vey, and did convey, only 16 falls. It is stated to be the piece of ground upon which the "Boswell Arms Inn and Stable" are now built. These are built upon the ground now conveyed, but the extent of the ground is nowhere specified.

But what makes the present question quite clear is, that while the defenders state that there was a dispute upon that point, they attended the sale and authorised a person to bid for them. They knew that the pursuers said that the piece of ground for sale amounted to 28 falls, but in his evidence Smith further says—"I knew the ground but not the measurement; both of us were claiming it." As long as it was uncertain what the defenders had got by the deed of 1864, it was impossible for the pursuers to say what they were doing at the sale.

The object of the defenders was to put an end to this dispute by uniting the titles; they knew the whole circumstances, and I cannot see any grounds why they should not pay the price. They must prove that what they got by the deed of 1864 amounted to 21 falls. They have failed in this, and this is enough to dispose of the case.

But supposing I am wrong, the next question is, Have the defenders established that there was a materiality in the error they allege? Was it essential? This always depends upon the circumstances of the case. The value of the ground here in dispute is of very small amount, only about £5, and, even if the defenders were successful in their contention that there was essential error on their part, the amount in which they would be the losers on account of this alleged error is so trifling that I doubt whether they would succeed to getting the sale nullified. On the whole matter, I think the pursuers must prevail.

LORD GIFFORD concurred.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Mitchell's Trustees against Lord Curriehill's interlocutor of 20th June 1877, Alter said interlocutor: Decern in terms of the first alternative conclusion of the summons against the trustees of the late Hugh Mitchell, under his disposition and settlement of 25th July 1864, to the effect of ordaining them to implement the contract of sale libelled: *Quoad ultra* assoilzie the defenders from the conclusions of the summons: Find the defenders, the said trustees, liable in expenses, and remit to the Auditor to tax the same, and to report; and decern."

Counsel for Pursuers — Campbell Smith — Moncrieff. Agent—John M'Millan, S.S.C.

Counsel for Defenders—Guthrie Smith—J. A. Reid. Agents—Philip, Laing, & Monro, W.S.

Friday, November 9.

FIRST DIVISION.

[Lord Young, Ordinary.

SMITHS *v.* CHAMBERS' TRUSTEES.

Writ — Testing-Clause — Where it contained the Granter's Will.

The testing-clause of a probative deed, cannot competently contain anything except what is directly connected with the subscription and authentication of the deed.

Held that the insertion in the testing-clause of a trust-disposition and settlement, after the writer's designation, of an express provision and declaration that the "whole of the legacies, annuity, and provisions made and provided by this disposition and deed of settlement shall be strictly alimentary, and shall not be arrestable or attachable for the debts or deeds of the persons in whose favour the same are conceived, or any of them, nor be subject or liable to the diligence of their creditors"—the whole clause being fairly written, and in the same handwriting as the rest of the deed—was incompetent, and that the provision could not be read as part of the deed.

Review of the law regarding the functions of the testing-clause.

Trust—Powers of Trustees—Postponement of Term of Payment—Fee and Liferent—Arrestment—Litigiosity—Effect of an Arrestment by Creditors in barring the exercise by Trustees of powers conferred on them to limit the rights of Beneficiaries under a Trust-Disposition and Settlement.

A truster had directed his trustees to hold his estate for behoof of his children, declaring that their shares should vest at his death, and be payable six months thereafter, but powers were given the trustees to postpone the payment of the shares so long as they should see fit, and to create a new trust, so that his children should receive the income only during their lives. The trustees having paid certain portions of the capital and the whole income to the beneficiaries, the share of residue accruing to one of the children was arrested in their hands by creditors five years after the truster's death, and thereupon the trustees executed a deed restricting the right of that child to a liferent.—*Held* (*revg.* the Lord Ordinary Young, *diss.* Lord Shand) that the execution of the arrestment fixed the rights of parties as they stood at its date, and produced litigiosity, and that no innovation could be effected by the subsequent execution of such a deed of limitation.

Opinion (*per* Lord Shand) that the arresting creditors took the right *tantum et tale* as it stood in the debtor, in whose person, although it had vested, it remained undetermined and suspended, and subject therefore to the exercise of the powers conferred on the trustees.

This was an action of furthcoming raised by Charles Edward Smith, Charles George Smith, and Edward Smith, creditors of James Chambers,

against the said James Chambers, as principal debtor, and the trustees of the late Dr Robert Chambers, his father, as arrestees, concluding for payment of £2294 on account of three bills of exchange drawn by the pursuers on the defender and accepted by him, for which sum they had obtained a judgment in absence against the principal debtor before the Exchequer Division of the High Court of Justice, Westminster, and a certificate whereof had been recorded, in terms of the Judgments Extension Act 1868, in the Books of Council and Session. Upon the extract registered judgment the pursuers used arrestment in the hands of the accepting and acting trustees of the late Dr Robert Chambers, under whose trust-disposition and settlement, dated 10th November 1870, and recorded 24th March 1871, the defender James Chambers was entitled to a share of the residue of the trust-estate.

The trustees resisted payment, on the ground that by the terms of the trust-disposition and settlement they were entitled to retain the share of residue due to James Chambers, and to apply the interest of the same as an alimentary fund. The clauses on which they founded this contention are fully quoted in the opinions of the Judges, and it will here be sufficient to state that the trustees were empowered to postpone the payment of the shares of residue therein destined to the truster's children so long as they should see fit, and to apply the interest of the shares during the period of postponement for behoof of the truster's children, or, in the event of their decease, of his grandchildren; and further, to retain the said provisions vested in their own persons, or to execute a new deed of trust appointing trustees to retain the said provisions, to the effect of limiting the rights of the said children or grandchildren to a liferent for such time as they should fix, settling the fee on their lawful issue. Subject to the exercise of the powers conferred on his trustees, the truster provided that the shares due to his children should be payable six months after his decease, and that these should vest at his death.

Further, the testing-clause of the deed runs thus—"In witness whereof, I have subscribed these presents, written on this and the four preceding pages by William Anderson, clerk to the said Stuart Grace (but with and under this express provision and declaration, *videlicet*, that the whole of the legacies, annuity, and provisions made and provided by this disposition and deed of settlement shall be strictly alimentary, and shall not be arrestable or attachable for the debts or deeds of the persons in whose favour the same are conceived, or any of them, nor be subject or liable to the diligence of their creditors) at St Andrews, upon the 10th day of November in the year 1870, before these witnesses, James Jamieson, keeper of the baths at the Scores of St Andrews, and James Berwick Forgan, also clerk to said Stuart Grace."

It appeared that during the period intervening between the death of the truster and the execution of the arrestments the trustees had advanced to James Chambers £2086 out of capital and £2272 as income, leaving as the balance of his interest in the estate £2525, exclusive of heritable estate. They had never exercised their powers of postponement, nor had they limited Mr Chamber's rights in any way. They, however, *inter alia*, stated in their answers to the condescendence in this action—"Explained that the trustees have thought it proper, and have resolved, to postpone the payment of the said balance, and to pay the interest only to Mr James Chambers for his aliment, as provided in the trust-deed."

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

The pursuer reclaimed, and during the debate on the reclaiming note the trustees were allowed to execute and put in process a deed of trust, whereby, on a narrative of the powers conferred on them by the truster, and of their belief that the share still in their hands was not more than sufficient for an alimentary provision to James Chambers and his family, they declared that this share remained vested in them to the end that it should serve as a liferent alimentary provision for himself, and after his death should vest in his children in fee.

Argued for pursuer—

First, On the effect of the declaration as to the alimentary nature of the fund made in the testing clause—Such a declaration had never been held to have any effect when found in the testing clause. To give effect to it would be highly dangerous. It was the custom, fortified by decisions, to fill up that clause *ex intervallo*, it might be years after the granter's death. If such a declaration could be competently inserted, any provision, *e.g.* the distination originally expressed in the dispositive clause, might be altered or cancelled in a clause which it was quite likely the granter of the deed would never see—*Kedder* v. *Reid*, Nov. 6, 1835, 13 Shaw 619, H. of L., 1 Robinson's App. 184. Bell on Conveyancing (1st ed.) p. 225. The cases of *Johnstone* v. *Coldstream*, June 30, 1843, 5 D. 1297, and *Dunlop* v. *Greenlee*, Nov. 2, 1863, 2 Macph. p. 1, and H. of L. June 2, 1865, 3 Macph. 46, where certain declarations made in the testing clause had been allowed effect, gave no authority to the contention of the defenders here, for these decisions did not touch the question whether an entirely new provision could thus be introduced. What was read into the deed in these cases was a declaration which was not in fact necessary, and was merely explanatory of the purpose with which a party had signed.

The defenders answered, on this branch of the case—The testing clause was part of the deed—Bell on Conveyancing, (2d ed.), p. 235. The ground of decision in the case of *Johnstone* v. *Dunlop* was, that the declaration found in the clause was part of the deed, and was authenticated by the granter's signature; see especially Lord Justice Clerk Hope's opinion in *Johnstone*, as to the danger of such a clause being interpolated without the granter's consent, and possibly after his death. There was the same danger of interpolation by superinduction of words, or by erasures,

which could be authenticated by being noticed in the testing clause.

(The authorities quoted *hinc inde* on this branch of the case are all referred to in Lord Deas' opinion).

Second, On the effect of the arrestment in barring the trustees in the exercise of their powers of limitation. Mr Chambers' share of the residue had vested, and the trustees and he were dealing with the fund as his without any limitation. When the period of vesting and payment had arrived, the right of the beneficiary was the same as if he had got payment. No vested right could be burdened with a power in trustees to give that right to some one else. To secure a fund from the diligence of creditors needed the intervention of a trust, and if such fund had vested in the beneficaries it became subject to the diligence of their creditors—(*White's Trustees*, 14 Scot. Law Rep. 499, June 1, 1877). In the case of *Urquhart* v. *Douglas* (M. 10,403, Elchies, p. 20, No. 8) there was a direction to keep up the trust for payment of the provision, and on that ground it was held to be protected against creditors; there was no such vesting of the capital in the beneficiary as there was here. Bell's Comm. i., 126 (5th ed.) 130. There was at the date of the arrestment no right in Mr Chambers' children. The intention of the trustees was immaterial, for no power which was constituted in writing could be exercised except by a writing. The question here was—Was this privilege of restriction merely a personal right or inherent in the nature of the provision? It could not have been the latter, for that was inconsistent with the nature of the property created by vesting. If it was the former, then the provision was arrestable until the privilege was exercised—Lewin on Trusts, cap. vii, sec. 2; *Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38 (Answers to second question put to the Court.) After execution of the arrestment, the trustees had no power to execute any such deed of restriction as they have done. The fund was thereby rendered litigious, and it was trite law that *post litem motam nihil innovandum.*

The defenders argued—All that Mr Chambers had was an interest which was to be what the trustees pleased, and this interest was all that had vested; if the fee was held to have vested there would be a repugnance between that part of the clause providing for the vesting and that part which declared it subject to the conditions afterwards expressed. The same discretion was given to trustees in the case of *Hunter* v. *Hunter's Trustees* (10 D. 922, March 10, 1848), and there the fund was found to be alimentary. In *Balderston* v. *Fulton* (19 D. 293, 23d Jan. 1857), one who was at once fiar and alimentary liferentrix had her liferent interest protected. In the case of *M'Lay* v. *Borland*, July 19, 1876, 3 R. 1124, there was an example of the vesting of a fee subject to defeasance; that was the position here, the defeasance being dependent on the will of the trustees, and therefore there was no repugnance between the vesting of the fee, even if that had taken place, and its defeasance by an event that might afterwards take place. The diligence used could not abridge the trustees' powers; they took no higher right than Mr Chambers had, and he could not have insisted on payment by the trustees. This was therefore no contravention of the maxim *pendente lite nihil innovandum*, for the right attached had always been qualified by the possibility of such an exercise of their powers by the trustees. Erskine (iii. 6, 7), in treating of things arrestable, proceeds on the principle that where a sum was pestined by the granter for a particular purpose, that purpose must be respected.

At advising—

Lord Deas—The pursuers are creditors of the defender James Chambers in a debt duly constituted by judgment and decree to the amount of £2294, 1s. 10d., and £4, 6s. of costs. Upon this judgment and decree the pursuers, on 29th September and 2d October 1876, used arrestment in the hands of the other defenders, the *mortis causa* trustees of the late Dr Robert Chambers, father of the debtor James Chambers, to attach all funds belonging to the latter in their hands for payment of his said debt.

The validity of the diligence thus used by the pursuers to attach whatever fund may be available is not called in question. Nor is it disputed that, after deducting large payments made to the pursuers' debtor towards his share of his father's residuary estate under the testamentary trust-deed, there remains of that share in the hands of the trustees a balance exceeding in amount the debt due to the pursuers.

But, in defence against the present action of furthcoming, instituted to have that balance made available for payment of the debt due to the pursuers, it is maintained for the debtor and the trustees—*First*, That, having regard to the terms of the clause ("Lastly") in the trust-deed disposing of the residuary estate, the fund in their hands is not attachable for the debt of the beneficiary James Chambers; and, *second*, that supposing this to be otherwise, the fund is protected from such attachment by being declared in the testing clause to be alimentary and not arrestable or attachable by creditors. Either of these grounds, it is said, is sufficient to entitle the defenders to absolvitor. It is necessary, therefore, to consider them separately in their order, and I shall do so accordingly.

As introductory to both grounds, it is necessary to notice shortly the purposes of the trust-deed. These are—(1) To pay the truster's debts and the expenses of the trust. (2) To pay the following legacies at the first term of Whitsunday or Martinmas which should happen six months after the truster's death, viz., to his sister Janet, £100; to his nephew Alexander Kirkwood, £100; to the four daughters of his brother David, equally among them, £1000, "their shares whereof shall be payable on their respectively attaining majority or being married, whichever event shall first occur, but no share shall vest till it becomes payable, and shares lapsing shall go to increase the shares of the survivors;" to Peter Scott Fraser, £100; and further, that the trustees should pay all other legacies and provisions the truster might leave by any codicil or memorandum, formal or informal. (3) To pay from the yearly proceeds of the truster's interest in the concern of W. & A. Chambers the following annuities, viz., to his son William, £250 per annum during life; to Mrs Cross or Mitchell, £20 during life—both annuities to be payable quarterly in advance, declaring the annuity payable to William to be in full of all legal claims. (4) To deliver a certain manuscript to the Faculty of Advocates for their library. (5)

To convey to the truster's eldest son Robert, or his heir-at-law, a house in St Andrews, subject to the liferent of the truster's daughter Alice while unmarried, "and also under the conditions and reservations hereinafter conceived in favour of my children and grandchildren hereinafter named." (6) To take charge of his said house in St Andrews and furniture therein as a home for certain of his children and grandchildren, in manner therein detailed. (7) On the death or marriage of his daughter Alice to deliver the contents of the said house to his son Robert, or failing him to his executors.

Then follows the purpose entituled "Lastly," upon which the question I am first to consider arises, and to judge of which satisfactorily the purpose itself must be read *ad longum*.

I shall, however, state the substance of it, which is that the trustees shall hold, apply, pay, and convey the residue of the truster's means and estate and the annual produce thereof to and for behoof of his children, with the exception of his son William, "and, with and under the exceptions and modifications to be afterwards stated, payable in the case of such as are major six months after my decease, but in the case of my said daughter Alice on her attaining majority or being married, whichever of these events may first happen, but only after the expiry of the said six months, declaring that the whole provisions in favour of my said children shall at my death vest in those surviving me," the lawful issue of those predeceasing coming in place of the parents, and if no issue, then to the survivors of the truster's children, with the exception of the issue of William.

Pausing here for a moment, it will, I presume, not admit of doubt that if nothing had followed affecting or qualifying what had thus been expressed with reference to the shares of residue provided to the truster's children and grandchildren, these shares would, under the clause "Lastly," have been attachable for their respective debts and affectable by their respective deeds. But the deed goes on thus—"And, notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to and in the power and option of my trustees, if they shall see cause, to postpone as long as they shall think it expedient to do so the payment of the provisions or shares of residue hereinbefore provided as aforesaid in the case of all or any of my children or grandchildren, and to apply the interest or annual produce of the same during the period of postponement to or for behoof of such children or grandchildren, or, by a deed under their hands to retain the said provisions or any of them vested in their own persons, or to vest the same in the hands of other trustees (whom they are hereby authorised to appoint), with all or any of the powers, privileges, and exemptions belonging to themselves, including the power of appointing factors, so that my children and grandchildren, or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children or grandchildren and their lawful issue on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges."

Now, as introductory to remarking upon the powers thus conferred upon the trustees, let us attend to how matters stood at the date of the pursuers' arrestment, and consider what was then the legal effect of that arrestment.

The date of the truster's death is not stated in the record, but, according to usual practice, his *mortis causa* deed would not be recorded till after his death, and the date of that recording is stated to have been March 24, 1871.

The share of residue accruing to James Chambers, the pursuers' debtor, was arrested in the hands of the defenders on September 29 and October 2, 1876, five years after that share, in accordance with the express terms of the deed, had become vested in the beneficiary, and four years and a-half after it had become payable to him.

It is not alleged that the trustees had in the meantime passed any resolution, either by way of minute of meeting or otherwise, postponing the term of payment of James Chambers' share of residue or of the shares of any of the children or grandchildren. It was explained from the bar, in answer to my question, that one of the daughters had predeceased the truster leaving issue, so that there were grandchildren as well as children interested at the date of the truster's death. If there was to be a postponement of the term of payment, the natural time, one would have thought, to have made that postponement would have been before the term of payment had arrived, but whether made before or after that term, it was surely necessary to have specified for what period or periods the postponement was to be made, whether it was to be applicable to the shares of all the children or grandchildren alike, and, if not to all, then to which of them, and for what period as regarded each. The beneficiaries and their creditors were alike interested and entitled to know how they stood and were to stand in these respects if a change was to be made at all upon the position which they held under the deed.

Nothing of this kind was, however, done or declared as to the shares of any of the children or grandchildren, or the rights of their creditors. On the contrary, the trustees went on dividing among the beneficiaries all that from time to time came into their hands of the realised capital as well as the whole income, on the footing that no postponement of the term of payment, either of capital or income, had been made or was contemplated. As regards the share of James Chambers in particular, it is now admitted that prior to June 1, 1875, the trustees had paid to him of income £2272, 6s. 3d., and of capital from the personal estate £2086, 3s. 4d., leaving due to him of capital from that estate £2525, besides his estimated share of the value of the heritable estate.

So much as regards the mere power of postponing the term of payment. But that power, although it had been exercised, could not have excluded creditors from attaching the shares of their debtors so long as the legal effect of the vesting was not rescinded; and this vesting the trustees plainly could not rescind either at common law or under the express terms of the settle-

ment, except by a deed divesting the beneficiary of the fee with which the truster had expressly invested him. Admittedly no such deed was executed prior to the date of the pursuers' arrestment nor prior to the raising of this action, nor even prior to the closing of the record, the judgment of the Lord Ordinary, and the original debate on this reclaiming note.

That leads me to advert to what is the legal effect of the diligence of arrestment, which in our law and practice is surely not doubtful. The arrestment fixes the rights of the arresting creditor and the position of the debtor and arrestees finally and irrevocably, as these rights stood at the date of the execution of the arrestment. If the creditor had a right, as matters then stood, to attach the fund for payment of his debt, nothing done afterwards by the debtor or by the arrestees could alter or prejudice that right.

This is well understood in practice, and familiarly laid down by our Institutional writers. Thus Mr Erskine says (iii. 6, 11)—"Arrestment, being a step of diligence, renders the subject litigious so soon as it is used, before it be perfected by forthcoming, in the manner to be soon explained; and therefore, according to the received rule in *rebus litigiosis*—b. 2, tit. 11, § 7, and b. 2, tits. 12 and 16—it cannot be excluded either by the posterior voluntary deeds of the debtor—see arg. *Wodrop*, Feb. 1744, Dict. p. 1025; and *Crawford*, Feb. 1733, (not reported) —or by the legal diligence of creditors, unless the user of the begun diligencehad been *in mora* or become negligent in prosecuting it—Stair, b. 3, tit. 1, § 42; b. 4, tit. 35, § 6."

Lord Stair, in like manner, says (iii. 1, 24)—"Arrestment is a precept or command of a Judge ordaining the thing arrested to remain in the same case it is when arrested till such things be done as are prescribed in the letters of arrestment." He adds in the same section—"Arrestment, which we are now about, is a precept by letters of arrestment arresting debts or goods in the hands of any party, haver thereof, at the instance of the creditors of him to whom the debts or goods belong, to remain under arrestment until the debt whereupon the arrestment proceeds be secured or satisfied." And in section 32 he lays down the doctrine which, as we have seen, is adopted by Erskine, that "Arrestment orderly laid on renders the thing litigious."

In b. iii, tit. 1, § 39, he explains that in competition with the diligence of other creditors the right is not transferred by the arrestment, but only by the decreet of forthcoming; but the arrestment is "a legal prohibition to alter the condition of the thing arrested, nor to pay or deliver the same to the arrester's debtor, but that it may remain in the arrester's hand for satisfaction of the debt arrested;" and although it does not transfer the right, it is a "legal diligence rendering the subject-matter arrested litigious, so that the party in whose hands the arrestment is made cannot alter any sums or debts belonging to that debtor in prejudice of the debt arrested for until the arrestment be loosed," &c.

In the next section (40) he explains that if the arrestee pay unwarrantably he to whom he paid "will be compelled to restore and satisfy the arrester, the subject having been litigious by his arrestment before he recovered the same, albeit he have recovered payment *bona fide* without any fault in him, but by the litigiousness of the subject." And in sec. 42 he adds, that "'seeing the arrestment maketh the subject arrested litigious, it hath the common effect necessarily introduced by law in *re litigiosa*, that inchoate diligence cannot be excluded either by the voluntary deed of the debtor or by any legal diligence posterior unless the user of the first diligence become negligent."

The execution of the arrestment thus, of itself, brought matters under the well-known rule *pendente lite nihil innovandum*. It is improper, as Mr Erskine explains, to call arrestment a judicial assignation—such, for instance, as is operated by sequestration under the Bankrupt Statute, transferring the right to the trustee for behoof of all interested, *tantum et tale*, as it stood in the person of the bankrupt. Neither the judicial assignation nor the voluntary assignation operate by creating litigiosity against the debtor and all concerned, like the prohibitory diligence of arrestment, and it is, therefore, fallacious to reason from the one to the other. No resolution adopted by the trustees, nor deed executed by them subsequent to the arrestment, can be regarded as in a question between the arrestees and the pursuers, or between James Chambers and the pursuers, founding on their arrestment.

Litigiosity was, *separatim*, operated by the institution of the present action of furthcoming. The trustees had, at that time, executed no deed, and passed no resolution by way of exercise of the option conferred on them by the trust-deed. Neither had they done so when the record in the action was closed on November 24, 1876, nor at the date of the Lord Ordinary's judgment of February 22, 1877, nor till we were on the eve, in this Division of the Court, of making avizandum to consider the argument we had heard and dispose of the case. It was then, for the first time, that the trustees asked leave and were allowed, to lodge in the clerk's hands, *quantum valeat* and under reservation of all objections, the deed dated 6th and 9th July 1877, which bears to create a new trust in their own persons for purposes quite different from those expressed in the trust-deed. The effect of this deed, if recognised, would be to alter *in toto* the position in which the pursuers stood at the date of their arrestment and the institution of this action, by divesting James Chambers of the fee of his share of residue, which had vested in him and become payable to him between five and six years previously, restricting him to a liferent allenarly and alimentary, conferring the fee on his children *nominatim* for behoof of themselves and those to be born, and of which share they had, in the meantime, paid to him, without qualification or reservation, not only the whole income, but nearly one-half of the whole capital, which, no doubt, went to pay debts due by him, although not the debt due to the pursuers.

It seems to me that the deed thus executed by the trustees serves no purpose in this case beyond illustrating what sort of written instrument fell to have been *tempestive* executed, so as to have affected the rights of all creditors equally, if the trustees had meant to exercise the option conferred upon them at all.

What, however, the effect of the deed thus executed may be in a question with James Chambers and his other creditors, I do not inquire.

We have to do only with the rights of the presen pursuers, and my opinion is that, in a question with them, the deed can have no operation at all.

There remains, however, what I have called the *second* question, which is of great general importance, relating as it does to what may be legitimately inserted in the blank usually left for the testing-clause, in all kinds of deeds, at the time of subscription of the granter and witnesses.

In the testing-clause of the trust-deed and settlement now under consideration, immediately after the words "In witness whereof," we have the fact of subscription by the granter and the name and designation of the writer of the deed set forth in the usual manner. Then there is introduced this parenthesis—("but with and under this express provision and declaration, *videlicet*, that the whole of the legacies, annuity, and provisions made and provided by this disposition and deed of settlement shall be strictly alimentary, and shall not be arrestable or attachable for the debts or deeds of the persons in whose favour the same are conceived, or any of them, nor be subject or liable to the diligence of their creditors"). The clause then concludes with the place and date of subscription and the names and designations of the witnesses in the usual manner.

Now, supposing the words in this parenthesis had occurred in a different and clearly appropriate part of the deed, there would, I think, have been a good deal of difficulty in determining their precise object and effect. But, waving this difficulty in order to decide—as I think it is our duty to decide—the important general question involved, unconnected with specialties, I assume it for the present to be clear that the words used, had they been in their proper place, would have effectually restricted, as they seem to have been intended to restrict, the whole legacies and provisions to proper alimentary funds, neither attachable by creditors nor assignable by the beneficiaries.

It is obvious that this was to make a radical change upon the nature of the rights which in the previous part of the deed had been conferred on these beneficiaries. If this could competently be done in the testing clause, it is difficult to see what alteration, restriction, or addition could not competently be made in the same way in that clause. And if the functions of the testing clause are to be extended to purposes such as this, it seems to me that the risks, already sufficiently great, attending our law as established by decisions, applicable to the filling up of the testing clause, will be unnecessarily and alarmingly increased.

I do not say that, merely because such extension is unnecessary it follows that it is incompetent. Unnecessary however it plainly is, there being other and unobjectionable ways of easily accomplishing the same object. A marginal addition, mentioned in the testing clause, would of course be sufficient, and avoid the necessity of throwing aside the extended deed, but the great difference in security there would be, that such addition would be subscribed by the granter after it was made. If the addition required to be longer than could conveniently be put on the margin, there could be no great hardship in making it by a codicil, either separately tested or holograph.

The testing clause is undoubtedly to be regarded as in the body of the deed. I do not for a moment dispute that proposition. But, on the other hand, it cannot be disputed that all clauses in a deed have not the same functions; the dispositive clause, the clause of warrandice, the procuratory of resignation, the precept of sasine, the clause of registration, and the testing clause, have all their peculiar functions. Those of the testing clause are attesting the granter's subscription, naming and designing the writer and witnesses, noticing erasures, marginal additions, blanks filled up before subscription, and generally, it may be said, whatever is directly connected with the subscription and authentication of the deed.

I do not suppose that any one will substantively affirm that the testing clause might competently be inserted in the dispositive clause, or in the clause of warrandice, or in the procuratory of resignation, or precept of sasine, or in the clause of registration. Nor do I suppose that it will be affirmed that any one of these clauses may be competently inserted in the testing clause.

I not only do not question that the testing clause is in the body of the deed, but I hold it to be settled by decisions that the clause authenticates itself as well as the rest of the deed. I do not know, however, any stronger reason that could be given why the clause should be confined to its own proper and peculiar functions. No other clause has the same extraordinary privileges and effects, and it is just because the testing clause has been held by decisions, not now to be gone back upon, to have extraordinary privileges and effects, that it becomes so important to confine it to its own proper and peculiar functions.

To see the light in which the testing clause has been regarded, in contrast with other clauses, we have only to attend to what has been the course of decisions, in regard to none of which am I adventurous enough to pronounce them, in this incidental way, to have been unsound.

1. It is settled that the clause may be left an entire blank at the time when the granter and witnesses subscribe the deed, and may be filled up *ex intervallo;* and we know quite well that, in practice, the clause is scarcely ever fully filled up before subscription; that it is seldom filled up upon the spot immediately after subscription; and that in filling it up *ex intervallo* it is not usual, and is not considered necessary, to require the presence either of the granter or the attesting witnesses. I am not prepared to affirm that mere lapse of time can never bar the filling up of a testing clause, but I am bound to admit that I know of no case hitherto in which a deed has been held improbative in respect of the length of time which had elapsed between the execution of the deed and the filling up of the testing clause. And all conveyancers know that in the case of *Blair* v. *The Earl of Galloway, &c.*, Nov. 15, 1827, 6 S. 51, it was found no nullity, in a deed of ratification and discharge, that the testing clause had been filled up after the lapse of 32 years, and after several of the parties to the deed were dead.

2. The deed may be used for the most important purposes—such as the irrevocable act of giving infeftment upon it, and thereby establishing a preference in a competition of heritable rights, while the testing clause is still blank. It was so decided in *The Leith Bank* v. *Walker's Trustees,*

&c., Jan. 22, 1836, 14 S. 332. I shall immediately return to that case, so far as to remark upon the important principle on which Lord Moncreiff (Ordinary) rested his judgment, and in which the other Judges concurred.

3. In *The Bank of Scotland* v. *Telfer's Creditors*, Feb. 17, 1790, M. 16,909, it was decided that, at a considerable interval after the testing clause had been filled in by the writer of the deed, he might at his own hand fill in further words in the unexhausted part of the blank, correcting what was alleged to have been a fatal error in the clause as he had at first made it. The deed was a bond granted by Telfer, for the accommodation of certain third parties, to the Bank of Scotland, writtenby Mr Fraser, the secretary of the bank. It had been deivered to Fraser for behoof of the bank after being executed by Telfer. Fraser immediately filled in the testing clause, but in doing so he erroneously stated the name of one of the subscribing witnesses to be Robert Gibson, whereas his name was Robert Dickson—the designation as servant to a party named and designed being, however, correct. A considerable time after the deed had been delivered to Fraser, and the testing clause understood to have been completed, the trustee for the creditors of Telfer, who had become bankrupt, discovered and intimated the error and objection to Fraser, as representing the bank, whereupon Fraser added, in the vacant space still left, the words "I say, Robert Dickson, his servant, the word 'Gibson' being a chirographical error of the writer in filling up the last line of the testing clause, all written by the said James Fraser." The objection that the addition thus made to the testing clause was incompetent and the deed improbative was repelled by the Court.

4. Where the writer of the deed names and designs himself, and partially fills up the testing clause, it has been held that another party who, in an obviously different handwriting, completes the clause by filling in the dates and names and designations of the witnesses, need not be, himself, either named or designed. It was so decided in *Gray and Stewart* v. *Scott*, Jan. 21, 1703, M. 12,602; *Watsons* v. *Scott*, Nov. 29, 1683, M. 16,860; *Laird of Edmonstone* v. *Lady Wolmet*, June 19, 1722, M. 16,862; *Ramsay* v. *Sawer and Husband*, March 2, 1836, 14 S. 589. It is noteworthy, by way of contrast, that if blanks of equal importance in a different part of the deed had been filled in by a third party not named and designed, the result would have been nullity of the deed, according to the decision in *Allardice* v. *Forbes*, Jan. 25, 1710, M. 16,862.

5. Where the writer of the deed does not name and design himself, but stops short at the registration clause, it has been held that he (the writer) may be named and designed by another party who fills in the whole of the testing clause —*White* v. *Henderson*, Feb. 21, 1710, M. 16,864.

6th, and lastly, Let it be observed, in reference to the risks attending an extension of the functions of the testing clause, that, in whichever of the above ways the testing clause may have been filled up, or partially filled up, and ultimately completed (although *ex intervallo*), it is thenceforth regarded as *probatio probata* of its own terms, as well as of the terms and authenticity of the rest of the deed. We have the high authority of the ate Lord Moncreiff for this doctrine in the note to his interlocutor in the case already cited of *The Leith Bank* v. *Walker's Trustees*, and approved of, as I have already said, by the other Judges, who unanimously concurred in his judgment.

It could, according to the decisions, have made no difference to the applicability of this doctrine had it appeared, as it did in *Telfer's* case, that the testing clause, after being left as completed, had been *ex intervallo* added to and amended, or had the 'provision and declaration" now in question been obviously in a different handwriting from the rest of the testing clause, and inserted by a party who was neither named nor designed. The question would still have been, as it is now—Whether such a "provision and declaration" could competently be made part and portion of a testing clause, and so *probatio probata* of itself, by whatever unknown hand the "provision and declaration" had been inserted?

It is true that the writer of the provision and declaration cannot, in the present case, be said to be unknown, because we have had the principal deed before us, and seen that the whole testing clause is fairly written, in the same handwriting with the handwriting of the rest of the deed. But this only serves to raise the general question in a pure form as to the competency of inserting in a testing clause a provision and declaration altogether foreign to the recognised functions of that clause. The importance of the judgment we are called upon to pronounce, as to the testing clause, lies much less in its bearing on the present case than in the consequences it is calculated to produce as a precedent applicable to the functions of the testing clause in all deeds whatever; for it is certain that there can be no difference in the rules applicable to these functions in the different classes of probative deeds, whether they relate to heritable estate or personal estate, or, as in the present instance, to both, or whether they are ordinary dispositions or deeds of entail. Nor am I aware of any decision hitherto pronounced sanctioning a distinction between the applicability of these rules to unilateral deeds and to mutual contracts.

Two cases were much commented on in the course of the argument—the case of *Johnstone* v. *Coldstream*, June 30, 1843 5 D. 1297, and the case of *Dunlop* v. *Greenlee*, Nov. 2, 1863, 2 Macph. 1, affirmed June 2, 1865, 3 Macph. (H. of L.) 46. I do not think that either of these cases (which were substantially identical in their circumstances) can be regarded as a precedent in the present case. And if neither of them is so, it cannot be pretended that there is any precedent at all for the competency of inserting a provision and declaration like that now in dispute in a testing clause.

The point noted (12 D. 918) in the entail case of *Kelso*, March 8, 1850, is plainly of no materiality—for although as matter of fact the party consenting to the disentail required to be twenty-five years of age, it was no more necessary to state his age in the deed of consent than it is to set forth the age of the granter of any other kind of deed, the validity of which depends on the granter being neither in pupilarity nor minority.

It was in like manner unnecessary in the cases of *Johnstone* v. *Coldstream* and *Dunlop* v. *Greenlee* to have stated, in the testing clause, that the wife had subscribed in token of her consent to her husband's deed, for her subscription was of itself

quite sufficient for that purpose. In the first of these cases the husband's deed bore that the provision he thereby made for his wife "shall be accepted of by her in full satisfaction to her of all terce of lands, third or half of moveables, and every other claim competent to her by and through my decease in any manner of way." In the second of these cases the husband's deed declared that the annuity thereby provided to his wife should be accepted by her in full of all terce of lands, half or third of moveables, and every other claim competent to her by his decease in any way or that of her nearest of kin if he survived her. Consequently when, in sequence to the words "In witness whereof," the testing clause bore that the wife had subscribed the deed before the attesting witnesses, it was mere superfluity to add in token of her consent. Her subscription meant consent, and could mean nothing else. This was well stated by Lord Medwyn in *Johnstone* v. *Coldstream*, 5 D. 1311. His Lordship there observed, that supposing the deed to be read without the words in the testing clause explanatory of the object of the wife's subscription, "I think that while it must be unquestionably good evidence that she subscribed the deed before the witnesses, the inevitable presumption of law would arise that she did so because she concurred in and approved of it. What other object could there be for her subscribing it?" After referring to the *a fortiori* case in which it had been held that subscription of a father or a brother, although only as a witness to the marriage-contract of a daughter or sister, implied knowledge and approval of the contract, his Lordship added as to the wife "I cannot conceive what other object she could have in adhibiting her subscription except to express her concurrence, so that any legal claim of hers should not stand in the way of its taking effect."

Lords Meadowbank and Moncrieff expressly concurred in this opinion. The Lord Justice-Clerk (Hope) went the further length of observing that a statement in the testing clause of the object of subscription would have been good although the consent had been a qualified one, but he agreed with the other Judges as to the effect of mere subscription in the actual case before them. He said (5 D. 1304,)—"It is true that in this case the purpose expressed in the testing clause goes the full length of what might be presumed to be the implied and necessary object of the party from the general fact of subscription of the deed. But it might have been the reverse. The testing clause might have expressed a very special object for the party's subscription, inconsistent with the general inference to be inferred from the mere fact of subscription."

This last observation is entitled to great respect, but it is obiter only. It may be defended on the ground that whatever relates to mere subscription is appropriate in a testing clause, but it would not be the same case with the case of *Johnstone* or the case of *Dunlop*. If the consent stipulated for in the deed was a consent to some limited effect, the subscription would of course imply consent to that limited effect only. But if the consent stipulated for was general and absolute, there might arise a question which was not involved either in the case of *Johnstone* or of *Dunlop*, whether the wife was not attempting through the medium of the testing clause, by a qualified consent, to make a different contract from that contemplated by the husband?

I am unable to deny that, in some other respects also, expressions occasionally occur in the Lord Justice-Clerk's opinion which might seem, at first sight, to imply that almost any object may be accomplished by the testing clause if clearly expressed; and these expressions have, throughout, formed my only ground of hesitation on this part of the case. But I am satisfied that, if his Lordship had really meant by these expressions to lay down a doctrine so much broader than the other Judges did, he would neither himself have limited it, as he did in other passages, nor acquiesced in the limitations which they distinctly put upon it. For instance, his Lordship says (5 D. 1305) —"It is true that there are certain objects which are the natural purposes for which particular clauses have been inserted; and it is also true that it would not be easy to introduce and to engraft into a testing clause the objects and effect of a dispositive clause."

In a subsequent passage (*ib.* p. 1308) his Lordship says—"I do not at all feel the force of the remark that the testing clause is not a right place in which to set forth the object for which a party therein named subscribes a deed. If that party is to grant nothing by the deed, it is not an unnatural place in which to set forth the object of such party's subscription, viz., consent or acquiescence." I think in this passage his Lordship summed up and explained the substance of the opinion he really meant to express, and accordingly he indicated no dissent from Lord Medwyn when the latter said—"I am perfectly aware that the object of the clause is peculiar, and that we are not to look to that clause for what is the peculiar province of another clause in the writ. I do not say that it should ever perform the function of the dispositive clause, the clause of warrandice, or of registration."

Lord Medwyn then enumerates what he considers the purposes of the testing clause, some of which he correctly says are essential and statutory, others are only expedient and sanctioned by custom. "Of the first sort, testing the subscriptions of the parties and naming and designing the writer and witnesses is an instance; of the other, the notice of erasures and marginal notes, or blanks filled up before signing, and of the person by whom this clause is written, if by a different person from the writer of the previous part of the deed, are examples and I am not sure that I may not also include the consent of a party as being not improper to find its way into that clause when noticing the subscription of the consenter where that is the only reason for that person subscribing the deed. I think it very reasonable it should be so, and I believe it to be very common."

I am of opinion, with Lord Medwyn, that merely to mention in the testing clause that the subscription is adhibited in token of consent is not illegitimate where the only reason for subscribing obviously is to consent, and accordingly I observe that in the subsequent case of *Dunlop* v. *Greenlee*, with reference to what I there called the first point, viz., "whether the wife's signature bound her as a party to the first deed," I am correctly reported to have said (2 Macph. 5)—"The first point was decided in the case of *Johnstone*; and I concur

with your Lordship that we cannot go back upon that case, which, moreover, I think was rightly decided."

I do not think I require to impugn either my own opinion or that of the House of Lords in *Dunlop* v. *Greenlee* in order to come to the conclusion that the "express provision and declaration" introduced into the testing clause of the present deed is beyond the proper functions of a testing clause. If I am right in this view, it must be admitted to be very clear that there is no precedent whatever for sanctioning such a use of the clause. No decision to that effect has been cited at the bar, and I have myself searched backwards to the time when by statute our admirable law ofp robative deeds was established, and failed to find any such decision, or even any dictum countenancing it, by any institutional writer.

On the contrary, Mr Robert Bell in his authoritative treatise, published in 1795, on the Testing of Deeds, describes the use of the testing clause in terms which exclude the supposition that it was considered as having any such question as the defenders here contend for. He says (p. 43-4, also p. 124)—"The use of the testing clause is to give, in plain and simple language, an account of the execution of the deed, the date, the place, the number of pages, the names and designations of the witnesses, and to take notice of such additions as may have been made to the deed, or of such parts as have been struck out before its final completion. The clause is in one sense no part of the deed, for it contains neither the will of the granter nor any provision by which that will is to be carried into effect, and there is no other clause in the deed which does not contain one or other of these. This clause alone relates to the authenticity of the deed, and is in fact an attestation or certificate of what has been done by the party in order to give validity to the deed."

In connection with these remarks, the view which Mr Bell entertained and authoritatively taught to the Profession of the functions of the testing clause will be made very clear by quoting the form which he gives for the clause when there are no marginal notes to complicate its terms. It is in these words—"In witness whereof, I have subscribed these presents, written upon stamped paper by L. M., writer in Edinburgh, at Edinburgh, the 30th day of April, 1795 years, before these witnesses, N. O. and P. Q., both writers in Edinburgh."

Mr Bell had already separately pointed out the vital necessity for designing the writer and witnesses in the testing clause, and he afterwards quotes the Act 1681, c. 5, which provides "that all writs to be subscribed hereafter wherein the writer and witnesses are not designed shall be null, and not suppliable by condescending on the writer, or on the designation of the writer and witnesses." He expresses regret, which must, however, be admitted to be now unavailing, that, by the course of decisions most of the purposes which the testing clause was calculated to serve, other than that of designing the writer and witnesses, might be dispensed with, such as omitting to mention the place of subscription, and the date, when nothing turned upon it (as something might do in competitions or cases of deathbed), although, as Mr Erskine observes (iii. 2, 18), time and place may be, in many cases, a strong guard against forgery, for which reason they had in Stair's time been accounted solemnities.

Mr Bell suggests no doubt at all that it had been settled by decisions that the testing clause may be filled up *ex intervallo*, and it would really be in vain to attempt to go back upon that proposition. In one of the cases he refers to—*Dury and Doig* v. *Dury*, March 11, 1753, M. 16,936 and 16,938—it was palpable, on the face of the deed, that the clause had been filled up after subscription, not only by the way it was crowded in and partially made room for, by erasure, but also from part of it being lower down than the subscription of the granter and the line of the witnesses' signatures. It is no wonder that, in such a case, there was a difference of opinion on the Bench; but the general rule that, if *ex facie* fairly written, the clause might be filled up *ex intervallo*, does not seem to have been doubted, Lord Elchies in particular observing (16,938)—"That writs are often subscribed with a blank left for the testing clause, which, after subscription of the party, is filled up by any hand; and therefore it can be no nullity to insert the testing clause *ex post facto*, whether a blank be left for it or not." Mr Bell remarks upon this case (p. 119)—"But narrow as this plurality may have been, so far as the case is a confirmation of the common practice of filling up the testing clause after the deed is subscribed and out of the presence of the party and witnesses, you are to consider it as one that would be adhered to, for the Court have again and again in other cases said that the testing clause may be filled up at any time before the deed is produced in judgment." He then mentions the case of *Telfer's Creditors*, and refers to the case of *Arthur and Fullerton* v. *Marshall*, in December 1792, which he says is unreported, in which—after a bond had been put on record by one of the cautioners, the creditor went to the keeper of the record, who allowed him to fill up the testing clause, and the cautioner having brought a suspension, Lord Eskgrove (Ordinary) sustained the bond "as a good ground of action." The account given of the case by Mr Bell (p. 120) is particularly valuable for the opinion he gives of the Lord President (Sir Islay Campbell), who said—"A testing clause may be filled up at any time before it be produced in judgment. It may be filled up the day after the parties have subscribed the deed, and consequently at any time. The putting of the deed on record was evidently a trick. The cautioners had no title to do so; on the contrary, they were bound to have returned it to the creditor. The date is said to be wrong, though there is no proof of this; but granting it to be so, it is not a statutory solemnity. The names of the writer and witnesses are statutory solemnities, the date is not. The date is of consequence only in a competition of creditors or in a deathbed question; here it is a matter of no moment, as there is nothing that depends on it. It is said too that the place of signing is wrong. It may be so, but neither is this a statutory solemnity, and it is not material here; so that neither the errors in the place nor in the date appear to me of sufficient importance to found the reasons of suspension, and I am therefore for adhering to the Lord Ordinary's judgment." Mr Bell adds—"This was the unanimous opinion of the Court."

Taking this case along with the cases I have mentioned, both of prior and subsequent dates, it would obviously be in vain to impugn the doctrine thus laid down by the Lord President—and coupling that doctrine with what is equally well settled, that the name and designation of the party who in a handwriting different from that of the writer of the rest of the deed partially fills up or adds to the testing clause, need not be mentioned—I think it is difficult to overrate the importance of adhering to the doctrine of Mr Bell, that in using the testing clause for its only legitimate purposes it "contains neither the will of the granter nor any provision by which that will is to be carried into effect," and that it relates solely to the authenticity of the deed. The fact, which cannot be questioned, that the testing clause is part of the body of the deed, and authenticates its own contents equally with the contents of the deed, so that these cannot be challenged except in a reduction on the ground of fraud, obviously makes the objection all the stronger to sanctioning any extension whatever of the purposes for which the contents of the clause may be used beyond what have already been sanctioned by irrevocable decisions. Even therefore if it could be said, which I do not think it can, that the cases of *Johnstone* and of *Dunlop* import—in some degree—an extension of these purposes, I should hold that to be a reason for stopping short in place of adding, however slightly, to that extension.

The extension, however, contended for in the present case would appear to me to be great and important, and not slight. If the clause may competently contain the will of the granter of the deed, and provisions by which that will is to be carried into effect upon matters so important as those dealt with in this instance, I do not see where this is to stop. In place of a provision and declaration that all the legacies, which had been given unqualifiedly in fee, are to be alimentary, and consequently neither attachable nor assignable, it had been a provision and declaration that some of the legacies were to be real burdens on the heritable estate, or if it had been provided and declared that the heritable estate should be itself conveyed under all the fetters of a strict entail, or, in short, if it had been a provision and declaration of any other kind, altogether altering the dispositive and distributive clauses in the deed, I do not see how any different principle could be applied to such provisions and declarations than to the provision and declaration now in question.

This leads me to observe that I think the views expressed both in this Court and in the House of Lords in the case of *Reid or Arnott* v. *Kedder or Calder* (12 S. 781, 13 S. 619, and 1 Robinson's Ap. 183), are altogether opposed to any extension whatever of the functions of the testing clause beyond what has been already sanctioned. At the first advising of the cause on June 24, 1834, this Court unanimously recalled Lord Moncreiff's interlocutor allowing a proof by the writer and instrumentary witnesses that the christian name of the disponee in the deed was altered from James to John, upon an erasure, in presence of the granter, at or before subscribing, and that the testing clause, which was fairly written, was filled up in his presence. The proof was held to be incompetent, even in a reduction. Lord Cockburn, to whom the action was then remitted, held the deed to be invalid, and reduced it accordingly. His Lordship, *inter alia*, observed in his note—"The subsequent filling up of the testing clause being legal and usual, it is impossible not to see the consequence of allowing one name to be changed for another by erasing the one first inserted, and then, without openly noticing this, putting a new name to fit it into the testing clause" (13 S. p. 621). At advising the reclaiming note, Lord Mackenzie remarked, that "in practice there is a substantial and marked distinction between the testing clause and the rest of the deed. I have great doubt, therefore, in allowing that clause in itself to operate any change in any part of the deed, or to control the deed which it is used merely to attest. If any part of a deed may thus be changed, the whole of it may equally be so." The result was that the Court unanimously adhered to Lord Cockburn's interlocutor, and this judgment, after the case had been heard, along with the *Strathmore* case, was adhered to in the House of Lords (July 30, 1840, 1 Robinson, p. 188). The opinion of Lord Brougham is of peculiar value in that case, because his Lordship was bred and practised for a time at this bar, and was consequently familiar with the practice as well as the law applicable to our Scotch system of deeds. His Lordship observed, *inter alia*,—"The whole argument as to the effect of the testing clause rests upon the supposition that the clause is filled up at the time of execution; but this is contrary to the usual practice. Certainly, nothing like even a formal practice of filling up at the time has been pretended. Now, if it was filled up afterwards, the alteration may have been made after execution, and the clause filled up according to the alteration." After commenting on the looseness of the practice, his Lordship continued,—"But the course now referred to having been established in practice and recognised by the decisions, it remains carefully to prevent it from being extended, and to keep the rules respecting it, already too loose, from being in any particular relaxed," which his Lordship thought it would be by giving the effect contended for to the words used in that case in the testing clause. He further observed that permission to examine the attesting witnesses, allowed by Lord Moncreiff, was justly refused by the Court, on the ground that such a course would be inconsistent with the nature of probative writings. There was no dissent from the opinion delivered by Lord Brougham, and the result was that the judgment of this Court was affirmed.

I have only to add, that if the provision and declaration in question could be held competent in the testing clause (in which view it would be in the body of the deed), there would arise various perplexities both as to what the granter meant by it, and how far that meaning could receive practical effect. There are, as we have seen, a number of legacies bestowed by the deed, besides two life annuities, one to the truster's son of £250 a-year, and one to a Mrs Cross or Mitchell of £20 a-year. The legacies are declared to be payable six months after the truster's death, with a qualification as to majority or marriage in the case of the daughter Alice, and while there are two annuities given by the deed, the corresponding word in the testing clause, as I have ascertained by inspection of the principal deed, is "annuity," in the

singular. The "express provision and declaration" in the testing clause bears that "the whole legacies, annuity, and provisions, made and provided by this disposition and deed of settlement shall be strictly alimentary, and shall not be arrestable or attachable," &c. Now, it is certainly not usual to declare legacies payable six months after the granter's death to be alimentary, and the granter's object might more naturally be supposed to have been to protect and limit the use of these annuities than to protect and limit the use of the capital sums provided to each and all of the legatees. But if this view were taken, the difficulty would arise that one of the two annuities only was referred to in the "provision and declaration" relied on, and we could not tell which of them. If, again, we were to hold the provision and declaration to apply to the whole provisions in the deed—legacies and annuities both included—the doctrine of Lord Stair would require to be considered, that alimentary provisions are restrictable to a reasonable amount, involving the very vague and unsettled question, what a reasonable amount is? My impression would rather be that if the provision and declaration were to be held to have the same force and effect as it would have had in a different and appropriate part of the deed, the capital sums would, in the least favourable view for the pursuers, be validly arrested, whatever might be said in regard to the income. But in the view I take of the case these questions do not arise. I am satisfied that the provision and declaration is altogether out of place and ineffectual, and upon that ground I prefer to rest my judgment.

Lord Mure—In this case two very important questions are raised for our decision—(1) Are the words of limitation in the testing clause to be read with and construed in connection with the leading provisions of the trust settlement so as to qualify them? (2) If they do not so qualify these provisions, are the defenders, on a sound construction of the deed of settlement, entitled to plead that they may "retain in their hands the share of residue belonging to the said James Chambers, and to apply the interest of the same as an alimentary fund for his behoof?"

In the view of the case which I take it is desirable to dispose first of the question as to the effect of the declaration in the testing clause. As to that effect I entirely concur with Lord Deas. A testing clause is not intended to provide parties with an opportunity of making alterations in earlier parts of the deed, nor can there be allowed *ex intervallo* an insertion of words calculated to dispose of property or deal with subjects already dealt with in an earlier part of the deed. The testing clause, I think, should be confined, as Lord Ivory says in his note in the case of *Johnstone*, "to its own proper function," and so in my opinion it is not competent to allow alterations to be made there on provisions already set forth in the body of the deed.

In the second place, reading the deed, as I think we must, without reference to this clause, I am of opinion that this fund was arrestable and was validly attached by the pursuer's arrestments. The broad ground on which I go is, that vesting was intended to take place, and did take place, at the date of the granter's death, the provisions being made payable six months thereafter; if no such deed as that which the trustees have executed had been before us, I could have no difficulty in holding that the arresting creditor must prevail. The only question is, whether the deed executed by these trustees in virtue of the powers conferred on them makes any difference; and I am of opinion that it does not. I take it, that by the terms of the deed this provision had vested, and it required some act of the trustees to divest Mr James Chambers of the fund; till that act was done the fund remained attachable by creditors, and these creditors who are pursuers here did attach it.

Lord Shand—This case raises a question of considerable pecuniary amount, and in the way in which it has now been dealt with by your Lordships involves also a question of much importance in the law applicable to tested deeds.

I am unable to concur in the judgment proposed by Lord Deas, being of opinion, with the Lord Ordinary, that the trustees of the late Dr Chambers are entitled under the powers conferred by his settlement to retain the money to which the pursuers, as creditors of Mr James Chambers, maintain they have acquired right, and to apply the interest or proceeds towards the maintenance of Mr Chambers and his family. In the view I take of the case, it is unnecessary to decide any question as to the effect of the provision in the testing clause which declares the annuity, legacies, and provisions left by Dr Chambers to be alimentary; but on the question whether that provision is a part of the deed which can receive any effect, I agree with the opinions which have been now expressed.

The settlement of the late Dr Chambers was executed on November 10, 1870, and recorded after his death on March 24, 1871. At the time of his death he was a partner of the firm of W. & R. Chambers, publishers in Edinburgh, under a contract, the term of endurance of which expired only on December 31, 1875. Dr Chambers authorised his trustees to prolong the period of the copartnery if they thought fit, by arrangement with the other partners, and it appears the copartnery was extended till December 31, 1876, when it expired. The estate thus consisted not merely of the realised means and property which Dr Chambers left, but of the share of the profits of this continuing business.

It is stated that the accounts of the copartnery having now been closed, the result is that Dr Chambers' trustees are possessed of a sum of £3625, which would be due to Mr James Chambers if he were absolutely entitled to the share of his father's estate provided to him. In that view the pursuers would be entitled to payment of a sum of principal amounting to £2294, and if the arrestments used cover interest, that sum will be increased to £2500, leaving Mr Chambers in right of a sum of £1125 only. Taking the sum now held by the trustees at £3625, it would appear that the full amount to which Mr Chambers acquired right was £8607, for in the meantime between March 1871 and July 6, 1876, being a period of five years and four months, the trustees have paid to him sums amounting in all to £4982, being somewhat under the rate of £1000 a-year.

The question now involved is—Whether the pur-

suers, Mr Chambers' creditors, are entitled to have the large amount of their claim paid over to them out of the balance of Mr Chambers' share, being £3625 as already stated? The solution of this question depends on the nature and extent of the powers given by Dr Chambers to his trustees by his deed of settlement, and an examination of the provisions of that deed therefore becomes necessary.

The first observation I have to make on the deed is, that it is plain the truster contemplated that the trust might be of considerable duration. The partnership in which he was engaged had a currency of upwards of five years at the date of the deed, and, as already noticed, he authorised his trustees to make arrangements for continuing the business beyond that period. There are provisions for payment of annuities out of the profits of the business to two persons during all the days of their lives, powers given to retain the shares of children and grandchildren for a period of time, and power to lend out moneys—obviously in contemplation of a trust of some duration.

In the next place, it is clear that Dr Chambers was anxious to provide against the improvidence or imprudence of his children, and to give his trustees the power to secure an annual income in all time coming to such of them as might so conduct themselves after his death as to show that they could not safely be trusted with the capital of their provisions. In regard to one of the children, William Chambers, there was no option of payment of any capital sum given, the only provision in his favour being an annuity of £250. The residue of the estate he divided amongst the other children, but with provisions, anxiously expressed, which would enable the trustees to protect such of them as might require it against their own imprudence or want of care. In the last purpose of the trust he appointed his trustees "to hold, apply, pay, and convey" the residue to and for behoof of his children, equally among them, excepting William, to whom the annuity already mentioned was provided, "and with and under the exceptions and modifications to be afterwards stated, payable in the case of such of them as are major six months after my decease" . . . "declaring that the whole provisions in favour of my said children shall at my death vest in those surviving me." There follows a destination in favour of the issue of predeceasing children, whom failing in favour of the survivors of the children themselves, excepting always William Chambers and his issue. On this part of the clause I have to observe that the first words of it provide that the trustees may "hold" the child's or children's share of residue, the other words "apply, pay, and convey" being suitable to the case in which the trustees may not think it necessary to continue to hold the shares. In the next place, while the shares are made payable in the case of such as are major six months after the testator's decease, the declaration of the time of payment is introduced and qualified by these important words, "with and under the exceptions and modifications to be afterwards stated,"—a qualification, as will immediately appear, of great importance; and thus, although it was declared that the whole provisions shall vest in those children who survive, the payment of any part of these provisions is qualified by "the exceptions and modifications" contained in the deed.

These modifications and exceptions are the subject of the clause immediately succeeding the part of the deed I have now noticed. That clause is thus expressed — "And notwithstanding the powers above appointed for the payment of the shares of the residue of my means and estate, I declare that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone, as long as they shall think it expedient to do so, the payment of the provisions or shares of residue hereinbefore provided as aforesaid in the case of all or any of my children or grandchildren, and to apply the interest or annual proceeds of the same during the period of the postponement to or for behoof of such children or grandchildren." Here ends the first alternative of the important clause on which it appears to me the decision of this case really rests. The other alternative which the clause provides is, that in place of merely postponing payment of the shares of children or grandchildren, the trustees may, by a deed under their hands, retain any share vested in their own persons or vest the same in the persons of other trustees, so that the right of the children or grandchildren shall be restricted to one of liferent only, and the capital shall belong to the issue of such children or grandchildren, "on such conditions and under such restrictions and limitations, and for such uses, as my said trustees in their discretion may deem most expedient, of which expediency and the time and manner of exercising the powers and option hereby given they shall be the sole and final judges." It may here be noticed that the anxiety of the truster to give his trustees the power of protecting his children against their own imprudence or unfitness for the control of money is farther shown by the fact that in a subsequent part of the deed he provides that "in order to prevent the failure of the discretionary powers hereby conferred in consequence of the office of trustee lapsing, I request my trustees, as soon as their number shall by resignation or otherwise be reduced to three, to assume other trustees or trustee according to law, and with the same powers as are hereby conferred on themselves."

The deed thus gave the trustees power to deal with the share of James Chambers by either resolving to postpone payment of the capital, and to give to him the interest only during the period of postponement, or to restrict his right to that of liferent, giving the fee to his children, should they think that expedient, of which expediency, and the time and manner of exercising their powers, the trustees were to be the sole and final judges.

I am of opinion that the terms of the deed now quoted and referred to suspended the effect of anything contained in the previous part of the deed as to payment of the children's shares, and gave the trustees the most ample powers of dealing with each child's provision at any time up to the time of actual payment. I further hold that so long as there was any part of the share of a child remaining unpaid the trustees had not only the power of postponing payment and applying the interest for maintenance, or restricting the right of fee to one of liferent, under such conditions and for such uses as they

might think fit, but that the duty was imposed on them of exercising their discretion and determining or resolving whether one or other of these powers should not be put in force.

In the faithful exercise of the trust committed to them it appears to me that the trustees would not have been entitled to renounce the power which according to their duty they might at the time of payment become bound to exercise. Even although they might intend, when the term of payment should arrive, to pay away a child's share to such child absolutely, they were not entitled antecedently to bind themselves to do so, for they were not only entitled but bound to exercise the power of securing the maintenance of the child, and it might be of his children, by withholding payment or restricting the child to a liferent, if in their discretion, when the time of payment came, they thought it expedient to do so. The language of the learned Judges of the Supreme Court in the case of *Weller*, L.R., 1 Sc. and Div. App., appears to me to have a direct application to this case. The Lord Chancellor, in dealing with the argument that trustees had renounced a similar power, there stated—"It seems a very strange proposition that if the testator gives power to trustees evidently to be exercised only with reference to the interests of his children or those for whom he is providing, the trustees should be able to say, 'We give up that power'—a power which was committed to them, not for their own benefit, but for the benefit of others;" and Lord Chelmsford observes—"It appears to me that the trustees could not either abandon or fetter the exercise of the powers entrusted to them. It was a power coupled with a duty of a most important character. It was evidently intended that it should be retained and freely exercised down to the time that they were called upon to convey the estate."

Your Lordships have attached great importance to the words in this deed, "declaring that the whole of the provisions in favour of my said children shall at my death vest." It is said that the effect of this vesting clause is to deprive the trustees of the discretionary powers which the truster conferred,—at least to deprive them of these powers in the circumstances of the present case and in a question with the present pursuers. I have found myself unable to appreicate the reasons upon which this view is founded.

This clause of vesting occurs in that part of the deed which declares that the direction for payment shall be with and under the exceptions and modifications to be afterwards stated, and it is immediately followed by the clause beginning "notwithstanding the periods above appointed for the payment of the shares," which gives the trustees their discretionary powers, to be exercised as a duty down to the time when they are called upon for payment. It appears to me that the truster, while declaring that the provisions in favour of children shall vest, yet in very guarded and plain language declared at the same time that any vesting of the children's provisions should be subject always to the discretionary powers which he gave to his trustees, and which continued in force until the trustees should divest themselves by payment. It is true a share of the residue vested in each child who survived his father. It is, however, equally true that the right which so vested was made subject to this condition, that the trustees in their discretion might, with a view to secure the child's maintenance, either postpone payment or restrict the right of fee to one of liferent, under such conditions and for such uses as they might prescribe. There was no vesting of an absolute right. There was absolute vesting, but of a right affected by a condition, which obviously suspended the effect of the vesting clause, as giving to any child an absolute right to the capital, or even the interest, for his own purposes, at least until payment—the right of each child being subject to the condition that the trustees were bound to exercise their discretion, and might postpone payment and give the interest only, or restrict the provision from a fee to that of liferent.

There is no difficulty in giving to each clause its full signification. There is nothing unusual in the vesting of a right subject to a condition which may seriously affect its extent or value, and which, so far as it goes, is therefore suspensive in its nature. This occurs daily in the case of money left by settlement, or reserved by marriage-contract in favour of the children of a marriage, but subject to a power of apportionment. The right to a share vests in each child at birth, but the vested right is liable to be most materially affected by the exercise of a power conferred or reserved, a power which operates so long as it may be exercised as a condition suspensive of any absolute right to an equal or definite share. So also, in the case of a fund left to children born or to be born of a marriage. The fee vests in a child on birth, but subject to the condition that it may be seriously affected by the existence of future children, a condition which is suspensive of vesting of an absolute right in any definite share so long as the possibility of future children is open. So, also, I think the right may vest subject to a contingency, the occurrence of which before the fund is paid over may resolve the right entirely. An illustration of this will be found in the case of *Snell and Others*, which occurred before me in the Outer House, March 20, 1877, 4 Rettie, 709.

I have said that the power might be exercised by the trustees at any time before payment, and I do not understand either of your Lordships whose opinions have now been delivered to hold if the question had arisen with Mr Chambers, and not with creditors who had done diligence, that the power could not have been effectually exercised by the trustees as it has been. It is clear that the clause authorising payment six months after the testator's death is not only expressly qualified, but, as the deed specially declares that the trustees shall be the sole and final Judges as to the time and manner of exercising the power and option conferred, it cannot be represented that the discretion must be exercised within the period of six months. And if it may be exercised beyond that period, it follows, I think, that it must be operative till payment has been actually made. There is no intermediate point. I take it, therefore, that Mr James Chambers could not himself have compelled payment of the fund now sued for. On his asking for payment the trustees would be entitled to say—"Your recent actings, or the position of yourself and your family, have led us to resolve to postpone payment or to restrict your right to one of liferent;" and if it be the fact, as stated by the defenders, that Mr Chambers, having

no settled profession, has in recent years been largely speculating in stocks, there would be a very good reason for the resolution. Again, an assignee, by intimating an assignation by Mr Chambers, could have no higher right, for there is nothing more clearly settled than that the assignee has no higher right than his cedent—*Assignatus utitur jure auctoris.* I am unable to see any sound principle for holding that a creditor using diligence is in any higher or better position. The conclusive answer to him, as to the assignee is:—"The right of your cedent or debtor which you seek to assert or attach is qualified by the provision that until payment the trustees have a power and duty to exercise the option which the deed confers."

The case is practically the same as that of a creditor attaching and seeking to vindicate a claim to an equal share of a fund which, though destined to children, is subject to a power of apportionment. The creditor in such a case who brings a furthcoming could surely never succeed in maintaining that because he had used his diligence the person vested with the power of apportionment could no longer exercise it. So here, I cannot understand why the use of arrestment and furthcoming should have the effect of converting a conditional right into an absolute right, or, in other words, have the effect of depriving the trustees of the power which the deed declares they shall be entitled to exercise at any time before payment, and as to which it is according to their duty that they shall exercise their discretion only when they are called on to make the payment.

It has been said that the right had vested, that a resolution or deed was necessary to divest Mr Chambers, and that this resolution or deed could have no effect after diligence or litiscontestation. The answer to that view, quite satisfactory and conclusive to my mind, is, that until payment the extent of the vested right is undetermined and suspended. Where the trustees exercise their power they do not resolve the right of the child, for the child has no complete or absolute right to the fund under the clause of vesting till he has secured actual payment. The conditions which the testator has affixed to the gift are truly of a suspensive and not a resolutive nature, for nothing short of payment can give an absolute right. The exercise of the trustees' discretion and power is therefore no infringement of the rule *post litem motam nihil innovandum.* The right, qualified in its nature, is affected by the diligence and the process in Court, so that its character cannot be altered to the prejudice of the creditor, but, being qualified by the trustees' powers, the exercise of these powers is no violation of the rule on which the creditors rely.

I presume it cannot be supposed that the right of the present pursuers is higher than that of a trustee in a sequestration, who, on behalf of all the creditors, has under the Bankrupt Statutes a title which has the strength of perhaps every completed form of diligence, and which of course is much stronger than a mere arrestment. The 102d section of the Bankrupt Act gives the trustee right to the whole moveable estate and effects of the bankrupt so far as attachable for debt, and the same effect as if actual delivery or possession had been obtained at that date, subject only to preferable securities; and the 108th section provides that the sequestration shall be equivalent to an arrestment in execution and decree of furthcoming. What, then, would have been the effect of sequestration of James Chambers' estate? According to the pursuers' view, I presume the whole fund would have been swept away. I can see no good ground for coming to this conclusion, for I see no reason for holding that a sequestration, which would give the trustee even larger rights than the pursuers can have,—for it would give right over the whole fund,—could deprive Dr Chambers trustees of the discretion and power which the truster committed to them as conditions affecting the provisions which he saw fit to make in favour of his son; and I think the case of *Trappes* v. *Meridith*, November 3, 1871, 10 Macph. 40, is a direct authority to that effect. The concluding words of the answer to the second query in that case, which was a remit by the Court of Chancery in England to the Court of Session, expresses precisely the view which I think would apply to the case of sequestration here, viz., "The trustee and creditors under the sequestration can take this right and interest of the bankrupt only *tantum et tale* as they stood vested in the bankrupt, and subject to all the conditions and qualifications legally attaching to it." I have further to observe, that it would be an anomaly that the powers and discretion of these trustees should be terminated according to the time and measure of a creditor's diligence. It results from the judgment now to be pronounced, that in order to defeat the powers in his father's settlement Mr James Chambers had merely to incur debt and allow decree to go against him, which could be used for arrestment and furthcoming, and that the trustees' discretionary powers would be affected to the extent of the amount of the debt and diligence, but to that extent only, so that if the present creditors' debt had been £1000, the remaining fund, of large amount, would still be subject to the power, while if the debt were large enough the whole fund might be swept away. I can only say I know of nothing analogous to this as the effect of diligence in reference to any other right. I know of no form of ordinary diligence which can give a creditor a higher or larger right in his debtor's estate than the debtor himself had, and the proposed judgment must in my opinion be unsound, because it admittedly leads to that result.

An argument was maintained for the pursuers on the terms of the clause giving the trustees the discretionary power. It was maintained that the second part of the clause did not truly authorise the restriction of a child's share to a liferent, because the language, taken literally, meant that the liferent and fee were to be given to the same person or persons, being children or grandchildren respectively. The clause is not skilfully framed, but I have no doubt that, according to its sound construction, and in accordance with the intention of the truster, the power conferred is that of restricting the beneficiary, who would obtain payment if the power were not exercised, to a liferent, and giving his children a fee. I think the expression "their lawful issue" in the clause means the lawful issue of the children or grandchildren whose rights are restricted under the power. Even, however, if there were anything in this argument, the fact of the trustees having resolved, as they at first did, to postpone payment,

and to pay the interest only to Mr Chambers for his aliment, would, in my opinion, prevent the pursuers from obtaining decree. This resolution was taken immediately on the demand for payment being made by the pursuers by the institution of the present action, and was judicially intimated in the defences in the answer to condescendence 3, and second plea in law. The deed of settlement does not require that the resolution to postpone payment and apply the interest for behoof of the children or grandchildren shall take the form of a regular deed, and it was, I think, enough that it was taken and intimated. It was, however, embodied in the deed of January 1877, before the cause was heard. For the reasons now so fully stated, however, I am of opinion that not only this deed, but the later deed of July 1877, by which the trustees restricted Mr Chambers' right to one of liferent and for his alimentary use only—executed before payment, and while the trustees, therefore, were still vested with the funds—was effectual to carry out their intention of preserving the fund, as Dr Chambers authorised them to do, for the maintenance of Mr Chambers and his family.

In the view I take of the case it is unnecessary to consider the question which has arisen in regard to the provision and declaration contained in the testing clause, but on that subject I agree in the views which have been expressed in the opinions already delivered. It is not maintained that the provisions of the Conveyancing Act of 1874 apply to this case so as to admit of any proof, so as to make this part of the deed probative, and thus possibly remove the difficulty that has arisen. The question must therefore be determined by the law as it stood before the date of that statute.

The first element of importance in this decision of this question is that it is well known that the usual and recognised practice in the execution of deeds is to fill up the testing clause after the signature of the granter has been adhibited to the deed. The deed is signed with a blank, and after it has been so signed by the granter and witnesses the testing clause is filled up, and this is done almost invariably without the granter even seeing what is filled in in the blank above his signature. In the next place, the testing clause may be so filled up after a long interval of time—at any time, indeed, before the deed is produced in judgment, and even although many years have elapsed. The blank is left for the testing clause, and the signature below it is an authority to complete the deed, even after an interval to which no limit has yet been fixed so far as the mere lapse of time is concerned. So, if it be lawful to insert an important provision into the testing clause, which shall be part of the probative deed vouched by the granter's signature, it comes to this, that after the granter has signed a deed its character may be materially changed many years after, and the granter's signature be used as the warrant for adding provisions which he never authorised, or for revoking or altering important provisions of the deed which he intended should have effect, with the result that the unauthorised interpolation is probative like the rest of the deed. That being so, and agreeing with Lord Deas that the proper function of the testing clause is to state the particulars required by the testing statutes in regard to the execution and authentication of the deed, I am of opinion that a substantive provision going beyond this is ineffectual, and consequently that the provision and declaration in the deed under consideration cannot be regarded as a part of the deed. I have only to add that it is an element which weighs with me also in the decision of this question that the statutes require that the writer of the deed shall be described by his name and designation, whereas in a case such as we have here the description of the writer of the deed has reference directly only to the part of it that precedes, and if a substantive part of the deed having no relation to the execution is filled in thereafter, the description of the writer of the deed does not seem to apply to this, as it is held to do to the ordinary and proper testing clause.

I agree with Lord Deas in thinking that this view of the invalidity of the provision in the testing clause does not conflict with the decisions which have been referred to, in which the effect of deeds signed by ladies as consenters was considered. The deeds in these cases bore the signatures of the ladies, who were not named in the deed at all, at least down to the testing clause. It was within the scope and purpose of the testing clause to give the particulars regarding the execution of the deeds by these ladies. It appears to me that the decisions in these cases proceeded upon the view that the particulars regarding the ladies' signatures to the deeds might properly be contained in the testing clause, the proper function of which is the execution and authentication of the deed, and that with these particulars there was then enough on the face of the deeds to show the purpose for which they were signed. It does not appear that it was held to be essential to the validity of these deeds that the clause should go on to state, as it did in both cases, that the deeds were signed in token of the parties' consent to the whole provisions of the deed. The signatures attested by the testing clause were, I think, held to have the full effect of such consent. If, however, the decisions were to be read otherwise, and as giving effect to the deeds as binding on the ladies as consenters only in respect of the words in the testing clause expressive of the purpose for which the deeds were signed by them, I should then hold that these cases must be taken as going to the utmost extent to which the function of the testing clause can be extended.

I must further add, in regard to a point which was touched upon by Lord Deas, that if in this case the declaration and provision contained in the testing clause could be accepted as an effectual part of the deed entitled to receive effect, I think it would be of no real importance or value in the question between the parties, for I think it was only an additional provision showing the testator's anxiety to do what he had already effectually done in giving the discretion and powers to his trustees which I have already fully considered, and which empowered them to restrict the right of the children to a liferent "on such conditions and under such restrictions and limitations and for such uses" as the trustees in their discretion might deem most expedient, which are the words of the deed.

I am of opinion that the defenders should be assoilzied from the conclusions of the action.

Lord President—I concur so entirely with all that Lord Deas has said on the question whether the provision inserted in the testing clause of this deed can be read as part of the deed, that I do not think it necessary to offer any remark.

On the other part of the case, as the Court is not agreed on the effect of the deed of settlement apart from that clause, I shall endeavour to explain what I think is its true construction, and what is the effect of the diligence used by the creditors. The leading provision as to the disposal of the residue is—"I appoint my trustees to hold, apply, pay, and convey the same, and the interest and other annual produce thereof, to and for behoof of the children of the marriage between me and Mrs Anne Kirkwood or Chambers, now deceased, equally among them, with the exception of my son the said William Chambers, and with and under the exceptions and modifications to be afterwards stated, payable in the case of such as are major six months after my decease." Now, I quite concede that the right given there in general terms is to be subject to the "exceptions and modifications" that follow, and is to be qualified by them; but it is material to observe that after this clause as to the disposal of the residue there occurs another clause, which is most important, and of whose meaning, taken by itself, there can be no dispute—"Declaring that the whole provisions in favour of my said children shall at my death vest in those surviving me." The meaning of that clause certainly is that the right of each child is to vest on the death of the testator, and but for what follows that vesting would be complete and absolute.

The sole question therefore is—How far is the effect of this clause taken off or modified by what follows? It would be strange if the effect of that modification were that in certain events the shares should not vest at death. That would simply undo what has immediately preceded, and that has not been done. But it is quite possible that a provision may vest and yet in certain events be subject to defeasance. An entailed estate, for instance, may vest fully in an heir of entail and yet be subject to defeasance. There have been instances of that in cases that have come before this Court; and if this is possible in the case of an entailed estate, it may certainly take place in consequence of provisions in a deed which were made with that purpose. If the clauses that follow are resolutive and not suspensive, vesting takes place as fully and completely as if there had been no conditions appended. The fallacy in the opinion of my brother Lord Shand, it appears to me, lies in this—that he has overlooked the distinction between resolutive and suspensive conditions. What is the effect of the conditions and exceptions that follow? As regards the first part of them, they are neither concerned with vesting nor divesting. They merely deal with the term at which the provisions are to be payable, and if there had been here a postponement of payment by the trustees in virtue of that power, the effect would be, not certainly to make this arrestment bad, but the right of the arresting creditors to make their arrestment effectual would have been postponed.

Passing over that clause, we come to a clause empowering the trustees to create new trustees or to constitute themselves new trustees, to provide that the beneficiaries are not to be entitled to more than the liferent of the provisions, and that the capital is to be settled on their children, "on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient." Now, I quite admit that by that deed which the trustees have executed they divested the legatee, when it was executed, of the right which had previously vested in him. This is therefore a resolutive condition; but till it was executed the fee of the residue remained vested in the beneficiary just as if no such condition existed. From that it follows that the fee existed in the legatee subject to the diligence of his creditors; and on that simple ground I hold that the deed executed by the trustees had no effect on the arrestment previously used by the creditors.

The Court pronounced the following interocutor:—

"The Lords having resumed consideration of the reclaiming note and heard counsel, Recal the interlocutor of Lord Young, of date 22d February 1877, reclaimed against: Repel the defences; and decern in the furthcoming in terms of the first alternative conclusion of the summons to the extent of the sums of £2294, 1s. 10d. and £4, 6s. therein mentioned: Find the pursuers entitled to expenses, and remit to the Auditor to tax the account thereof and report."

Counsel for Pursuers—M'Laren—Keir. Agents—Adamson & Gulland, W.S.

Counsel for Defenders—Balfour—Mackintosh. Agents—Watt & Anderson, S.S.C.

Friday, November 9.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MATSON *v.* WILLIAM BAIRD & COMPANY AND NORTH BRITISH RAILWAY COMPANY.

Reparation—Private Railway—Erection of Gates and Fences—Statutes 2 *and* 3 *Vict. cap.* 45; 5 *and* 6 *Vict. cap.* 55, *sec.* 9; *and Railways Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 69.

A horse having strayed from the public road by a level crossing, which was without gate or fence, upon a branch line of railway belonging to the proprietors of the ground, and from that at a distance of about half-a-mile having got upon the main line of the North British Railway Company, which, was likewise without gate or fence, and been killed—in an action of damages both the proprietors of the branch line and the railway company were assoilzied, on the grounds—(1) that under the Railway Statutes there was no obligation to erect gates and fences on private lines; (2) that at common law the public could not complain of the want of fencing at the junction with the main line; and (3) that the *locus* of the accident