival Gibson or Ross, and to the child or children of her present marriage, or of any subsequent marriage into which she may enter, in such terms and in such manner as will restrict the right and interest of the said Mrs Ellen Percival Gibson or Ross to the same to a liferent right allenarly, and will exclude the *jus mariti* and right of administration of her present husband or any future husband she may marry, and liability

for his or her debts or deeds, and the diligence of the creditors of such husband, and her own creditors, and will secure the same as an alimentary and inalienable provision for the said Mrs Ellen Percival Gibson or Ross, and also in such manner and in such terms as will settle and secure the fee of the said residue to the pupil children already born of the said Mrs Ellen Percival Gibson or Ross' present marriage, and any other children of the said present or any subsequent marriage into which she may enter, equally among them, if she shall not otherwise appoint, but subject always to a power of division by her among her said children, and failing a child or children of the said Ellen Percival Gibson, then to the truster's own nearest heirs and assignees whomsoever: Therefore sustains the claims for the pursuers and nominal raisers as trustees foresaid, and for David Ogg, S.S.C., curator *ad litem* to William Walker Gibson Ross and Reginald Carew Ross, the pupil children of the said Mrs Ellen Percival Gibson or Ross, in so far as the same are consistent with the foregoing findings: *Quoad ultra* repels said claims: Repels the claims of the whole other claimants; and before further answer appoints the cause to be enrolled in order that the parties may be heard as to the amount of the fund *in medio*, and as to the precise terms in which the conveyance or conveyances of the said residue are to be expressed; and reserves all questions of expenses: Grants leave to all concerned to reclaim, if so advised.

"*Note.*—The late William Walker Gibson was a partner of the firm of Gibson & Walker, corn and flour merchants, Bonnington steam-mills. He died on 1st April 1875, leaving a trust-disposition and deed of settlement, dated 18th October 1866, whereby he conveyed his whole estate, heritable and moveable, to trustees in trust for the purposes specified in the deed. The whole of the trustees so nominated accepted and are acting. By the first purpose of the deed the trustees were directed to pay the truster's debts and funeral expenses and the expenses of the trust. By the second purpose they were authorised to retain in the business of the copartnery such part of the capital thereof as might be provided under the contract of copartnery in operation at the time of his death, and to implement and fulfil all obligations that might be incumbent on him under such contract, and to conform to the contract in all respects. By the 3d, 4th, and 5th purposes of the trust certain special legacies were bequeathed, all of which have been paid with the exception of an annuity of £400 sterling per annum to John Gibson, the truster's brother, which is still current. By the 6th purpose the trustees were directed to offer to sell to the surviving partners of the firm the truster's interest in the property of Bonnington mills and whole plant thereof, and in the event of the offer not being accepted, then on the termination of the current lease to relet the property or to sell it by private roup and sale. And by the 7th purpose the trustees were directed to feu out such portions of lands as they should consider suitable for feuing, and either to sell by public or private sale, or to convey to his residuary legatees, all his other estate and effects; and should uplift, realise, and discharge all debts and sums of money that might be owing to him at the time of his death, and should hold the proceeds thereof and apply the same as thereinafter directed.

"Then follows the 8th purpose of the deed, on the interpretation of which the questions raised in the present action mainly depend. It is in the following terms:—'In the eighth place, I direct and appoint my trustees to retain in their own hands the whole residue of my estate and effects, including the said mills or the price thereof, and the said lands retained for feuing, until my only child Ellen Percival Gibson, at present residing with me, shall be married, and until a child shall be born of her marriage; and I further direct and appoint, that until my said daughter shall attain majority or be married, my trustees shall pay to her or apply for her behoof and benefit the whole, or such part as may be required for her maintenance, education, and upbringing in a manner suited to her station, of the annual proceeds or income of my estate and effects, and upon my said daughter being married, my trustees shall pay over to her, for her alimentary use, the whole annual proceeds or income thereof: And further I direct and appoint, that upon a child being born of her marriage, my trustees shall convey and dispone to her, and to the child or children of her marriage, or of any subsequent marriage into which she may enter, equally among them, if she shall not otherwise appoint (but subject always to a power of division by her among said children), and failing a child or children of my said daughter, then to my own nearest heirs and assignees whomsoever, the whole residue and remainder of my estate which may then be vested in them: And I hereby declare and direct and appoint that neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction.'

"The truster died, as has been mentioned, on 1st April 1875, survived by an only child, Ellen Percival Gibson, who had been married in 1874 to William Ross, C.A. in Edinburgh, their antenuptial contract of marriage having been entered into on 23d March 1874. Two children have been born of the marriage, viz., William Walker Gibson Ross, who was born on 27th January 1875, during the truster's life, and Reginald Carew Ross, who was born on 5th June 1876. The contract of copartnership current at the date of the truster's death was dated 29th September 1866, and was to endure until March 1877. After Mr Gibson's death the surviving partners intimated to the trustees that it was not their intention to purchase Mr Gibson's share of the mill, property, and machinery, and that they dispensed with any formal offer of the property being made to them. They further stated that it was not their intention to take over the copartnery concern under the 4th article of the contract, and that the concern would therefore fall to be wound up under such arrangements as might be agreed to. The parties appear to have been satisfied that a forced or hurried sale of the mills and machinery would entail a certain and heavy loss upon all concerned, and in consequence the trustees, with consent of Mr and

Mrs Ross, seem to have agreed that the business should be carried on by Messrs Walker, as surviving partners, for joint behoof, until the termination of the contract in March 1877. It further appears that at a later date, by a minute of agreement between (1) the trustees, (2) the surviving partners of the firm of Gibson & Walker, (3) Mr and Mrs Ross, and the said William Ross for himself and on behalf of his wife and children, and (4) three of the trustees, viz., Robert Gibson, James Young Gibson, and John Gibson, the truster's brothers, and his nearest heirs and representatives failing his own direct issue, it was arranged that as an advantageous sale of the mills and machinery, even in March 1877, could not reasonably be looked for, the business should be carried on subsequent to that date under the existing contract as if the period of dissolution had not arrived, and that this arrangement should continue until favourable opportunity should be found of disposing of or letting the mills and machinery, or until any of the parties should desire the arrangement to be terminated and the concern wound up.

"Besides the mills and machinery, and the ground on which the same stand, and which is used in connection with the works, the truster possessed heritable property of considerable extent and value in the neighbourhood of Bonnington and in Edinburgh. The moveable estate of the truster, as stated in the inventory given up for confirmation, amounted to upwards of £20,000.

"From what has been stated it will be readily seen that the time contemplated by the truster for the winding-up of his estate has arrived. All his debts, legacies, and annuities, have been paid, excepting the annuity of £400 per annum to his brother John, which will be met by laying aside a capital sum sufficient for the purpose; and his daughter Mrs Ross is not only married, but is the mother of two children. Indeed, one of these children had been born before the truster's death, so that the trustees were bound to denude of the trust-estate as soon as they could conveniently realise the same after the death of the truster. The trustees indeed maintain that, although they may be bound to denude of a part of the estate, they are entitled to retain not only an amount of capital sufficient to meet John Gibson's annuity, but also the mills and machinery, and so much capital as may be necessary to carry on the business until a suitable opportunity for selling the same shall occur. It appears to me, however, that without the consent of the fiars of the estate the trustees are not entitled so to retain or apply any part of the trust-funds, at all events after the expiration of the contract of copartnership in March 1877. If Mrs Ross is held to be the fiar, then she may grant or withhold her consent, as she and her husband and her marriage-contract trustees may arrange; but if her children, who are pupils, are the fiars, no effectual consent can be given to the proposed retention and application of the funds. The primary and principal questions therefore to be answered are—Who are the fiars of the residue? And to whom, and in what terms, are the trustees now bound to convey the residue of the trust-estate?

"On the one hand, Mr and Mrs Ross maintain that as a child has been born of the existing marriage they are entitled to call upon the trustees to convey the fee of the residue of the trust-estate, both heritable and moveable, under burden of John Gibson's annuity, to Mrs Ross absolutely, with a bare destination in favour of her children *nati et nascituri*, and with a declaration that the provision is to be alimentary and inalienable, and not liable for the debts or deeds of either Mr or Mrs Ross, or attachable by the diligence of the creditors of either. On the other hand, the infant children of Mr and Mrs Ross (whose interests in the action are protected by Mr David Ogg, S.S.C., as their curator *ad litem*) claim that, according to the sound construction of the settlement the truster intended to restrict, and has restricted, his daughter Mrs Ross' interest in the residue to an alimentary and inalienable liferent allenarly, and that he intended to confer, and has conferred, a right of fee upon Mrs Ross' first-born child, for behoof of himself and of all the other children which might be born of Mrs Ross' present or any subsequent marriage, and they desire a conveyance to be executed in favour of Mrs Ross in liferent allenarly and her children in fee accordingly. They also maintain that there should be no ulterior destination of the fee to the truster's nearest heirs and assignees whomsoever. In the claim which has been lodged for the trustees they maintain the same views as to the liferent and fee which are stated on behalf of Mrs Ross' children, but they further maintain that they are bound to insert in the conveyance the ulterior destination in favour of the truster's nearest heirs and assignees.

'Having been favoured with an exceedingly able argument for all the parties upon two separate occasions, the last debate having had special reference to the questions indicated in the note to my interlocutor of 27th December 1876, I have, after the best consideration I have been able to give to the case, come to form a clear opinion in favour of the general construction of the settlement contended for by the children of Mrs Ross and by the trustees, and against that contended for by Mr and Mrs Ross. It is no doubt true that in the present case after the birth of a child of Mrs Ross' marriage the trustees are to cease to hold the estate for behoof of Mrs Ross, and are thereupon actually to convey the estate to her and her child or children; and it is also true that in the direction so to convey the estate the words 'liferent,' or 'liferent allenarly,' or any equivalent words, are not expressly used in immediate conjunction with the name of Mrs Ross. But I think that it is impossible to read the eighth purpose of the trust-deed as a connected whole without being satisfied not only that the truster meant his daughter's interest to be limited to a bare liferent, but that the directions which he has given to his trustees as to the execution of the conveyance are sufficient to enable them to give effect to his intentions. The truster begins by directing the trustees to retain in their own hands the whole residue until his only child Ellen Percival Gibson, who then resided with him, should be married, and until a child should be born of the marriage. Now, although both of these events actually occurred before the truster died, it is necessary, in order to understand the deed, to see what the truster intended the trustees to do with the residue in the event of his daughter not being married, or being married and not having a child born of the marriage. In the first place, he directed that until his daughter should attain majo-

rity or be married, his trustees should either pay to her, or for her behoof, only so much of the annual proceeds or income of the estate as they should think necessary for her suitable maintenance and education. In the next place, upon his daughter being married, the trustees were to pay over to her for her alimentary use the whole annual proceeds or income of the residue. The truster does not appear to have expressly provided for the case of his daughter attaining majority but being unmarried, although I think it is probable that in that case she would have been held entitled to the annual income of the estate until her marriage. And, in the third place, it is not until a child is born of the marriage that the trustees are to denude of the trust-estate. They are, however, directed to do so upon that event taking place. The duty of retention of the residue, which was imposed upon them by the introductory part of the eighth purpose, was then to cease, and the duty of conveying and disponing the residue was to emerge. And on that event occurring the trustees are directed to convey or dispone the estate to the truster's daughter and the child or children of the marriage, or of any subsequent marriage—that is to say, to the child or children so born, and to Mrs Ross' other children *nascituri*.

"Now, although nothing is here expressly said as to the conveyance being to Mrs Ross in liferent and to her children in fee, it would certainly, looking to the previous context, be natural to expect some such limitation of her right. Why did the truster so anxiously limit his daughter after her marriage, but before the birth of a child, to a bare right to call upon the trustees for payment of the annual income of the trust-estate for her alimentary use if it was not to protect the estate of her possible children? And if so, could anything be more inconsistent with and subversive of that intention than directing the trustees immediately on the birth of a child to convey the estate to his daughter in fee without limiting her right and protecting the estate for behoof of her children? But, as I read the deed, the truster has not fallen into any such inconsistency. In the first place, although the conveyance is to be made to Mrs Ross and the child or children of her marriage, or of any subsequent marriage, it is not to be a conveyance to her and them *pro indiviso* or as joint disponees; there is plainly to be something of the nature of succession or separation in their respective interests. Mrs Ross is to take first, and then her children—for all her children, whensoever born, are to have an interest—the share of each being subject to her power of apportionment. And although the bestowal of this power of apportionment is not of itself conclusive, it certainly points to the conclusion that the donee of that power was not herself to have a right of fee in the estate, or a right to dispose of the estate, but only some limited and temporary right, such as a right of liferent only. In the next place, the clause goes on to declare that neither the annual proceeds or income of the estate, nor the fee, should be subject to the *jus mariti* or right of administration of any husband of his daughter, or to his or her debts or deeds, or to the diligence of his or her creditors, but that 'the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction.' Now, I think that these declarations and directions are equivalent, on the one hand, to an expression of the truster's intention that the conveyance to be executed by the trustees in his daughter's favour on the birth of a child of her marriage shall operate in so far as she is concerned only during her life—that is to say, that she shall have the estate during her life or in liferent as an alimentary and inalienable provision, and the trustees are to execute the conveyance in such terms as shall give effect to this intention. Mr and Mrs Ross maintain, that even if the direction should be held to point to a conveyance to Mrs Ross in liferent and her children in fee, that would, according to the well-settled rule of law, vest her with the fee. But, as the Lord President observed in the recent case of *Dawson*, 'such an alimentary provision would be a very futile and inexpedient mode of settling a fund of this kind, if a declaration that it was to be alimentary and an exclusion of the diligence of creditors were to be followed by a vesting of the fee, of course operating so as to open it to the diligence of creditors. Yet that is the result of the contention of Frances Dawson here. If it prevailed she could do what she liked with the money, and it could be attached by creditors. What would then become of the alimentary provision? It would perish with the fee which was to produce it, so that there would be an absolute inconsistency in giving a liferent which is declared to be alimentary, while at the same time the deed is so framed that the provision is made to vest in fee."

"I therefore think that the truster intended that in one way or another his trustee should so denude of the estate as to restrict Mrs Ross' right to a bare liferent and secure the fee for her children. And this view is strengthened by the circumstances that no conveyance at all is to be made until a child is born of Mrs Ross' marriage. The reason, I think, plainly is, that the truster intended and desired that his trust should not be wound up until by the birth of a child a person should be in existence to whom the fee could be conveyed *nominatim*, and who would thus be competent to hold the fee, subject to his mother's liferent, but for behoof of himself, and with an obligation to admit all his mother's subsequent children to participate with him in the fee. Even, therefore, if it should be held that the trustees were not bound to qualify the liferent conveyance to Mrs Ross by the use of the taxative word 'allenarly,' they would in my opinion be bound, while conveying the fee to her in liferent for her alimentary use, and as an inalienable provision not affectable by the debts and deeds of herself or her husband, or by the diligence of creditors, to insert, as the fiars of the property, the children born of Mrs Ross' present marriage *nominatim* and her future children *nascituri*. A conveyance in such terms would, according to a well-settled rule of law, restrict the right of the parent to a bare liferent, and vest the fee in the children.

"If I am right in the views above expressed, it follows that the trustees are not entitled longer to retain any part of the trust-funds except so much as may be necessary to meet John Gibson's annuity, and that they are bound to convey the whole to Mrs Ross and her children for their

respective rights of liferent and fee. I also think that the ulterior destination to the truster's own nearest heirs and assignees should be inserted in the conveyance. In so far as the estate consists of heritage, there can be little or no difficulty in framing the conveyance or conveyances. There may be more difficulty as to those parts of the estate which are moveable; and the cause is appointed to be enrolled in order that the form and terms of the conveyances thereof may be adjusted.

"As I have come to be of opinion that the interest of Mrs Ross in the residue does not amount to a right of fee, but is a liferent to her for her own exclusive alimentary use, it follows that her marriage-contract trustees can have no claim upon the fund *in medio* in virtue of the conveyance by Mrs Ross in their favour, contained in her antenuptial marriage-contract. She has expressly excepted from that contract 'all such estate and effects as the said Ellen Percival Gibson may succeed to under any destination or provision which may settle the same upon herself or her heirs exclusively.'

"Further, if the right of Mrs Ross is a bare liferent, and in no sense a right of fee, no question can arise similar to that which occurred in the case of *Lady Massy*, referred to in the note to the interlocutor of 27th December 1876. But I think it right for the information of the parties to say, that if I had regarded Mrs Ross' right to the residue as a right of fee, I should have held that it was a qualified right, that her children had more than a bare *spes successionis*, and that they had a right, of succession which the Court would have been bound to protect by some expedient similar to that adopted in the case of *Lady Massy*.

"The case will now be enrolled for the purpose already indicated, and to enable the parties, if necessary, of ascertaining the amount of the fund *in medio*."

Mrs Ross reclaimed, and the case was appointed to be argued before seven Judges.

Mrs Ross argued—The truster's intention here was to give to his only child a fee of the whole residue of his estate, both heritable and moveable, but subject to certain qualifications. The question really is, whether Mrs Ross' right is limited to a bare liferent? There is a direction to convey the fee of the residue. The Lord Ordinary has regarded the intention here as equivalent to a desire to protect the whole estate for the truster's grandchildren against even Mrs Ross. In point of fact, however, Mrs Ross' right as thus limited was determined by the birth of a child. No doubt there is a power of appointment, but that is a mere indication which, unsupported, cannot qualify an expressly given fee (*M'Donald—Anstruther*). [Lord President—Is there any case where the power of apportionment has been given, the fee being in the parent, without a protected right of succession? No, but in *M'Donald* Lord Balgray observed that the existence of the power did not affect the question of fee. The trustees maintain that in order to secure the provision being "alimentary and inalienable" they are to limit the actual fee as given by the testator to a "liferent allenarly." It is possible that some mode of conveyance might have been found in the case of heritage alone, but here there are likewise moveables. In *Dawson* the right *ex figura verborum* was one of liferent, here it is one of fee. [Lord President—The Lord Ordinary's view is that the truster could never have intended to settle the fee in this way, as he could not possibly do it effectually. Now, he could never, on the other hand, have meant in this way to settle the liferent, as he could not do that effectually either. The argument only goes that far]. In a recent case (*Allan*) where a payment of the fee was ordered, yet the right of fee was limited, and there was no interposition of a trust. Again, in the case of *Massy* the effect was only to protect against the *jus mariti* and to give the issue a sort of protected right. [Lord Shand—Did that give Lady Massy the fee and to the children merely a strong right of credit?] That is our contention; Lady Massy had left to her the whole power of administration. Here the children are *nati*, but they may fail, and the right, or whatever it is, may pass *nascituris*, so the observation of the Lord Ordinary as to this fails. Anyhow, there must be a conveyance to the mother and the children which will terminate the trust (*Ochterlony—Gordon*). What, then, is the effect of the language here used as regards parent and child? It gives, without disputing the cases of *Ramsay* or *Dawson* as authorities, a fee to Mrs Ross (*Anstruther*). The gift is one of fee, according to the plain reading of the context, and though by technical expressions what appears a gift of liferent may be extended to include a gift of fee, there is no authority whatever for saying that an express gift of fee can be reduced to one of liferent. If this was intended to confer a protected right of succession upon the children with a fee to Mrs Ross, then the power of apportionment becomes quite intelligible. The "annual proceeds" refers to one period of her life, and the "fee" to another.

Argued for the trustees of Mr Gibson—What could have been the meaning of the testator in making the birth of a child the period of the conveyance in favour of more than one person? Only that his daughter's right could then be conveniently restricted to a liferent when the fiar had come into existence. The test of the claim made by Mrs Ross is, that if it received effect the fund would not be protected, as Mr Gibson expressly directed, against her debts and deeds. The material questions here are, *First*, Is Mrs Ross a liferenter or a fiar; *Second*, if she is a fiar, is she so absolutely, or have her children a protected right of succession. [Lord President—What was done in *Lady Massy's* case was possible in law; here it is said that what is imported into the deed makes an impossibility in law.] The use of "alimentary" would almost seem to be equivalent to allenarly, to judge by some cases where it has been employed (*Ramsay—Dawson*).

Authorities quoted for Mrs Ross—*M'Donald*, Jan. 12, 1831, 9 S. 269; *Anstruther* v. *Cunningham*, March 18, 1869, 7 Macph. 689; *Dawson* v. *Dawson*, Nov. 10, 1876, 14 Scot. Law Rep. 71; *Allan* v. *Allan's Trustees*, Dec. 12, 1872, 11 Macph. 217; *Massy* v. *Cuninghame*, Dec. 5, 1872, 11 Macph. 173; *Gordon* v. *Gordon's Trustees*, March 2, 1866, 4 Macph. 501; *Ramsay* v. *Beveridge*, March 3, 1854, 16 D. 764; *Gordon* v. *M'Intosh*, April 17, 1845, 4 Bell's App. 105, 3 Ross' Leading Cas. 617; *Lord* v. *Colvin*, July 15, 1865, 3 Macph. 1083; *Arthur*

and Seymour v. *Lamb*, June 30, 1870, 8 Macph. 928; *White* v. *White*, June 1, 1877, 14 Scot. Law Rep.; *Douglas* v. *Sharp*, Hume 173.

Authorities quoted for the respondents—*Ferguson's Trustees* v. *Hamilton*, July 13, 1860, 22 D. 1442; *Seton* v. *Seton's Creditors*, 1793, M. 4219; *Dykes* v. *Boyd*, June 3, 1813, F.C.; *M'Gowan* v. *Robb*, Dec. 14, 1862, 1 Macph. 141; *Martin* v. *Milligan*, Dec. 24, 1864, 3 Macph. 326; Bell's Commentaries, vol. i., pp. 55, 125; Bell's Principles, § 1956; Bell's Illustrations, vol. ii., p. 347; Cases in Morrison's Dict. *voce* "Personal and Transmissible § 3;" *Tennant*, 1637, M. 10,372; *West Nisbet*, 1627, M. 10,368; *Lady Pinkhill*, 1709, M. 10,399.

At advising—

Lord President—The question which we have to determine regards the nature and extent of the interest which the claimant and reclaimer Mrs Ellen Ross is entitled to under the trust-disposition and settlement of her deceased father William Walker Gibson, and that depends upon a construction of the clauses of that settlement, but particularly of the clause disposing of the residue. When Mr Gibson made his settlement in the year 1866, Mrs Ross was his only child, and she was then unmarried and in minority; but at the time of his death, on the 1st of April 1875, Mrs Ross was married, and there was one child born of the marriage.

In these circumstances, the question comes to be, what is the duty of the trustees under the directions given by the testator in the eighth purpose of his settlement? He begins by directing them to retain in their own hands the whole residue of his estate "until my only child Ellen Percival Gibson, at present residing with me, shall be married, and until a child shall be born of her marriage." He thus very distinctly assigns the term for which the trust is to subsist; and then he proceeds to declare what the trustees are to do during this period — "Until my said daughter shall attain majority or be married, my trustees shall pay to her or apply for her behoof and benefit the whole, or such part as may be required for her maintenance, education, and upbringing in a manner suited to her station, of the annual proceeds or income of my estate and effects, and upon my said daughter being married, my trustees shall pay over to her for her alimentary use the whole annual proceeds or income thereof." Then he proceeds to direct and appoint what is to be done upon the further event of a child being born of the marriage. Upon that event the trust is undoubtedly to come to an end, and a conveyance is to be made. But while the trust subsists it is important to observe that there are two periods provided for by the truster—First, during the time that his daughter continues minor and unmarried she is to be maintained and brought up in a manner suited to her station, and for that purpose the trustees are to use so much as may be necessary of the annual proceeds or income of the estate. Then, after she is married, and before a child is born of the marriage, they are directed to pay over to her for her alimentary use the whole of the annual proceeds or income thereof. It is only necessary to observe at present that in neither of these portions of the deed is there anything like a liferent right created in favour of the wife. Now, we come to the direction as to what is to be done when a child is born, and the direction is "that upon a child being born of her marriage, my trustees shall convey and dispone to her and to the child or children of her marriage, or of any subsequent marriage into which she may enter, equally among them if she shall not otherwise appoint, but subject always to a power of division by her among the said children, and failing a child or children of my said daughter, then to my nearest heirs and assignees whomsoever, the whole residue and remainder of my estate." Now, the first question is, what is the legal meaning and construction of these words taken by themselves, because these are the leading and most important words in that clause. It may be that their natural legal meaning may be overruled by other declarations in the deed, but it is very desirable, in the first place, to ascertain what is the meaning of the words of this direction to convey. Now, I think the conveyance which the trustees are hereby directed to make is according to the true legal construction of the words used—a conveyance to his daughter of the fee of the residue. The words are "convey and dispone to her and to the child or children." There is no mention either of liferent or of fee in this clause, and I think therefore that the true legal construction of the words is a conveyance to his daughter in fee, whom failing to the child or children of her marriage, or of any subsequent marriage, equally among them, also in fee, unless she shall otherwise appoint — that is to say, it is to be equally unless she shall otherwise appoint, but a power of appointment or division is reserved. Now, that being, according to my view, the natural meaning of these words, the question comes to be, next whether there is in anything that follows a sufficient indication of an opposite intention on the part of the truster to derogate from the proper construction of the words used? My opinion is that everything that follows goes strongly to support and confirm the proper legal meaning of the words so used. He expresses himself thus—"I hereby declare and direct and appoint that neither the said annual proceeds and income of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds or to the diligence of his or her creditors." Now, be it observed, there can be no mistake here of what is the subject he is speaking of, for he expresses himself in words that cannot be misconstrued. It is both the annual proceeds and income of my estates above mentioned, or, as it is expressed, "the said annual proceeds and income of my estate, and also the fee thereof;" and what is said of them is that they are not to be subject to the *jus mariti* or right of administration of any husband, nor subject to his or her debts or deeds, or the diligence of his or her creditors. The "said annual proceeds" plainly applies to the income of the estate, which is directed to be paid to her while the trust subsists. There is no provision of any annual income or proceeds at all except during the continuance of the trust. And therefore it is plain to me that, in so far as that part of the estate is concerned, it is declared here that no part of anything that is paid over to her during the subsistence of the trust shall be subject to the *jus mariti* or right of administration,

or to the diligence either of her own or her husband's creditors. And that seemed a very reasonable provision, because the annual proceeds and income of the estate are to be paid to her after she is married, but before she has a child. But then it is also quite plain that he is anxious to prevent the fee of the estate from being subject to the *jus mariti* or right of administration of the husband, or to his or her debts or deeds; but how could the fee of the estate possibly fall under the *jus mariti* or be subject or liable to the husband's debts or deeds if the fee was not given to the wife, but was given to the children? That seems to me to be an impossibility; and therefore, upon that view of the matter, he is here trying to save the fee from a merely imaginary danger, whereas if the fee is vested in the wife, then the provision becomes a perfectly intelligible and a very proper one—to prevent the fee so vested in her from being subject either to the *jus mariti* or to the debts of the husband. No doubt he goes a little further, and says that it shall not be subject to her debts or deeds either, or to the diligence of her creditors, and I am afraid in his endeavours to accomplish that object he has gone a little further than the law will aid him to go, because a fee vested in a party cannot be protected in that way against his debts or deeds: but that is only an evidence of over-anxiety to make this fee in the person of his daughter as secure and as much protected as possible. So far, therefore, the whole of this declaratory clause in my opinion supports the proper legal construction of the words in which the conveyance is directed to be made. But then the declaratory clause proceeds further—"but that the same." Now, here it is necessary to observe what is meant by "the same." It is the said annual proceeds and income of my estate and the fee thereof—both the one and the other—both the annual proceeds and income of the estate during the dependence of the trust, and the fee thereof after the trust comes to an end—"shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance to be executed by them." Now, if the fee is to be an alimentary and inalienable provision for the daughter, the fee must surely be given to her, because if it were not so, it could never be inalienable in her person or secured against her debts and deeds. And yet the contention for the respondents in this reclaiming note is that there is after all nothing in effect given to the lady here except a bare liferent—it may be with a kind of fiduciary fee for her children—but the whole of these expressions appear to be entirely inconsistent with that notion. There is perhaps one expression that I have just read which gives at first sight some little countenance to that contention, when it says that the provision is to be for my said daughter during her life. No doubt that is the way in which people generally talk of a liferent; but then it is impossible to dispute that the truster here is talking about a fee, because he says it in so many words. And in one sense it is quite correct to say that the fee as well as the income of the estate is to be a provision for his daughter during her life, because it is quite plain that in the leading part of the clause, where he directs what the conveyance is to be, he intends to make the children the successors of his daughter—substitutes for his daughter. And in that point of view it is by no means incorrect to say that the provision is made to her for her life, and to her children after her death. Nor is that in the least inconsistent with the provision to the daughter being a fee, with a substitution to her children. Then there is another clause which follows this, in the ninth purpose of the trust. He says—"In the event of my daughter, the said Ellen Percival Gibson, dying without leaving a child or children, and before said conveyance shall be executed, I direct my trustees, at the first term of Whitsunday or Martinmas after her death, to make payment" of certain legacies to charitable institutions, and then to divide and convey the residue equally among the whole persons then alive who would by law succeed to his personal estate. Now, the case here contemplated, it must be observed, is that Mrs Ross dies without leaving a child, and before the conveyance has been executed; but he does not make any provision for the case that his daughter dies without leaving a child after the conveyance has been executed. There is no provision for that event; and it is worth while therefore to consider what would be the effect of this deed according to the two competing constructions of the clause regarding the residue in that last event. Suppose a child be born to Mrs Ross and the conveyance to be executed, and then the child dies, and she has no more but dies herself, would she or would she not have the power of settling this estate by testamentary disposition or will? According to the construction of the deed which gives her a bare liferent, of course she would not, and yet it does seem very important that in the event we are now contemplating the truster should deprive his daughter of the power of settling by will one shilling of the estate he had left to her and her family in favour of the nearest heirs and assignees of the truster; for that is the way it would have gone under the destination in the first part of this clause. Nothing to my mind can be more unnatural than the supposition of such an intention upon the part of this truster. It seems to me, therefore, that the whole clauses of this deed, in so far as they bear upon this question of construction at all, all tend in one direction, and the conclusion to which I have arrived is this, that the trustees are bound to execute a conveyance or conveyances of the property of different descriptions in favour of Mrs Ross in fee, whom failing to her child or children of the present or any future marriage, also in fee. It may be for consideration whether the children who are now born should be named as substitutes along with the children to be born. That enters merely into the form of the conveyance; but the substance of my opinion is that these children are substitutes to their mother Mrs Ross, and it will be quite proper that it should be distinctly found and provided for in the deed of conveyance when executed that these children have, according to the intention of the truster, a protected right of succession which cannot be defeated by any gratuitous acts or deeds of their mother while she enjoys the fee of this estate; and it will also, of course, be necessary that there should be reserved to her that power of division among the children which, looking upon them as substitutes, is not in the least degree inconsistent with her being in the meantime vested with the fee of the estate.

I should therefore propose to your Lordships, if you agree with me, that we should make a finding to the effect that I have suggested, and remit the case to the Lord Ordinary to proceed further. I may just mention, before concluding, that there is one claim which we have not heard parties upon as yet—I mean the claim of the marriage-contract trustees of Mr and Mrs Ross, and it may be, for aught that we have seen yet, that these marriage-contract trustees may have some claim to the fee of this residue if it shall be found to belong to Mrs Ross in terms of the opinion which I have just given; but that remains for future consideration, and I think it could not very well have been considered until it is determined by the Court what is the nature of the interest or estate which Mrs Ross takes under the settlement.

Lord Justice-Clerk—The period has arrived under this settlement at which these trustees must convey over the estate in the terms in which they have been directed by the truster—that is to say, there has been a child born of the marriage, and under the present action the question has been raised in what terms is that conveyance to be made? The Lord Ordinary has decided that the conveyance must bear to be to Mrs Ross, the testator's only daughter, in such terms and in such manner as will restrict the right and interest of the said Mrs Ross to the same to a liferent right allenarly. I understand the question upon which your Lordships of the First Division wished our opinion was, whether that was or was not a sound finding under the terms of the settlement? I am of opinion, with your Lordship, that it is not a sound construction of the settlement, and that the trustees are bound to convey this estate to Mrs Ross in fee with such restrictions or qualifications as may be found to be practicable and directed by the deed; and the opinion that I have formed is so much in conformity with that which your Lordship has announced that I do not think it necessary to go over this deed in any detail. There can be no doubt that it is drawn with very considerable obscurity, and it rather appears that there is a conflict between the first and cardinal part of the deed and those provisions which are rather directory, or executory, or calculated to carry out the primary intention of the testator. If there be such a conflict, we must do our best to arrive at the testator's real and substantial meaning; and, as a general rule, directions which are merely subsidiary and auxiliary to one cardinal intention that the deed was meant to carry out, must yield to that intention, and cannot be construed except in conformity with it. Now, it seems to me quite clear that the first direction, standing by itself, in regard to what is to be done when the period which has arrived, shall arrive, viz., when the daughter shall be married and shall have a child of the marriage, I think that very little doubt would have arisen upon these words if they had stood alone. The testator has set up a trust for the benefit of his daughter, not only until she is married, but until she has a child of the marriage. Up to that time she is to have the annual proceeds or income of the estate, or until she attain majority so much of it as may be necessary for her upbringing. But when that event occurs the direction is thus—"I direct and appoint that, upon a child being born of her marriage, my trustees shall convey and dispone to her and the child or children of her marriage, or of any subsequent marriage into which she may enter, equally among them, if she shall not otherwise appoint (but subject always to a power of division by her among said children), and failing a child or children of my said daughter, then to my own nearest heirs and assignees whomsoever, the whole residue and remainder of my estate which may then be vested in them." If these words had occurred standing by themselves and alone, I do not think it could be doubtful that it was the fee of the residue that was intended to be conveyed, first to the daughter, and failing her to the children and to his nearest heirs. The words are quite precise, and I take the opportunity of saying that if this had not been the intention of the testator there was machinery already in operation which would have carried out any desire or design that he had to limit the right of his daughter to her liferent interest in the residue. But he deliberately abolishes the trust, and directs the trustees to denude, and to denude directly in favour of those to whom he intended that this estate should go. Then the next part of it is a direction that neither the annual proceeds or income of the estate, which were to be paid to the daughter until a child was born and until the conveyance came to be made, nor the fee thereof—that is, after the conveyance comes to be made—shall be subject to the *jus mariti* and right of administration of the husband. Then, again, it is perfectly clear that the annual income and proceeds relate solely and entirely to the period before the conveyance came to be granted, and that the fee mentioned in so many words refers to nothing but the residue, which was to be conveyed by the former part of the deed. Now, the only difficulty that has arisen is in the restrictions which the testator has attached or has tried to attach to the gift which he has directed the trustees to make in the conveyance. He says that it is not to "be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction." The Lord Ordinary holds that, notwithstanding the direction to convey the residue to the daughter, and notwithstanding the words, which are quite clearly expressed, that these restrictions are to be applicable to the fee to which he has already referred—that these words must be read as converting the fee which has been, in words at all events, given, into a liferent allenarly. I cannot read the provision in that way. I think, on the contrary, that no such provision was intended by the testator. How far these particular restrictions can be validly and effectually carried out in conformity with a conveyance of the fee as directed in the prior part of the deed is another question, and I do not understand that our opinion upon that matter has been desired by your Lordships of the First Division. It does not in the least follow, although there may be restrictions and qualifications which the testator attempted to attach to the direct conveyance, which cannot be carried out

according to the ordinary terms of law, that he did not intend the conveyance to be made. That is rather an absurd conclusion from the words, and although it is said that these qualifications are to create an alimentary and inalienable provision during his daughter's life, that to my mind means no more than this, that the fee so qualified and so restricted is only to be qualified and restricted during her life, and that the qualifications and restrictions do not apply to those who are to succeed through the after destination. I do not know that I have anything further to say. I do not see that there is here the creation of any fiduciary fee in the mother. She is given a power of division, and that rightly; because if your Lordship's intention is carried out, as I think it should be, of inserting in the conveyance what will render this a destination protected against the mother's gratuitous deeds, it is perfectly right that she should have the power also of apportioning among the children the amount of the estate. On the whole matter I agree with the opinion which your Lordship has delivered.

Lord Deas—The Lord Ordinary has put a construction upon this deed, and directed the trustees to frame a conveyance in accordance with that construction. Assuming his construction of the deed to be right, I do not suppose any experienced conveyancer could have the slightest difficulty in framing a conveyance which would carry out that construction. I am of opinion that the Lord Ordinary's interlocutor is perfectly right, although, as the case has been taken out of his hands before the draft conveyance was lodged, we do not know in what precise terms he would have approved of the conveyance being expressed. The views which I have on that subject are not in the least inconsistent with anything in his interlocutor and note.

The conveyance was to be executed when a child was born. There must have been an object in the mind of the testator in directing the execution of the conveyance to be delayed till then, and I think that must be held to have been either that the conveyance might be to the mother in liferent and the child *nominatim* and her subsequent issue in fee, which would have limited her to a bare liferent without the necessity of using any restrictive words such as allenarly or alimentary, or it must have been that the conveyance should be to the mother in liferent for her liferent use allenarly, (or, what would be equivalent, alimentary) "and to the child or children born and to be born in fee," which would have conferred a liferent on herself and a fiduciary fee for her children. This last form of destination would give the mother a title of the nature of a trust for behoof of the children, and I prefer it therefore, as, of the two alternatives open, the most in accordance with the probable will of the truster, who does not say expressly that the child who is to be born shall be named in the conveyance. If that had been said expressly there could have been no doubt at all that the mother was to be a bare liferenter. But that not being said, it is open, I think, for the trustees to accomplish the same purpose by the other and more available form of destination; and if a conveyance were executed in favour of the mother in liferent for her liferent use alimentary, "and the child or children born and to be born in fee," nobody will doubt that that would be a habile title to confer a fiduciary fee upon the mother and a beneficial fee on the children. That stands decided as regards heritable estate by the very authoritative case of *Waterston* v. *Renton*, 25th November 1801 (M. 4291), where Mr Waterston granted a disposition in favour of his daughter and her husband in conjunct fee and liferent, and to the longest liver, for their liferent use allenarly, and to the children procreated or to be procreated of the marriage equally in fee. That case was reported to the Inner House by the first Lord Meadowbank, and the Court were all clear that the point had been fixed by previous cases, and that there was there only a fiduciary fee in the parents. It has been explained that in the present case the heritable and moveable estate are together of the value of £40,000, and that about one-half of this sum may be taken roughly as the value of each. The case of *Waterston* has ruled the practice ever since its date, and it is beyond all question therefore that a conveyance of the heritable estate in the present case to the mother for her liferent use alimentary, and the child or children born or to be born in fee, would be valid and effectual to make the mother liferentrix and the children beneficial fiars without the necessity of any nomination of trustees.

That the same would be the consequence of a conveyance in similar terms of the moveable estate was decided in the case of *Rolls* v. *Shaw or Ramsay*, 28th November 1832, 11 S. & D. 132. In that case the wife, by antenuptial marriage-contract, destined a sum of £5000, which had been bequeathed to her by her uncle, to herself and her husband for the liferent use allenarly of the longest liver, and to the children of the marriage in fee. The husband uplifted upwards of £2000 of the money, and died insolvent in 1828. The widow claimed and obtained for herself and the children a ranking on his estate for the money he had so uplifted. About £3000, principal and interest, remained in the hands of the uncle's executors, and was claimed by the husband's creditors, for whose behoof Mr Rolls, W.S., expede a confirmation as executor-creditor of the husband, whereupon the uncle's executors raised a multiplepoinding, in which a claim was lodged for the widow and children, who pleaded that "nothing more was given to the husband than a liferent interest with a fiduciary fee for behoof of the children." On the other hand, a claim was lodged for the executor-creditor on the footing that the fee was in the husband. (The first) Lord Mackenzie, Ordinary (adding an instructive note), sustained the claim of Mrs Ramsay and the children, and repelled the claim for the creditors. To this judgment the Court unanimously adhered. Lord Glenlee expressly observed —"There appears to me to be no difference here from the case of *Waterston*." The other Judges said his Lordship had anticipated their opinions, the Lord Justice-Clerk at the same time referring expressly, as Lord Glenlee had done, to the case of *Waterston*. I refer to this case of *Rolls* solely as an instance that where personal estate is earmarked by a special conveyance, or, what would be equally effectual, by reference to an inventory, there is nothing to prevent a liferent and fee or fiduciary fee from being created over personal

estate any more than over heritable estate without the necessity of naming trustees, although no doubt it might be easier to commit a sucessful fraud on the destination in the case of moveable estate than in the case of heritable estate.

Of course in the present case the *jus mariti* and right of administration of the husband will fall to be excluded as to both estates in any conveyance to be executed, according to the express direction in the trust-deed.

I have suggested the words "liferent alimentary" in place of "liferent allenarly" to be used in the conveyance, because "alimentary" is the word used by the truster in his deed; but authority to use the one term is authority to use the other, it being quite settled that in such destinations the word "alimentary" has the same effect with the word "allenarly." The earliest decision I have noted to this effect is the case of *Gerran*, June 1781, reported to the Court by Lord Braxfield (M. 4402), where the decision was unanimous that "alimentary" was equivalent to "allenarly." It was so decided again in the case of *Douglas* v. *Sharp*, March 9, 1811.

And accordingly, we have the law so laid down in distinct terms by Mr Bell in his Commentaries, p. 54 of the fifth edition, and in his Principles, sec. 1956, in which last he cites the case of *Gerran*, which he had not cited in the Commentaries.

As to the construction of the clause now in question, I cannot adopt the observation that if the first part of the clause had stood by itself it would have given the beneficial fee to the mother. All we find there is, that some right is to be given to the mother and some right to the children, but what each of these rights is to be is not there explained; and I know no ground for holding that when a father is providing for his daughter and her children, and excluding the *jus mariti* and right of administration of any husband she may marry, a presumption at once arises that he means to give the children nothing but a *spes successionis*. On the contrary, where the provisions are, as in this case, of large amount, a father may naturally think that the best thing he can do for his daughter is to secure to her the life income, which she would lose if the capital were dilapidated and spent, and to give her the comfort of knowing that the children who are to come after her are reasonably secured in the means of education and support. Nothing, accordingly, is more usual in practice than for a father to act upon views of that description. It was observed by one of your Lordships in the course of the discussion, that as by clause 8th the truster's heirs were to be substituted failing the issue of the daughter, it was unnatural to suppose, unless he meant her to have a full fee, that he would not have given her a power of disposal applicable to the event of her surviving her issue. But when the words substituted in the 8th clause are read, as they fall to be, along with the relative words in the 9th clause, it seems clear enough that it was only in the event of the daughter "dying without leaving a child or children, and before said conveyance shall be executed," that the substitution of the truster's nearest heirs was directed to take effect. The predecease of the daughter's issue after a conveyance has been executed is not provided for at all. That is nothing more than overlooking a remote contingency, as testators often do, and cannot entitle us to refuse effect to his will so far as expressed. If such a contingency should occur, the truster's heirs would be the daughter's heirs, and what her right then would be is far from clear, and I do not speculate upon it.

As to the argument that the fee was to go to the daughter whom failing to her children, it will be observed that the words "whom failing" are not in this clause from beginning to end; and these are words not readily to be supplied.

But the conclusive answer to the inference attempted to be drawn from the first part of the clause is, that you cannot know the meaning of that part of the clause till you have read the clause to the end. What the truster means in the introductory part of the clause he immediately proceeds himself to explain by saying—"And I hereby declare and direct and appoint that neither the said annual proceeds and income of my estates nor fee thereof shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction."

Now, this is not a deed subject to any strict or technical construction. It is not like a special disposition of an heritable subject, the precise words of which must go into the Record of Sasines and be construed by technical rules. It is a mere general *mortis causa* deed, and the clause we are dealing with is simply intended to let his trustees understand what sort of deed (technical in so far as technicality may be necessary) they ought to execute, under professional guidance, in order to carry his intentions into effect, just as where a testator directs his trustees to execute a strict entail without (it may be) saying more about it. The directions to execute the entail do not require to be in technical language, and are to be construed with reference to intention merely, although the entail itself must be in technical language, and will be subject when executed to a technical and strict construction. Now, there is not a word from beginning to end of this clause to the effect that the daughter is to have the beneficial fee. The only inference that she is to have a fee at all rests on the words—"that neither the said annual proceeds and income of my estates nor the fee thereof shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds or to the diligence of her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life." Now, I grant that there is here an inference that the daughter is to have a fee of some kind; but it must be a fee which shall answer the description given of it, and what that can be except a fiduciary fee I am unable to conceive. The writer of this deed was obviously a young and untrained conveyancer. We are all, I believe, under that impression. Probably the experienced law agents for whom he acted thought their superintendence unnecessary, as the more important

and technical conveyance was to follow. But the writer obviously knew that what the truster wanted was that both fee and liferent should be independent of the husband and of the husband's creditors and of the daughter's creditors; and so, in place of attempting to describe the kind of fee or the form of destination, he contented himself with a detail of the consequences aimed at, and a direction to the trustees to "make full provision to the above effect in the conveyance or conveyances to be executed by them," so as effectually to secure these consequences.

It is now agreed that the daughter is to have a qualified or limited and not an absolute fee, and the question therefore is reduced to this—What is the qualification or limitation to be? Your Lordships propose that the daughter shall be fiar, subject to the qualification that there shall be a *spes successionis* in the children not defeasible by her gratuitous deeds. That is the whole qualification or limitation proposed to be put upon her right of fee in the conveyance to be executed. But the truster has declared, directed, and appointed that his estate shall not be subject to the debts or deeds of his daughter, whether gratuitous or onerous, or to the diligence of her creditors. The truster directed a conveyance that should exclude liability for the daughter's debts and onerous deeds, but your Lordships propose to direct a conveyance which will admit that liability, and even liability for her husband's debts, if they are, as in some circumstances they may be, undistinguishable from hers. That appears to me to be the very opposite of the declared will of the truster. Then we have the intensifying declaration that the estates and annual income thereof "shall be an alimentary and inalienable provision for my said daughter during her life." Your Lordship in the chair has said that the only income thus referred to is the annual income before the birth of a child and the execution of a conveyance; but how the annual income prior to the birth and conveyance can form an alimentary and inalienable provision for the daughter during her life if she lives after the execution of the conveyance I am unable to conceive.

The Lord Justice-Clerk, on the other hand, seems to acknowledge rather than to ignore the inconsistency between the latter portions of the clause and the kind of fee which he spells out of the first part of it, but his Lordship thinks he solves all difficulty on that score by saying the concluding declarations and directions are subsidiary and auxiliary merely to what goes before, and, being of a conflicting nature, can receive no effect. But nothing that goes before is half as clear and distinct as these concluding declarations and directions themselves. They are subsidiary and auxiliary in no other sense than an interpretation clause may be said to be subsidiary and auxiliary. They are really the sting of the whole matter, and their inconsistency with the kind of conveyance now proposed affords, I think, the most legitimate and convincing argument against that being the kind of deed the truster contemplated, especially as he concludes by directing his trustees to make full provision for carrying out these declarations and directions in the conveyance or conveyances to be executed by them.

For my own part, I could understand the deed being construed as contemplating a conveyance to the daughter in liferent alimentary or allenarly, and to the child *nominatim* and other children to be born, so as at once to vest an absolute fee in the children. But I cannot read this eighth clause of the deed and conceive it to have been the intention of the truster that there should be in the daughter a fee of a kind which should render the estates liable for her debts and onerous deeds, and expose them to the diligence of her creditors.

Any question as to the nature and efficacy of the daughter's alimentary liferent is quite a different matter from the more important question of the fee, and the one ought not to be mixed up with the other. I see no difficulty, however, in excluding the creditors both of the husband and wife from affecting the wife's liferent to the extent, at all events, of a suitable alimentary provision, and from excluding the *jus mariti* not only as regards the heritable estate, but likewise as regards the personal estate to be specifically conveyed, all in accordance with the will of the truster. It may not, perhaps, be practicable, without the intervention of a trust, effectually to prevent the daughter from despoiling herself of her liferent of the personal estate by her own express voluntary deeds; but it is quite practicable without a trust to protect her liferent of that estate against the husband's *jus mariti* and the acts and deeds of his and her hostile creditors. We have an instance of this as regards the exclusion of the *jus mariti* and of the husband's creditors in the case of *Macdonald or Young* v. *Loudon & Company*, June 26, 1855, 17 D. 998, and the same principle would exclude the wife's creditors where her liferent is declared alimentary. The late case of *White's Trustees* v. *Whyte*, June 1, 1877, is not inconsistent with this doctrine. The truster there by his *mortis causa* settlement conveyed his whole heritable and moveable estate to trustees for certain purposes, and, *inter alia*, for the purpose of paying to his sister, half-yearly in advance, an annuity of £60, declaring it to be purely an alimentary provision, not arrestable for her debts or deeds and not assignable by her, either onerously or gratuitously, in any manner of way. The *jus mariti* of any husband she might marry was also excluded. All the other purposes of the trust being satisfied, the heir-at-law who became entitled to the residue called upon the trustees, with consent of the annuitant, to denude in his favour on his discharging the trust and securing the annuity to the lady over the heritable estate, which was ample in value. But it was obvious there that the truster's purpose was to secure the annuity to his sister, not only against the interference of third parties, but against the voluntary deeds of the lady herself; and what the Court decided was, that it had not been shewn that this latter purpose could be accomplished otherwise than by a trust, and, at all events, the truster had chosen that his purpose should be guarded in that way, which was clearly effectual, and therefore, on considering a Special Case for the trustees, the heir, and the lady, we refused to sanction the arrangement. That judgment does not imply that an alimentary liferent cannot be secured against the *jus mariti* and against creditors both of the husband and wife, without a trust, so as to afford a practical protection, although a trust may be necessary effectually to protect the liferentrix against herself.

My opinion in the present case is, that the judg-

ment of the Lord Ordinary ought to be adhered to, and a conveyance or conveyances directed to be prepared to carry it into effect.

Lord Ormidale—It cannot be questioned that the duty of the Court in this case is to give effect, so far as practicable, to what may be legitimately held to have been the intention of the truster. But that intention must be collected from the language he has used in his trust-deed of settlement, and not from any loose or vague speculations as to what he ought to have done.

Now, by the eighth purpose of the trust-deed of settlement, upon the terms of which the disputed question entirely depends, the deceased Mr Gibson directs his trustees to pay to his only daughter and child Ellen Percival Gibson, now Mrs Ross, till her majority or marriage, the whole, or such part as might be required for her maintenance, education, and upbringing in a manner suited to her station, of the annual proceeds or income of his estates, and "upon my said daughter being married, my said trustees shall pay over to her for her alimentary use the whole annual proceeds or income thereof."

So far there neither is nor could well be any dispute as to the intention of the truster, or as to the legal effect of the language he employs in expressing his intention. The dispute arises in regard to the meaning of what follows in the same eighth purpose of his trust-deed.

After expressing his intention as to the disposal, in the manner which has been stated, of the income or annual proceeds of his estate during the minority of his daughter, and while she is unmarried, the truster goes on to provide for the contingency of his daughter being married and having a child or children, in which event he directs his trustees to convey and dispone to her and her child or children, whom failing his own nearest heirs and assignees whomsoever, "the whole residue and remainder of my estate which may be then vested in them." Neither did I understand that any difficulty or dispute was raised in regard to the meaning and effect of this direction looked at by itself. I am not, however, to overlook what follows; but it is important to bear in mind that according to the truster's directions as to the disposal of his estate on or after the marriage of his daughter and her having a child or children, so far as I have yet gone, it is clear and indisputable (1) that his trustees were to divest themselves of his whole estate, capital or fee as well as the income, in favour of his daughter and her child or children; (2) that supposing this to be done, the full fee would be in his daughter, and her child or children would have a mere *spes successionis*.

Accordingly, the truster goes on to declare, direct, and appoint "that neither the said annual income and proceeds of my estates, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or creditors." Here it will be observed that the truster is dealing with the income of his estates and the capital or fee as two different things; and it must be assumed that he understood the difference between these two things. Clear it is, therefore, that, so far as I have yet gone, the truster intended that his daughter's right to the income and to the capital or fee of his estate should be equally full and complete, although with regard to both he excluded the *jus mariti* of his daughter's husband and the debts, deeds, and diligence of her creditors. How far, if at all, he could by the mere use of these words exclude the debts, deeds, and diligence of creditors is a different matter, but it is at anyrate clear, I think, that such an exclusion, so attempted to be imposed, could not change a fee, assuming one to be vested in the truster's daughter, as he expressly says it was intended by him to be, into a mere liferent. And just as little do I think it can be maintained that the fee so expressly spoken of by the truster was a mere fiduciary fee in his daughter on behalf of her children, for in that view it would have been absurd to protect it, as he does, from the *jus mariti* of his daughter's husband, or the debts, deeds, and diligence of her creditors. Neither her husband's *jure mariti* nor her creditors by any mode of diligence could possibly affect a fiduciary fee which, indeed, would be wholly valueless to them. It was a full beneficial fee, as distinguished from a fiduciary one, that it could in any view be necessary to protect by an exclusion of the husband's *jus mariti*, or the debts, deeds, and diligence of creditors.

But it is true that the directions of the truster in regard to the protection of his estates as vested in his daughter do not stop there, for he goes on to say that the same, that is, both the income and capital or fee, "shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction." It is out of this part of the truster's deed that the difficulty—and I do not say that it is not one of importance—of the case arises. It is said that the object of the truster is here distinctly expressed, to the effect that his estates when they devolved to his daughter were to be an alimentary and inalienable provision for her during her life, and that his trustees were to make full provision to that effect in the conveyance or conveyances to be executed by them. This is quite true, but not more so than that the truster had previously in the most unequivocal manner, as it appears to me, directed his trustees, on his daughter having a child born to her, to divest themselves by conveying to her and her children his whole estate, capital or fee as well as income or annual proceeds. Surely this is not to be gone back upon and disregarded in order to carry into effect the subsequent declaration of the truster, that he intended his estates to remain an alimentary and inalienable provision for his daughter during her life. And to adopt such a course appears all the more inadmissible when the difficulty, or rather the impossibility without making a new settlement for him, of carrying the truster's supposed object into effect is considered. To convey his estates to Mrs Ross in liferent allenarly or solely for her alimentary use and to her children in fee would, according to my apprehension, be virtually making a new or different settlement for the truster than that which he has made for himself; and, after all, it would not, so far as I can see, indefeasibly secure an alimentary and inalienable provision for his daughter during

her life, in regard, at least, to the moveable portion of the estates in question. Then, in regard to the creation of a trust, which was the only other mode suggested by which such an object could be carried into effect, that would be still more obviously making a new settlement for the truster. To create a new trust in the face of the truster's express direction that the trust he had himself created should in a certain event, which has happened, be brought to an end, would not only be a violation of his settlement, and without precedent, but in the face of the judgment of the Court in the recent case of *Allan* v. *Allan's Trustees*, 11 Macph. 216.

The truster may perhaps have intended nothing more by the declaration in question than that it should appear for what it is worth in the conveyance or conveyances to be executed by his trustees in favour of his daughter; but if he intended something more, I do not for myself see how his intention can be carried into effect.

In these circumstances, I have found it impossible to adopt the conclusion to which the Lord Ordinary has come. The only course I think that can be followed is that which has been suggested by your Lordship in the chair.

Lord Mure—I do not understand there is any difference amongst your Lordships as to the rules of construction upon which this case must be decided. We are called upon to deal with a *mortis causa* settlement, and, according to the ordinary rule, the intention of the testator in the provisions of that settlement must be our guide in dealing with such a question as that which is here raised. Now, the portion of this deed which we have to consider is the eighth purpose of the trust. It is of some length, and must be construed according to that rule, viz., What is there indicated to have been the intention of the truster with reference to this provision? Now, this intention must be gathered from that clause as a whole, and not from any isolated passage, however clear and distinct that passage may be. If that passage is inconsistent with what appears to be the general purpose and object of the truster—if the provisions of particular parts of a clause of this sort are inconsistent or even contradictory—they must be construed and reconciled to the best of the ability of the Court when called upon to deal with them in conformity with the general purpose and object of the truster as indicated in the whole of the clause. But where one part of a clause of this sort is inconsistent with the other, I apprehend that another rule comes into play, which is this, that the latter part of the clause, if at all inconsistent with the earlier part, is generally held to prevail, and more especially is that the case if we come to see that in the latter part of the clause there is a plain and distinct summing-up, as it were, of the general object the truster had in view, and a plain and distinct direction to his trustees to carry out what he has told them to do in a manner consistent and so as to give effect to those directions. If, therefore, the latter part of the clause contains a positive direction as to what the general purpose and object of this truster was, and directs his trustees to carry that out, those instructions must, I conceive, be obeyed; and, applying this general rule to the construction of the eighth purpose of this trust-deed, I have come to the conclusion that the Lord Ordinary has substantially taken a sound view of that eighth purpose.

I do not intend to trouble you by going over again the terms of this clause. I shall only say that, having read it over, and looking at it from a general point of view, I have not been able to come to any other conclusion than that this gentleman never did intend to give the fee of that estate to his daughter. On the contrary, I think it indicates an intention that her interest in that estate should be exclusively a liferent interest. In the earlier part of the deed he makes special provision of the liferent to her up to the period of the birth of her first child, and then, on the birth of the child—and this it is which has given rise to the present question,—he directs his trustees to convey and dispone to his daughter and her children the whole residue and remainder of the estate. It is unfortunate that that clause does not contain any express mention either of the liferent or of the fee. The insertion of a very few words here—to his daughter in liferent and to her children in fee—would have avoided all dispute; but those words are not there, and therefore as it stands the clause is open to the construction that under the general word "residue" the fee of the estate may have been intended to be conveyed. But the matter does not rest there. We cannot stop there and say—"There is a conveyance of the fee, and we must construe the clause by that intention." On the contrary, when we come to the latter part of the clause—which in the making of a will is the instruction the party gives to his trustees, and must be held to contain what the will of that man is—he makes use of language and declarations which appear to me to be inconsistent with the existence of any fee to the daughter—of any intention on his part that the fee should be given to the daughter—because he appoints and declares that "neither the said annual proceeds and income of the estate, nor the fee thereof, shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds, or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with these directions." Now, there is a distinct direction that the daughter's interest is to be a liferent interest. It is to be an alimentary provision during her lifetime, and the provision, such as it is, is to be inalienable; and there is also a positive declaration that the fee of the estate shall not be subject to her own or her husband's debts, but shall be free from both. As I understand the judgment proposed by the Lord President, the fee of this estate will be subject to the debts of those parties. The daughter will be prevented from making a gratuitous disposition, but it will be subject to her onerous debts and deeds, as it was in the case of *Lady Massy*, which was referred to in the course of the discussion. Now, the words that appear to me most distinctly to indicate the intention of the truster are the words "alimentary and inalienable provision for my said daughter during her life;" and what is that? It is nothing more than a liferent provision to his daughter. It is not to be available for her debts; and, con-

struing the conveyance of the residue in consistency with the direction given, and the positive declaration that her provision is to be a liferent provision—an alimentary and inalienable provision for her during her life—I think it would be a violation of the intention of this truster to oblige the trustees to execute any conveyance which would have the effect of exposing this estate to the diligence of this lady's creditors or to her own onerous debts.

The views of the Lord Ordinary, as indicated by him, do not carry out what I think was the intention of the truster by giving the liferent allenarly to the mother and the fee to the children. I have the less hesitation in adopting this course, because on studying the case of *Lady Massy* I find the opinions of several of the Judges in that case were very materially influenced by the fact that there was nothing in the wording of the provision in favour of Lady Massy which could be held to import that anything in the shape of a mere liferent was conferred. That was expressly referred to by two, if not three, of the Judges; but in other parts of the deed there were liferent provisions given to others of her relatives, showing that her man of business knew how to word the settlement so as to give a liferent. But here, instead of there being an absence of any declaration as to a liferent, there is a most express declaration, as I read it, of an alimentary provision for the lady during her lifetime, and that, coupled with the declaration that it is not to be subject to her debts, leads me to think that this gentleman never intended that the fee of the estate should be in his daughter at all.

I think, therefore, that the construction which has been adopted by the Lord Ordinary should prevail. Reference was made in the discussion to instructions given to trustees to make an entail where a direction to adopt a particular entail was given, and yet the trustees were held to be entitled to disregard that direction—and why? Because it was coupled with words which showed that the intention of the testator was that his estates should be inalienably dealt with and fixed upon as an entailed estate, and if the direction as to the mode in which the entail should be made had been carried out, that declaration of intention on the part of the testator would have been frustrated and defeated. I allude to the case of *Graham* v. *Lord Lyndoch's Trustees*, March 1853, and afterwards affirmed in the House of Lords, where the instruction was that the trustees should purchase land to be entailed in terms of a particular entail, and the entail was mentioned, and the words were added "so as to make it a valid and effectual entail according to the law of Scotland." Now, if the direction to make the entail in terms of that particular entail had been adopted, it would have been a bad entail according to the law of Scotland, and this Court held, that notwithstanding this specific direction to make it in terms of the particular entail, the trustees were bound to disregard that entail and make what was a good entail by the law of Scotland, so as to carry out the intention of the truster. The opinions of Lord Colonsay, Lord Fullerton, and Lord Ivory with regard to that case appear to me to be directly applicable to the question we have here to decide.

On these grounds, I concur with Lord Deas in thinking that the interlocutor should in substance be adhered to.

Lord Gifford—I think that the first question in this case is—What was the real wish, purpose, and intention of the testator, the late William Walker Gibson, in regard to the disposal of the free residue of his estate, heritable and moveable; what did he really mean should be done with that residue; and what was the precise measure and extent of the rights and powers in and over that residue which he truly intended should be conferred upon his daughter and her children respectively? I think this is the first question, and in putting it I purposely avoid the use of technical language, seeking only to get at the mind and will of a non-professional testator.

It is also of importance that this first question —What did Mr Gibson really wish to be done with the residue of his estate?—should be kept perfectly separate and distinct from the other questions in the case, which are—How far can the trustees or the Court give effect to Mr Gibson's intention consistently with the deeds which he has appointed to be executed? or, How far and to what extent ought the Court to give effect to the intention disregarding or superseding the special machinery which the testator contemplated employing? and still further, What ought to be the precise form and terms of the deeds of conveyance or other deeds which the trustees are now to be ordained to execute? All these questions are important, and some of them may be difficult, but none of them arise until the primary question be answered—What was the will and mind of the testator in reference to the disposal of the residue of his estate?

Now, in determining what was the mind and will of the testator—the *voluntas testatoris*—I am of course confined to the words of his trust-deed and settlement. I must gather his meaning and intention from the words which he has employed, taking his deed as a whole, and reading and comparing together all its parts. I do not leave out of view, also, that as the deed bears to be prepared by professional conveyancers, and as it contains technical words in many of its clauses, the canon of interpretation may apply, that where technical words are used they are to have their technical meaning, unless it appears from the context or from the deed otherwise that a different signification or a meaning more or less non-technical was intended. At the same time, I must say that in this case I feel that the rule that technical words must be read technically has very slight application, for it is impossible to read the deed without feeling that the conveyancer, whoever he was, has not used legal and technical words with proper appreciation of their exact legal force and meaning, or with any accurate understanding of their strict legal effect. The deed in the important clauses now under construction is framed in the most loose manner, and I feel at liberty to gather from the whole clauses what Mr Gibson's real purpose was, taking the whole expressions, technical and non-technical, together as the words of the testator himself, and fortunately, as I think, the testator by the common and non-technical words has made his meaning and intention perfectly clear.

It is also to be kept in view that in construing a testamentary deed—in reading the purposes of a

trust for the purpose of finding the intention of the testator—we are not bound by the rules which give certain legal effects to certain words when they are used in a deed of grant, a deed of conveyance, or even a deed of obligation. The question is not—What would be the legal effect of a deed of conveyance granted to Mrs Ross and her children in such and such words? On the contrary, the question is—What did the testator mean? and it is for the Court to select the words which will give full legal effect to his intention, whatever it was. In short, to use the words of the Lord President in *Graham* v. *Lyndoch's Trustees*, 15th March 1852, 15 D. 564, the case belongs "to that class of cases which have been treated as instructions to trustees, and to be ruled by the intentions of the maker—not to that class which have been treated as operative deeds of conveyance, to be ruled by the technical structure of the clauses." Even if there were a conflict between the prescribed or indicated terms of the deed to be granted, and the declared intention of the truster, I think the latter must prevail, as it did in *Lord Lyndoch's* case. In that case there was an express direction to settle certain fee-simple lands under all the conditions, provisions, and "clauses prohibitory, irritant, and resolutive," contained in an existing deed of entail specially referred to, so as to make a valid entail by the law of Scotland. It turned out that the entail referred to was defective in the irritant clause, and the Court held, and the judgment was affirmed in the House of Lords, that the direction to follow the terms of the bad entail must be disregarded, and that, notwithstanding such direction, a good and valid entail in different terms must be executed by the trustees. In the present case, however, I think no such conflict arises, and the directions of the testator are not inconsistent with his declared intentions.

Now, taking the trust-deed, let us see how Mr Gibson wished the residue of his estate to be disposed of. In the first place, and while the trustees themselves hold the residue in their own hands, there is and can be no difference of opinion. While Ellen Percival Gibson, the truster's only child, is in minority, the trustees are to apply the whole or such part of the annual proceeds as may be required "for her maintainance, education, or upbringing." Next, when Ellen Percival Gibson is married, and apparently when she attains majority if that should happen first, the trustees are to pay over to her "for her alimentary use," the whole annual proceeds or income of the residue of the trust-estate, and lastly, and it is here the difficulty begins, when a child is born of the marriage of the testator's daughter, the testator directs his trustees to convey the whole residue to his daughter and to the child or children of her marriage and of any subsequent marriage into which she may enter, equally among them, with a power of division to the daughter and a destination over to the testator's nearest heirs whomsoever.

Now, if the deed had stopped here, there might not probably have been much doubt as to the duty of the trustees. I think that they would have fallen to execute the conveyance in the very words or substantially in the words used by the truster, whatever the effect of such conveyance would have been. There would have been hardly room for construction or for reaching this intention of the testator and imposing restrictions or using different words from those of the testator, the direction could be carried out *in terminis*, and there would have been little doubt as to the legal effect of a conveyance in such terms.

But the case is very different when the testator goes on to declare and provide in what appear to me to be the most express and explicit terms what his purpose is, and what he intends and wishes to effect and to be fully secured by the terms of the conveyance or conveyances in favour of his daughter and her children, and it is in this clause, I think, that we find the testator's true intention, for the clause is introduced for the very purpose of telling what that intention is and for nothing else. The words are—"And I hereby declare, and direct, and appoint that neither the said annual proceeds and income of my estates nor the fee thereof shall be subject to the *jus mariti* or right of administration of any husband of my said daughter, nor shall the same be subject to his or her debts or deeds or to the diligence of his or her creditors, but that the same shall be an alimentary and inalienable provision for my said daughter during her life; and I direct my trustees to make full provision to the above effect in the conveyance or conveyances to be executed by them in accordance with this direction." This formal declaration of intention is not expressed in technical language, but to my mind it is perfectly clear and absolutely unambiguous. How it is to be carried out is quite another question, to which I will come immediately, but what the testator intended to be done I really have never been able, after the first consideration of the clause, to entertain any doubt.

In the first place, he meant the residue to be secured "as an inalienable provision for my daughter during her life." Does not this mean that the daughter shall have no power to sell or alienate or squander and dissipate the residue? Does not the testator say so? What other words could he have used to make clear his will? The residue is to be secured inalienably, not for a year or two, but "during my daughter's life." Whether this can be done effectually is not my present question, but I have not the shadow of a doubt that the testator meant this to be done. Again, the provision is to be alimentary, that is to say, the daughter herself is not to be allowed to have power to anticipate it, but is only to get it term by term, to be available for her termly maintenance. The testator expressly says so. What other words could he have used to give utterance to his wishes? Then the husband's *jus mariti* and right of administration are excluded—no one will say that this is not aptly and appropriately expressed—legal and technical words being used in their legal and correct application, but the testator in his anxiety reduplicates his words, for he declares that neither the annual proceeds and income of his estate nor the fee thereof (for so only can I read his words) are to be subject to the debts or deeds, either of his daughter herself, or of her husband, present or future, or to the diligence of "his" or "her" creditors. All this anxiety may possibly be in vain,—I shall come to that presently,—but I can hardly think that there is much room for two opinions as to what this anxious father meant. Let the residue of my estate be dedicated, he says—yes, let it be con-

veyed to my daughter and her children, but oh take care that it be so conveyed and secured that her husband or husbands shall not touch it, either through *jus mariti* or through right of administration; that my daughter herself shall not alienate it or delapidate it or put it away during her whole life; that her creditors shall not touch it; that her own debts and deeds shall not affect it; that the income of it shall not be anticipated and antedated, but shall always be termly forthcoming for the supply of her termly wants; that the capital shall be preserved intact—"inalienable"—during my daughter's life, and shall then be divided in the proportions that she may fix among the children or descendants that may be procreated of her body. I despair of ever estimating the force and the meaning of words if this is not the interpretation of what the testator has said—said I mean in the clause I am considering. Whether he contradicts himself in another clause or says something inconsistent with his intention, under a delusive notion that he is carrying it out, may be another question, and it is a still further question how far the law will give effect to his wishes, but, reading this declaratory clause as the expression of an unprofessional man's wishes, to me it is as clear as daylight what those wishes were.

I wish to remark, in the next place, that there is nothing either illegal or immoral in the testator's intentions, interpreted in the sense in which I read his will. There is nothing either illegal or improper or incompetent in a testator making his whole estate or his whole residue a fund for the alimentary use of his daughter, inalienable by her and not affectable by her debts and deeds, or by the diligence of her creditors, and exclusive of her husband and his acts and his creditors, the capital to be divisible at the daughter's pleasure among her issue. This is done every day, and the only questions in my view attended with any difficulty are, How is it to be done and how far is it to be done in the present case?

But before going to these questions, I must say that I am not moved in my interpretation of the truster's will by any apparent contradictions or inconsistencies in the words he has used. No doubt he directs a conveyance or conveyances of the residue to be made to his daughter and her children. But he is not here prescribing the technical terms of the conveyance. He is merely stating who are to be the beneficiaries. A conveyance to the daughter in liferent for her liferent use allenarly and alimentary and her children in fee, with a power of apportionment to the mother, would, I think, completely satisfy in every reasonable—indeed in every legal—sense the direction of the truster, for such a conveyance would still be, in the strictest sense of the truster's own words, a conveyance to the daughter and to the child or children of her marriage or of any subsequent marriage. They would be the disponees in the deed. I can see here no contradiction—not even an inconsistency. And so, when it is said that neither the said income of my estates nor the fee thereof shall be subject to the *jus mariti* or right of administration of my daughter's husbands, nor be subject to his or her debts or deeds, Does this in the least imply that the absolute fee is to be in the daughter? The reverse is implied, for undoubtedly the daughter is not to have the power of affecting or alienating the fee by her debts or deeds. The words may be unnecessary, but it is as if the testator had said, Wherever you put the fee, take care that my daughter and her husbands shall not have the power of absolute fiars; the terms of the legal deeds the lawyers will adjust.

Suppose that the instruction to grant conveyances instead of preceding had followed the declaration of intention, and had been introduced with some such expression as this—"And in order to carry out my intention as above expressed, I direct my trustees to convey to my daughter and her children, making in the conveyance or conveyances full provision which shall be effectual for legally carrying out my intentions." In such case could it have been said that the direction to convey was inconsistent with the pre-expressed intention. But I think it does not matter which comes first—whether the testator first expresses his intention and then provides machinery which he supposes will carry it out, or whether he first provides the machinery and then declares and limits the purposes for which it shall be used. In either case the result is the same, and when the inquiry is—What did the testator mean? you are surely not to look so much to the machinery as to the express words which the testator has employed for the very purpose of declaring what his meaning was.

And so, even if there were an irreconcileable inconsistency between the expressed intention and the prescribed machinery, still if the question only is asked, What was intended? I discard unhesitatingly the unsuitable machinery, and look to the express will alone. A mistake as to the suitableness of the machinery will never derogate from what the testator expressly says he meant to do. This was the principle of the decision of the House of Lords in *Lord Lyndoch's* case, a decision which seems to me to have a direct bearing on the present case.

This brings me to the only remaining questions in the case. Having ascertained what the testator's wishes really are, How and how far are these wishes to be carried into legal effect by the trustees under the direction of the Court?

The residue of the estate consists both of heritable and of moveable property, and I assume that the testamentary trustees are now to divest themselves thereof by conveyances in favour of Mrs Ross and her children. The truster has directed such conveyances to be granted. Whether a direction of a truster must always be carried out *in terminis* when the effect of so doing will necessarily defeat his carefully expressed intention, may well be doubted, and the opinions of the Judges, and indeed the decision in *Lyndoch's* case, rather lead to the conclusion that where a testator has clearly expressed his will and intention, and then professedly, with the object of carrying out that intention, has directed his trustees to do something which (although the testator did not know it) would really defeat the intention, the Court will vary the direction, so as to save and carry out the testator's purpose and intention. The details of the machinery must yield and be accommodated to the object in view. In the present case, however, I think there is no necessity for disregarding any detailed direction of the truster, for I think his purpose can be carried out by means of conveyances to his

daughter and her children, provided such conveyances are expressed in appropriate terms.

The exact terms of the deeds to be granted are not before us, for no drafts have been prepared; but I may say in general terms, that if these conveyances bear to be in favour of Mrs Ross in liferent only for her liferent alimentary use allenarly, exclusive of the *jus mariti* and right of administration of her present or of any future husband, and to her children in fee, with a power of apportionment in her favour, and a declaration (and here I would take almost the words of the trust-deed) that neither the annual proceeds of the subjects conveyed nor the fee thereof shall be subject to the debts or deeds of Mrs Ross or her husband, present or future, or to the diligence of his or her creditors, and so on—then such conveyances will validly and sufficiently carry out the testator's intentions. Of course I am only indicating their terms, and not adjusting and settling the drafts.

So far as relates to heritage, I do not think there is much, if indeed there is any, difficulty. Such conveyances will not give Mrs Ross the fee of the heritage, only a liferent alimentary and exclusion of her husband, and the fee will be to the children whether they are named or not. It will make no difference in the essential right even though a fiduciary fee be held by the mother for behoof of her children. Such fiduciary fee would not expose the rights of the children to any risk, and the express declarations and provisions added would secure the interests of all parties.

But even as to the moveable estate, I am of opinion that the conveyances thereto should be in precisely the same terms and with the same declarations and provisions. This is the will of the testator, and I see no legal objection or incompetency in its being fully and literally carried out. Suppose the testator to be now living, and to desire to divest himself by conveyances *inter vivos* in favour of his daughter Mrs Ross and his grandchildren, would there be any legal objection or incompetency to his expressing himself in such *inter vivos* conveyances in the terms proposed? I think not; and if so, may not Mr Gibson's trustees now do what Mr Gibson, if alive, might have done himself? I think they may.

It is true that such conveyances of moveable subjects or of moveable estate will not protect the ultimate rights and interests of Mrs Ross' children, or even the rights and interests of Mrs Ross herself, so well or so effectually as could be done in the case of the conveyances of the heritage. But this cannot be helped, as the testator has chosen to direct that stranger trustees shall not be interposed for the protection of the rights and interests of those concerned. It may be that after the conveyances are granted Mrs Ross may set herself to defeat her father's intentions. She may get the moveable subjects or the cash into her own hands, and by disposing of the subjects or by spending the cash she may disappoint her children, or she may, notwithstanding the exclusion of her husband's *jus mariti*, hand over to him money or funds, and if they become mixed with his separate estate, or if he deals with them as owner, they may become subject to his debts or deeds. But this is just a risk against which the testator has not chosen to provide, perhaps because he had confidence in his daughter that she at least would respect his wishes, and did not need to be fettered by being put permanently under trustees.

For rights of liferent and fee even in moveables or in money may be constituted quite legally and quite well without the interposition of a trust, and without the nomination of trustees. The interposition of a trust is not required for the constitution of such rights, but only for their security—only to afford a safeguard against their being defeated, and against the rights of the respective parties from being disappointed. A sum of money or a corporeal moveable may be handed to one person for his or her liferent use allenarly and for another party in fee; or the sum or subject may be given or handed to the fiar subject to the liferent of another. There is nothing illegal or incompetent in such an arrangement, and no trustees are required, only without trustees there will be the risk of the solvency of the person who has the custody and control of the money. But the fact that the right of the children, or part thereof relating to moveables, may possibly be defeated by the acts of Mrs Ross and her creditors is surely no reason why the Court itself should at once and for ever defeat the testator's intentions altogether, both as to heritage and as to moveables.

I am of opinion therefore that Mr Gibson's trustees are now bound to grant conveyances of the whole residue of the estate, both heritable and moveable, in favour of Mrs Ross in liferent only, and not to her in fee at all, and in favour of her children in fee, in terms similar to those I have suggested, and with all the declarations, powers, and restrictions which the testator directs, and I agree in this respect, and indeed in all respects, with the opinion expressed by Lord Deas.

The cardinal difference, as I understand it, between the opposing views in this case is, that while Mrs Ross contends that the conveyances shall give her at once the absolute fee of the whole estate, her children contend that these dispositions or conveyances shall only give her a liferent allenarly, and shall give to them (the children), and to them alone, the fee of the whole. I agree with Lord Deas and Lord Mure in thinking that the contention of the children is well founded. I think that to give Mrs Ross the fee, and to the children only and merely a *spes successionis* (even if protected), will not be to carry out the intention of the truster, but directly to defeat it. If Mrs Ross gets a fee, she may alienate or sell the whole estate to-morrow or at her own pleasure, while the testator says that it shall be inalienable "during my daughter's life." If she gets a fee, the whole estate will be exposed to her debts and deeds, and perhaps, in certain circumstances, to the debts and deeds of her husband, while the testator expressly says it shall not be affected by such debts and deeds, and so on. I read these restrictions, which I have no doubt are the work of the testator, as pointing quite clearly to a liferent, and not to a fee, and I think the dispositions and conveyances should be limited accordingly. I am not careful to decide at present to what risks such conveyances may expose the beneficial rights of the parties, but I think that the trustees and the Court ought not to destroy rights altogether simply because the testator has exposed them, or some of them, to risk and danger.

Lord Shand—I need scarcely say that the question of construction of this deed is attended with considerable difficulty. That is sufficiently attested by the fact that your Lordships are equally divided in opinion. After full consideration, however, of the terms of the deed, and having had the benefit of the argument and the views of your Lordships, I am of opinion that the effect of the deed was to give to the daughter of Mr Gibson the fee of the estate exclusive of the *jus mariti* and right of administration of her husband, with a right of protected succession in favour of her children—with this result practically, that while Mrs Ross will be vested as fiar with the right of dealing with the property as the absolute owner of it, this right will be subject to the condition that she cannot defeat or prejudice the children's right of succession by any merely gratuitous alienation, whether by deed *inter vivos* or *mortis causa*.

I concur with the observations of two of your Lordships, from whom I differ otherwise in opinion, that the Court must be guided by what they find to be the intention of the truster on the face of the deed, and also, that in ascertaining that intention you are not to take one part of this clause, and that alone, but to take the whole of the clause which has been the subject of so careful examination. But, adopting that principle, I think it leads to the result I have already stated. My Lords, I think the scheme of this settlement is not unimportant in enabling us to reach the true result. In the first place, the testator provides that until his daughter shall attain majority or marriage she is only to receive for her benefit either the whole or such part as might be required for her maintenance, education and upbringing, of the proceeds of the estate. In the next place, there is a direction that upon her marriage the trustees are to pay over to her not merely such part of the annual income of the estate as they may think necessary, but the whole income. And, in the third place, upon the birth of a child I think the truster intended to give her something more—an additional advantage—to put her in possession of his estate as her own, giving her children a right of succession to her, subject to her power of apportionment. It has been said there was no reason why the existence of a child should lead to that result, but I can very well understand how a father, looking at these three stages in the life of his daughter, may very properly and reasonably provide that the existence of a child shall lead to this result, that his estate shall then be parted with, and the daughter be put in possession of it.

Before dealing with the clause itself, I have one observation to make with reference to the view which weighs with the minority of your Lordships, and I think it is an observation of considerable weight. The result at which your Lordships have arrived is this, that it was intended by this deed to give the daughter a mere right of liferent, and to give the children a right of fee. If that simple result was what was to be operated by this deed, I can only say that it could have been attained by the employment of very familiar words—words in daily use, and the effect of which is known to every conveyancer—by merely stating that the estate was to be conveyed to the daughter for her liferent use only and to her children in fee. I cannot see any good answer to the view that this simple and well-known form of expression would have been used if liferent and fee had been intended. Taking the clause, however, as we have it, I can only read it as your Lordship in the chair has done, as giving a right of fee to the daughter. In the first place, the first portion of the clause directs the whole residue and remainder of the estate to be conveyed. It is said we have not the word "fee" there. I think the word "fee" would have been out of place in that clause. The proper way to convey an estate is to direct the estate itself to be conveyed, and the very use of the term "residue or remainder of the estate" necessarily implies a fee unless it is limited in some way. The first part of this clause directs that this estate is to be conveyed to the daughter and to the child or children of her marriage. Those words "to my daughter and to the child or children of her marriage" I think necessarily give to the daughter a fee; and the effect would be the same whether the conveyance were to her and to the child or children of the marriage generally or to children *nominatim*. I do not think the addition of children *nominatim* would make any difference, for, as I read the clause, the true import is that there is to be a disposition to the daughter, whom failing to the child or children of the marriage, or of any subsequent marriage into which she may enter, subject to a power of apportionment. The only other way of reading the clause is to read the word "and" as copulative, in which case it would be to the mother and children of the marriage and of any future marriage, in equal shares and with equal rights, unless Mrs Ross should otherwise appoint in regard to her children's shares. That is plainly out of the question, and therefore I take it that this part of the clause, concluding with the words "residue or remainder of my estate," plainly gives the daughter a fee.

The next part of the clause contains a declaration that this fee shall not be subject to the *jus mariti* or right of administration of her husband, nor to his or her debts or deeds, or to the diligence of his or her creditors. There, again, there is the strongest corroboration of what has gone before—that the fee has been given to the daughter. The declaration is that the fee shall not be subject to the *jus mariti* of her husband, but unless the father had previously given the fee, and meant to give it to his daughter, he would not have thought of declaring that it was not to be subject to the *jus mariti* of her husband. It was argued that he may have meant something of the nature of a fiduciary fee, but I think that argument is destroyed by the other consideration which has been pressed, that the father was waiting here till children should be born; for if the children were to be the fiars, there was no longer, after the birth of a child or children, the necessity for a fiduciary fee in their mother. If the truster was waiting till children were born in order that they should be the fiars, this clause, in that view, would have no meaning whatever; and accordingly as you advance in the clause both parts make it clear that a fee was given to the daughter. I quite feel that the words which follow present a difficulty, and a difficulty which has led to the difference of opinion here, and I do not disguise that a serious question is raised by the declaration that "the same shall be an alimentary and inalienable provision for my said daughter during

her life." But in regard to these words, in the first place, let me say this, that in the absence of the trust which the truster directed to be brought to an end, even the liferent right would not be protected against Mrs Ross' own deeds or the diligence of creditors. That seems to me to follow from the recent decision in the case of *Weir's Trustees*. It is said that the intention of the testator is to be carried out, that it is plain he meant this should be an alimentary and inalienable provision, and that effect must be given to his intention. That cannot be after the trust comes to an end as regards the liferent right. But further, what about the movable estate we are here dealing with? The trustees have given us a statement of the funds, and apparently there seems to be about £15,000 in cash to be handed over, and which the trustees are entitled to hand over, to this lady. It is said this estate is declared to be an alimentary and inalienable provision for the daughter during her life, but how is it proposed that the £15,000 shall be so treated consistently with handing it over to her? It is said you shall give effect to the intention of the truster, and that whatever machinery is required to do that must be imposed. The only machinery that could by possibility do that would be the creation of a trust. You cannot give this lady £15,000 and at the same time make it an alimentary and inalienable provision for her, because the moment she gets the money she is entitled to dispose of it, and I do not understand any of your Lordships to have suggested a course that would prevent that. And so, next advancing to the heritage, I think we are very much relieved of any difficulty that might arise in regard to it, and at the same time find a ready answer to the argument referring to this part of the estate by the fact that really a great portion of this estate cannot be put into the position in which it is said the truster intended it to be. I rather think it appears from the deed that the truster did intend in some way that his estate should be alimentary and inalienable; but, upon the other hand, I find it as clear as words can make it that he intended at the same time, first, that the trust should come to an end; and, secondly, that while there should no longer be a trust, there should be a fee conveyed to his daughter. If those two things are to be done, if you are no longer to have a trust, and if you are to have a fee conveyed, and if it is inconsistent with that to create an alimentry and inalienable provision, why should the fee be taken away and the trust continued to carry out the latter part of the deed. The truster seems to have had some rude notion that though the fee was to be conveyed in this way it could be in some way protected as an entailed estate. In that he was wrong. But it would be going against the intention of the truster to say that though he said there was to be a fee, and though the trust was to come to an end, you are, in order to make this provision inalienable, to take away the fee, and, if necessary, introduce a trust in order to work out the other branch of his intention. I think that would be injustice to this lady, who has a right to the fee, and I think the Court is not entitled, in order to work out the subsequent part of the clause, to go back upon that which the truster has quite distinctly said. I have only further to mention an additional reason that leads me to the conclusion at which I have arrived, viz., that a deed which would give this lady the estate in liferent for her liferent use allenarly, and to her children in fee, whom failing to her father's heirs and assignees whomsoever, would have this extraordinary effect, that supposing the children who are now alive should die and that she had no other children, this estate would go entirely beyond her control—that is to say, the truster's only child would have no power of disposing of or dealing with it in any way whatever, and it would go to heirs and assignees of her father unknown. I think that circumstance strongly confirms the general view that what this gentleman meant was that after his daughter's marriage and the birth of a child this estate should be given to her, to be her own, but with a right of succession in favour of her children, which she could only defeat by onerous deeds—and I may say I think that right is to be directly inferred from the power of apportionment which is given.

The following interlocutor was pronounced:—

"The Lords having resumed consideration of this cause, with the assistance of three Judges of the Second Division, and heard counsel on the reclaiming note for Mrs Ellen Percival Gibson or Ross and husband against Lord Curriehill's interlocutor, dated 20th January 1877, after consultation with the said three Judges, and in conformity with the opinion of a majority of the seven Judges present at said hearing, Recal the said interlocutor reclaimed against: Find that at the death of the truster, the deceased William Walker Gibson, his only child Ellen Percival Gibson or Ross was a married woman, and that a child had been born of the marriage and is still in life, and that another child has since been born of said marriage: Find that in respect of the birth and existence of a child of the marriage, and in accordance with the sound construction of the trust-disposition and settlement of the said William Walker Gibson, the nominal raisers and pursuers, as trustees under said trust-disposition and settlement, are bound, after providing for the annuity of £400 per annum payable to the truster's brother John Gibson, to convey and dispone the residue of the trust-estate to the said Ellen Percival Gibson or Ross in fee, but exclusive of the *jus mariti* and right of administration of her present or any future husband, whom failing to the children already born or to be born of her present or any future marriage, equally among them, also in fee, subject to the condition that the right of succession of said children to the said residue, or to a sum of money equal to the value of said residue on the death of their mother, shall not be defeated or prejudiced by any gratuitous act or deed done or executed by her, whether *inter vivos* or *mortis causa*, but with power to the said Ellen Percival Gibson or Ross to divide the said residue or equivalent in money among her said children in such proportions as she may think fit, and failing children of the said Ellen Percival Gibson or Ross, then to the nearest heirs and assignees whomsoever of the said deceased William Walker Gibson, the truster: To this

extent and effect sustain the claim of Ellen Percival Gibson or Ross and her husband, and repel the claims of the pursuers and nominal raisers and of the curator *ad litem* for the pupil children of the said Ellen Percival Gibson or Ross, and decern: Reserve for future consideration the claim of the marriage-contract trustees of the said Ellen Percival Gibson or Ross and her husband: Remit to the Lord Ordinary to proceed further in the cause as shall be just and consistent with the above findings: Reserve all questions of expenses, with power to the Lord Ordinary to dispose of the expenses incurred in the Inner House."

Thereafter the case, as between Mrs Ross and her marriage-contract trustees, was argued before Lord Curriehill, who pronounced the following interlocutor and note:—

"*Edinburgh, 24th July* 1877.—The Lord Ordinary having resumed consideration of the cause, &c., Finds that according to the sound construction of the destination of the residue of the trust-estate of the late William Walker Gibson in favour of Mrs Ellen Percival Gibson or Ross and her children, as the same has been fixed by the interlocutor of the Court of 12th July 1877, the said residue must be held to be 'settled upon herself or her heirs exclusively' within the sense and meaning of the antenuptial contract entered into between her and her husband William Ross on 23d March 1874, and that the said residue is accordingly excepted from the conveyance of her general estate made by Mrs Ross in said contract in favour of the trustees thereby appointed: Therefore repels the claim of the said marriage-contract trustees, and decerns, &c.

"*Note.*—By interlocutor of the Inner House, dated 12th July 1877, it is now settled that Mrs Ellen Percival Gibson or Ross has acquired or succeeded to the residue of the trust-estate of the late William Walker Gibson, her father, in virtue of his trust-disposition and settlement, by which the said residue is settled upon herself in fee, exclusive of the *jus mariti* and right of administration of her present or any future husband, whom failing the children already born or to be born of her present or any future marriage, also in fee, but subject to the condition that the right of succession of the children to the said residue, or to a sum of money equal to the value of the said residue, shall not be defeated or prejudiced by any gratuitous act or deed done or executed by her, whether *inter vivos* or *mortis causa*. The question now arises, under the reservation contained in the interlocutor referred to, whether Mrs Ross, on obtaining a conveyance in terms of the said interlocutor, is or is not bound to convey the said residue to the trustees under her own marriage-contract. By that deed, which is dated 23d March 1874, and to which her father, the said William Walker Gibson, was a party, Mrs Ross conveyed to the trustees of the contract 'the whole means and estate, heritable and moveable, real and personal, of every kind and wherever situated, now belonging to her, or to which she may succeed or acquire right during the subsistence of the marriage hereby contracted . . . . but excepting always from the above conveyance all such estate and effects as the said Ellen Percival Gibson may succeed to under any destination or provision which may settle the same upon herself or her heirs exclusively, or which may otherwise exclude the same from falling under the above conveyance.'

"In considering the meaning of the exception from the general words of conveyance just quoted, it is necessary to bear in mind that Mrs Ross' father William Walker Gibson was a party to this marriage-contract, and was therefore aware of the terms of his own trust-deed which he had executed in 1866, and by which he had provided the residue of his estate to his daughter. Mr Gibson, moreover, by the marriage-contract conveyed heritable property of considerable value to the marriage-contract trustees for the same purposes as those which were to regulate the application of the property conveyed to these trustees by his daughter. These purposes are shortly as follows:—(1) Payment of the income of the trust-estate to Mrs Ross, excluding the *jus mariti* and right of administration of her husband, and any claim to or control over it on his part or on the part of creditors or others in his right; (2) on the dissolution of the marriage by the death of the husband, there being issue of the marriage, the trustees were to pay the free income of the estate to Mrs Ross during her life, and in case of no issue they must pay the whole capital and produce thereof to Mrs Ross herself; (3) on the dissolution of the marriage by the death of Mrs Ross, leaving issue of the marriage, William Ross was to receive during his life the free income of the trust-estate for behoof of himself and of said children; (4) on the dissolution of the marriage by the death of Mrs Ross, there being no issue surviving, the trustees were to pay one-half of the free income of the lands and others put in trust by the said William Walker Gibson to William Ross during his life, and the remainder of the whole trust-estate and the free income thereof to the heirs and assignees of Mrs Ross, and on William Ross' death to pay over to the same parties the half of the lands put in trust by William Walker Gibson, of which the free income was provided to William Ross during his life; (5) in the event of there being issue of the marriage surviving at the dissolution thereof, the trustees were to hold the whole trust-estate subject to the foregoing directions as to the application of the income for behoof of the said issue of the marriage, and of the issue of any future marriage into which Mrs Ross might enter. The contract also contains an express exclusion and renunciation of the *jus mariti* and right of administration of the said William Ross or of any future husband whom Mrs Ross might marry in reference to all the provisions in her favour, and to all property she might succeed to or acquire.

"The trustees under the marriage-contract maintain, that as the residue of Mr Gibson's trust-estate has now been acquired by Mrs Ross, as a right of fee capable of being alienated by her for onerous consideration, and as the destination does not expressly exclude the operation of the marriage-contract, the residue falls under the general conveyance by her in her marriage-contract, and not within the exception from that conveyance, and that she is therefore now bound to convey the same to them for the purposes of the marriage-contract. This claim is supported by the *curator ad litem* to the children of Mr and Mrs Ross, who

are plainly deeply interested in the disposal of the residue of their grandfather's estate. Mr and Mrs Ross, on the other hand, contend that the residue of Mr Gibson's estate has been acquired by her under a destination or provision 'settling the same upon herself or her heirs exclusively,' and that it therefore falls under the exception from the general conveyance in the marriage-contract. The question is undoubtedly attended with much difficulty, and it depends for its solution upon the construction which shall be put upon the words 'settled upon herself or her heirs exclusively.' Now, I think that some light is thrown upon this question by considering the precise position occupied by Mrs Ross under the marriage-contract with reference to the property admittedly falling undef the conveyance therein. Her right during the subsistence of the marriage is limited to a liferent exclusively, the *jus mariti* and right of administration of her husband being also excluded. She cannot, *stante matrimonio*, either gratuitously or onerously affect the fee, which is destined to her and to her children by her present or any future marriage, and it is only on the dissolution of the marriage by the predecease of her husband and without any issue of the marriage that the capital of the trust-estate is to revert to her. On the other hand, her husband, Mr Ross, if he survives his wife, there being children of the marriage, is to receive during his life the income of the whole marriage-contract trust-estate for behoof of himself and of said children. He is to receive only half the income of that portion of the estate which was brought into the settlement by Mrs Ross' father. There is here undoubtedly a very manifest intention to exclude the husband from any interest in or control of the marriage-contract trust-estate during the subsistence of the marriage, but, on the other hand, to give him, in the event of there being children or issue of the marriage alive at the death of his wife, the free income of the whole estate during his life for behoof of himself and of said children. This being so, it is obvious that if the contention of the marriage-contract trustees is sustained, the effect will be to give to Mr Ross, in the event of his surviving his wife and of there being children of the marriage, the whole free income of the large estate to which Mrs Ross has now succeeded under her father's settlement. Now, I think it cannot be kept out of view that Mrs Ross' father was a party to the marriage-contract, and that throughout the whole deed, in so far at least as regards the provisions made by himself and the conveyance made by his daughter, he is to be regarded as speaking quite as much as his daughter, and he must be held to have had in view the terms of his own trust-deed which he had executed some years previously, and in which he had destined the residue of his estate to his daughter and her children in the manner already described, to the entire exclusion of any husband whom she might marry from all right or interest in the said residue either during her life or after her death. It may be that he believed that he had settled the residue upon his daughter and her children in such a way as to place it entirely beyond the control not only of her husband but of herself; in other words, that he had rendered it inalienable by her to the prejudice of her children. Indeed, I think it is highly probable that such was his understanding of his own settlement, and were the true construction of the settlement as I held it was in my interlocutor of 20th January 1877, I should without difficulty have held now that said residue was effectually excepted from the conveyance in the marriage-contract. But it is now fixed by the judgment of the Court that Mrs Ross' right is a right of fee, and that her children have merely a right of succession protected against her gratuitous deeds.

"The somewhat difficult question thus arises, viz., Whether the residue is settled 'upon herself or her heirs exclusively' within the sense and meaning of the exception in the marriage-contract? According to the construction put upon that word 'exclusively' by the marriage-contract trustees, it will be necessary to hold that the parties meant to include within the marriage-contract conveyance such property as should be settled upon Mrs Ross in such a manner as to enable her to alienate it either onerously or gratuitously, and to except only such property as should be settled upon her in such a manner so as to exclude her husband's *jus mariti* and right of administration. But that I think is not the sound construction of the word 'exclusively.' It is certainly not the natural or ordinary construction of the term, because property settled upon a person 'exclusively' is, in the ordinary acceptation of the term, held to belong to such person 'absolutely,' exclusive of the right of all others to interfere therewith.

"Now, that seems to me to be precisely the position of Mrs Ross and her children with regard to the residue of her father's trust-estate. The property belongs to her exclusively, excepting so far as her children's right of succession thereto is protected in the manner expressed in the interlocutor of the Court. The residue is therefore settled upon Mrs Ross or her heirs exclusively, in the natural or ordinary signification of these words; and it would be a violation of the canons of sound construction to place upon these words any other meaning. The marriage-contract trustees say that 'exclusively' is here used as synonymous with 'inalienably,' but in ordinary language property settled upon one 'inalienably' is not settled upon that person 'exclusively.' Under a title the right of the holder of the property, instead of being 'exclusive,' is limited by the right which other persons have to take the property in succession to the holder and to prevent alienation. But I think that the natural and ordinary construction of the word 'exclusively' is that which the parties had here in view. It was, I think, desired that, on the one hand, any property to which Mrs Ross might succeed during the marriage, and which might fall under the *jus mariti* or right of administration of her husband, should fall under the marriage-contract trust, but that all property to which she succeeded, and from which her husband's rights were excluded, and which thus belonged to herself and her heirs exclusively, and particularly the estate which her father had destined to her under his then existing settlement, should not fall under the marriage-contract trust. I think it was the intention of the parties that the husband should be excluded from all interest in such estate, not only during the marriage, but after his wife's death. It may be that the fee of the estate will not be so effectually protected for the children as it would have been had it been placed

under the marriage-contract trust, but, on the other hand, the children will on the death of their mother receive either the estate or its equivalent in money, free from the liferent of their father. The claim of the marriage-contract trustees must therefore be repelled."

Counsel for Mrs Ross—Lord Advocate (Watson) —Kinnear—J. J. Reid. Agents—J. & J. Ross, W.S.

Counsel for Mr Gibson's Trustees—M'Laren —Asher. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Mr and Mrs Ross' Marriage-Contract Trustees—Crichton. Agent—Graham Binny, W.S.

Counsel for Mrs Ross' Pupil Children and their *curator ad litem*—Maclean. Agents—Melville & Lindesay, W.S.

HOUSE OF LORDS.

Friday, June 29.

LADY GRAY *v.* RICHARDSON AND OTHERS.

(*Ante*, vol. xiii. p. 230.)

Property—Title—Salmon Fishing.

A and B were coterminous proprietors of lands situated on the river Tay. The description in A's titles was "All and haill the just and equal sunnie half of all and haill the lands of I. . . . as the same is presentlie occupyed and possessed by A. P. . . with the just and equal half of the salmond fishings and others fishings of the saidis lands of I." The description in B's titles was —"All and haill the quarter or fourth part of the town and lands of I. . . . . last occupyet be J. B., and now by myself," as also "the other quarter or fourth pairt of all and haill the said town and landis of I., . . presentlie possesset by G. L., my tenant, . . together with the just and equal half of the salmond fishings and other fishings of the saidis lands of I." Prior to 1795 the whole lands of I. were held by the predecessors of A. and B. in alternate lots or kavels, and each proprietor possessed the salmon fishing *ex adverso* of his respective kavels. In 1795, by decreet-arbitral, the kavels were done away with, and the lands of I. were divided into two continuous parts, the one to belong to A. and the other to B. By this decreet the salmon fishings were reserved to the parties "according to their present boundaries." *Held* that A and B had each an absolute right of property in the salmon fishings not *ex adverso* of their lands, but as reserved by the decreet-arbitral, and defined by possession.

Salmon Fishing—Crown Charter.

Circumstances in which *held* that a Crown grant in favour of a proprietor of the salmon fishings *ex adverso* of certain lands which he had acquired by excambion was inoperative, the said fishings having been formerly granted to the party with whom the contract of excambion had been carried out, the fishing not having been dealt with in the excambion, and the Crown having had no possession adverse to that of the original granters.

This was an action at the instance of the Right Honourable Baroness Gray of Gray and Kinfauns, against Sir John Stewart Richardson of Pitfour, Baronet, and Mrs Fleming of Inchyra, and her husband the Reverend Archibald Fleming, as her administrator-in-law, and for his interest. The summons concluded for declarator that the pursuer had the exclusive right of salmon fishing in the Tay *ex adverso* of part of the estate of Pitfour, the property of Sir John Richardson, but which at one time had formed part of the estate of Inchyra.

The facts are fully narrated in the report of the case in the Court of Session, *ante*, vol. xiii. p. 230.

The First Division gave judgment in favour of the pursuer, and the defenders appealed to the House of Lords.

At giving judgment—

Lord Chancellor—My Lords, this case was argued at your Lordships' bar some time since, and at the close of the very elaborate argument your Lordships did not, I think, entertain any doubt that the judgment of the Court of Session in Scotland, which was a unanimous judgment in favour of the respondents, ought to be affirmed. My Lords, the case was one of considerable intricacy and minuteness. In regard to the details of the title, and in regard to the evidence of user under that title, I have been prepared to express to your Lordships the reasons for the opinion which, so far as I am concerned, I have formed in the case, but having had the advantage of reading the observations which your Lordships will hear presently from my noble and learned friend on my left (Lord Blackburn), I have thought it better not to occupy the ground which he will be prepared so much better to cover, but simply to state to your Lordships that I shall move your Lordships that the judgment of the Court below be affirmed, and the appeal dismissed, with costs.

Lord Blackburn—My Lords, these two appeals, which were exhaustively argued at your Lordships' bar on the 17th, 19th, 20th, 23d, and 24th of April last, are both against the same interlocutor of the First Division of the Court of Session, but they are by different appellants, on different, and indeed hostile, grounds.

On the trial a great many documents were put in evidence, and a great mass of parole evidence was given on behalf of the three parties. Your Lordships have before you the very learned and elaborate judgment of the Lord Ordinary and of the four Lords of the First Division, and it is, in consequence, not necessary to state the case in such detail as it would be if without that advantage you had to dispose of the case in the first instance.

The questions raised are as to the right of salmon fishing *ex adverso* of a piece of land on the north side of the Tay. The matter will be better understood by reference to the first of the plans, which is an Ordnance map with several lines and letters on it.

The Ordnance map itself shows the configuration of the land as it has been since the year 1826