and therefore I am of opinion that the pursuer's casualty is to be ascertained on the basis of the year's rent from Whitsunday 1874 to Whitsunday 1875.

The LORD JUSTICE-CLERK and LORD YOUNG and LORD RUTHERFURD CLARK concurred.

The Court recalled the Lord Ordinary's interlocutor, and gave decree in terms of the conclusions of the summons.

Counsel for Appellant — D.-F. Balfour, Q.C. — Constable. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for Respondent—H. Johnston—Craigie. Agents—Macpherson & Mackay, W.S.

Tuesday, March 1.

SECOND DIVISION.

[Lord Low, Ordinary.

JACKSON AND ANOTHER *v.* MACDIARMID AND OTHERS.

Married Woman—Separate Estate—Antenuptial Debt—Cash-Credit Bond—Cautionary Obligation.

A man died in 1872 leaving a trust-disposition and settlement under which his estate was divided among his children, a son and three daughters. One of his daughters married in 1875, and by antenuptial contract of marriage conveyed her whole estate to trustees. It was afterwards discovered that her father had died cautioner in a cash-credit bond which the bank called up in 1885. By arrangement with all the parties interested, her brother, for whose benefit the cash-credit bond had been originally granted, paid up half the amount due and obtained a new cash-credit bond for the remaining half with himself as principal, and his sister, with consent of her husband, and two other brothers-in-law as cautioners. There was no formal discharge of the original bond, but the new one proceeded upon the narrative that the previous one had been discharged. Subsequently upon the cautioners being called upon to pay, the brothers-in-law paid up the whole sum due, obtained an assignation of the bond from the bank, and raised an action of relief against the sister and her marriage-contract trustees for payment of her share of the debt, which was less than what she had received from her father's estate.

Held (Lord Young *diss.*) that the original debt due by her father had been discharged, and that the cautionary obligation entered into in 1885 by her as a married woman was not enforceable either against her or against her separate estate.

The late Peter Jamieson, merchant, Edinburgh, became bound as cautioner in a cash-credit bond to the National Bank for £5000, dated 16th and 18th October 1871, in order to start his son James Jamieson in business. The full sum was soon thereafter drawn out, and he died on January 21st, 1872, leaving this liability upon his estate. His trustees, after paying all the debts of which they had notice, divided his estate among his four children, James, Janet wife of Alexander Wylie, W.S., Jane now deceased, then wife of Joseph Jackson, surgeon, Bradford, and Margaret Turnbull, then unmarried, but now and since 1875 wife of Rev. Alexander MacDiarmid, Free Church minister, Grantown-on-Spey.

The share of each of the children amounted to £4717, and by the addition of certain heritable property specially destined to her, Mrs MacDiarmid received by succession to her father about £6000.

By antenuptial marriage-contract Mrs MacDiarmid conveyed to trustees all her estate, heritable and moveable, then belonging to her or which she might afterwards acquire during her marriage, including particularly the means and estate to which she had succeeded from her father. The first trust purpose was for payment of her debts due or contracted by her prior to her marriage. She was secured in a liferent of her estate, and a similar liferent was given to her husband if he survived, the fee going to her children.

In 1885 the bank demanded payment of the amount in the bond, but by arrangement James Jamieson, who was making certain business changes, paid up £2500 with the interest due, and a new cash-credit bond was granted to the bank for the remaining £2500 with himself as principal debtor and Alexander Wylie, Joseph Jackson, and Mrs MacDiarmid with consent of her husband as cautioners. The old bond was neither formally discharged nor assigned, but it was delivered up by the bank to Mr Wylie, and the new bond proceeded upon the narrative that the old one had been discharged.

John Jamieson was made notour bankrupt in 1890, and the National Bank called upon the three cautioners to pay the £2500 with interest. Mrs MacDiarmid refused to pay her share, and the whole sum was paid by Alexander Wylie and Joseph Jackson equally, to whom the bank assigned the cash-credit bond of 1885.

Alexander Wylie and Joseph Jackson thereupon brought an action against Mrs MacDiarmid, her husband, as her executor and for his interest, and her marriage contract trustees, to have it found and declared that Mrs MacDiarmid and her separate estate were bound to free and relieve the pursuers of the obligations undertaken by them for her and for the benefit of her estate, and of the payments to the amount of £100, 6s. 11d. made by the pursuers equally between them for her and for the benefit of her estate with interest thereon, and to have Mrs MacDiarmid and her marriage-contract trustees decerned and ordained to make payment to the pursuers

equally between them of the said sum with interest thereon.

The pursuers averred—"The defender Mrs MacDiarmid's share of her father's estate was subject to the burden of payment of this debt equally in a question with her sisters, and she became liable for payment of this debt when she accepted payment of her share and discharged the trustees. . . . The original bond could in 1885 have been put in force against Mrs MacDiarmid and her estate for the half then remaining unpaid, with relief as accords. She was saved immediate payment of this half by the interposition of the pursuers, and her concurrence with them in a new bond. . . . The pursuers, along with the defenders Mrs MacDiarmid and her husband, recognised their liability to the bank, and obtained delay, the pursuers as acting for the respective wives, and Mrs MacDiarmid acting for herself with the concurrence of her husband. . . . By the new bond the said defender acknowledged liability for the said £2500 remaining unpaid of the original debt of £5000 owing by her father and his estate. . . . The defender Mrs MacDiarmid and her estate took benefit by the pursuers' interposition. Neither she nor they desired or intended that she should obtain this benefit gratuitously, or that her just share of the family liability as at her father's death should be transferred to and borne by the pursuers without recourse against her and her estate. The pursuers never in any way discharged this right of recourse for her share." . . .

Mr and Mrs MacDiarmid explained that they "were pressed to sign the bond by the said Alexander Wylie in ignorance of the real state of affairs, and without having an opportunity of consulting an independent agent. The personal obligation granted by the defender Mrs MacDiarmid, as a married woman, is null, and cannot be enforced, and the pursuers have therefore no right of relief against her."

The marriage-contract trustees explained —"The new bond, dated in December 1885, bears to be and was granted by Mrs MacDiarmid and the other granters, not as the representatives of Peter Jamieson, but as individuals. . . . The obligation against Peter Jamieson contained in the original cash-credit bond was by said new bond, and in respect of the consideration therein set forth, extinguished and discharged, and could not thereafter be enforced against his representatives. . . . In signing the said new bond Mrs MacDiarmid neither recognised nor incurred any such liability as is here stated."

The pursuers pleaded—"(1) The defender Mrs MacDiarmid and her separate estate being liable for and burdened with the sums of principal and interest now sued for, and the pursuers having advanced the same for the benefit of her and her estate, they are entitled to be reimbursed the same as concluded for. (2) The pursuers having paid the defender Mrs MacDiarmid's share under her bond along with them to the bank, they are entitled to repayment of the same from her and her estate. (3) The pursuers having incurred obligations and made payments for a debt of the defender Mrs MacDiarmid and her estate contracted before and continued by the pursuers' interposition for her benefit after her marriage, they are entitled to decree against her and her marriage-contract trustees, in terms of the conclusions of the summons, with expenses. (4) The liability of the defender Mrs MacDiarmid and her estate in the sum paid by the pursuers, and now sued for, being established by the writs libelled on, independent of the personal obligation by her in the second bond, the defences are irrelevant, and the pursuers are entitled to decree."

The defenders Mr and Mrs M'Diarmid pleaded—"(1) The pursuers' averments, so far as directed against these defenders, are not relevant or sufficient to support the conclusions of the summons. (2) The cash-credit bond for £5000 having been discharged by novation, Mrs MacDiarmid, as one of her father's representatives or otherwise, is not liable in respect of his obligations thereunder. (3) The defender Mrs MacDiarmid having been a married woman at the date of the said bond for £2500, she is not liable to implement the obligations contained therein."

The defenders the marriage-contract trustees pleaded—"(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons as against these defenders. (2) These defenders ought to be assoilzied, with expenses, in respect that the estate under their charge as trustees foresaid is not liable in payment of the sum sued for, nor any part thereof. (3) The cash-credit bond for £5000 having been discharged by novation, Mrs MacDiarmid, as one of her father's representatives, is not liable in respect of his obligation thereunder. (4) Mrs MacDiarmid's obligation under the cash-credit bond of £2500 being a new obligation contracted after the date of her said marriage-contract, these defenders are neither bound nor entitled to make payment to the pursuers as concluded for."

Upon 14th November 1891 the Lord Ordinary (Low) sustained the 1st and 3rd pleas-in-law for the defenders Mr and Mrs MacDiarmid, and the first four pleas-in-law for the defenders the marriage-contract trustees, and assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—If in 1885, before the bond of cash-credit to which the pursuers and the defenders Mr and Mrs MacDiarmid were parties was granted, the bank had demanded payment from Mrs MacDiarmid and her marriage-contract trustees of the sum for which Mr Peter Jamieson if alive would have been liable under the cash-credit bond of 1871, I do not think that either Mrs MacDiarmid or her trustees could have resisted the claim. The claim when it emerged was a good claim against Mr Peter Jamieson's estate, whether in the hands of his testamentary trustees before division or in the hands of beneficiaries after division. Mrs MacDiarmid would have been liable in so far as she was *lucrata* by succession to her father, and

her trustees, apart from the clause in the contract obliging them to pay her antenuptial debts would, I apprehend, have been liable to the same extent, because they as her assignees were only entitled to the amount to which she had right under her father's settlement, and the result of a debt due by her father's estate, emerging after division among the beneficiaries, would simply have been to show that she or her trustees in her right had received more than they were entitled to.

"The claim of the bank under the first bond was not, however, met by payment, but a new bond was substituted for the old bond, and in my opinion the obligation under the old bond was discharged. It is true that there was no formal or separate discharge of the old bond, but the new bond narrates, that 'in respect of the cash-credit hereinafter written, the said cash-credit of £5000 has been discharged,' and the old bond was delivered over to Mr Wylie, one of the obligants under the new bond. It thus appears to be clear that so far as the creditor—the bank—was concerned the obligation under the old bond was satisfied and extinguished.

"It was only, however, in respect of the obligation under the old bond that any liability could attach to the funds in the hands of Mrs MacDiarmid's trustees. The case would not, I think, be different, if instead of the claim being under a cautionary obligation undertaken by Mr Peter Jamieson, it had been for a debt incurred by him during his lifetime, and which his trustees had omitted to pay before dividing the estate. If in such a case a third party had paid the debt the creditor could, of course, have had no claim against Mrs MacDiarmid's trustees, and the third party who paid the debt could have had no claim unless he had obtained an assignation of the debt and claimed as in the creditor's right. Here the pursuers hold no assignation of Mr Peter Jamieson's obligation, and they do not sue as in right of the creditor. They simply say that they have paid or satisfied a debt which the trustees might have been called upon to pay, and that therefore the trustees are bound to relieve them. I do not think that there is any warrant in law for such a claim, and therefore I shall assoilzie Mrs MacDiarmid's trustees.

"The claim, however, is also made against Mrs MacDiarmid herself, and it is necessary to consider what her position is. She and her husband as consenter were parties to the bond of cash-credit of 1885. The pursuers have paid the amount in the bond and have obtained an assignation, and they now claim payment from Mrs MacDiarmid of her share. Mrs MacDiarmid pleads, however, that having been a married woman at the date of the bond her obligation, even although granted with the consent of her husband, is null. I think that the question is, whether Mrs MacDiarmid's bond was enforceable in a question with the bank, because if it was not, the pursuers cannot claim either as assignees of the bank or on the ground that Mrs MacDiarmid was bound to the bank along with them as co-cautioner. It was conceded that the husband's consent did not make the bond good if it would otherwise have been null, but it was contended that the object of the bond being to postpone payment of a debt which otherwise might have been enforced against Mrs MacDiarmid's estate, in so far as derived from her father, the obligation must be held to be *in rem versum* of her, and therefore enforceable. It appears, however, that to avoid a claim on the part of the bank and immediate payment, was not the sole object of granting the new bond. The legitimate inference from the narrative of the transaction given by the pursuers seems to me to be that one object of granting the new bond was to enable Mr James Jamieson to acquire sole right to the business which he had previously carried on in partnership with Mr Jenkinson junior. In 1871 Mr James Jamieson had entered into partnership with Mr Jenkinson junior, and they obtained for the purposes of their business a cash-credit from the bank for £5000, with Mr Peter Jamieson and Mr Jenkinson senior as cautioners. In 1885 Mr James Jamieson paid £2500 to the bank, and relieved the Jenkinsons of their obligation under the cash-credit bond. The new bond of cash-credit for £2500 was then granted to enable Mr James Jamieson to continue the business on his own account. The circumstances point to a new transaction altogether, and not merely to the substitution of a new obligation for an old one, with the view of getting rid of an immediate claim. Very likely Mrs MacDiarmid thought that if she refused to become a party to the new bond, she might have to pay something to the bank, while if she became a party to the new bond, and her brother prospered in business, she might never be called upon to fulfil her obligation. A cautionary obligation, however, undertaken in such circumstances, is not in my opinion a transaction *in rem versum* of Mrs MacDiarmid, of a kind which renders a personal obligation of a married woman enforceable. The present case seems to me to be ruled by the decision in *Ewing* v. *Lady Strathmore's Trustees*, 9 S. 558. There Lady Strathmore had, prior to her marriage, granted a bill. After her marriage she granted a renewal bill for the sum in the first bill, with interest and expenses, the first bill being discharged. It was held that Ewing could not claim on the first bill, it being discharged, and that the second bill being granted after marriage could create no obligation against Lady Strathmore. I think that all the arguments which were adduced for the pursuers in the present case were open to Ewing in his claim against Lady Strathmore's trustees, and there is not, to my mind, any such difference between the circumstances of the two cases as to render the principle which was applied in the one inapplicable to the other. It is important to remember that the claim of the pursuers against Mrs MacDiarmid is rested entirely upon the second bond. They

hold an assignation to that bond, but they have no assignation to the first bond, or to the rights of the bank thereunder, against Mr Peter Jamieson and his representatives. If they had held such an assignation the result might have been different, but I must deal with the case as it stands."

The pursuers reclaimed, and argued—This was a debt of the late Peter Jamieson. His beneficiaries could only take their legacies subject to payment of it—Stair, iii. 8, 70; *Grierson* v. *Wallace*, May 16, 1821, 1 S. 13; *Poole* v. *Anderson*, February 22, 1834, 12 S. 481. It might result in a hardship to the beneficiaries, but the bank was under no obligation to remind them of the existing cash-credit bond at the time of Mr Jamieson's death—*British Linen Company* v. *Monteith*, February 12, 1858, 20 D. 557. Mrs MacDiarmid was undoubtedly liable as her father's representative to pay the debt in the original bond out of her separate estate. The bond of 1885 was in reality nothing but a continuation of the original bond, and Mrs MacDiarmid's liability continued — *Bruce* v. *Paterson*, January 23, 1678, M. 5965; *Nairn* v. *Mercer*, November 17, 1785, M. 5860; Fraser's Husband and Wife, i. pp. 535-538. There was no novation—*Society of Journeymen Dyers*, February 11, 1802, Hume 244; *Stevenson* v. *Campbell*, February 4, 1806, Hume 247. In 1885 the bank could have sued Mrs MacDiarmid, and it was unnecessary for the co-cautioners to obtain an assignation of the bond of 1871 so as to operate their relief—Ersk. iii. 3, 68. If necessary the pursuers would request an opportunity of getting an assignation of that bond now. Even if the bond of 1885 were considered a new bond, it was *in rem versum* of the wife, as it delayed the enforcement of payment, and therefore was valid against her separate estate.

Argued for the trustees—(1) It was really unnecessary to plead novation, for the bond of 1871 had been expressly discharged by the terms of the later bond. (2) The debt here sued for was not an antenuptial debt, but one arising, if at all, entirely out of the bond of 1885. For that Mrs MacDiarmid's separate estate was not liable. The case of *Nairn* was inapplicable. Here it was a mere accident that the debt of Mr Peter Jamieson was for a cautionary obligation. The pursuers could not benefit in any way from that fact. They had just paid an outstanding debt of the deceased. (3) If the debt could be held to arise under the prior bond, the pursuers had got no assignation to that, nor could the bank give them one, for it had discharged that bond and could not itself sue upon it.

Argued for Mrs MacDiarmid — She adopted the arguments for the trustees. Further, she had given her name to the bond of 1885 for what it was worth, but as a married woman she could not legally be sued under that bond. No exception arose on the ground that it was *in rem versum* of her estate. It had been granted to benefit her brother, not to stave off diligence against her estate—*Ewing* v. *Lady Strathmore's Trustees* (reported as *Balfour and Others*, March 5, 1831, 9 S. 558).

At advising—

LORD JUSTICE-CLERK—The question in this case is, whether the marriage-contract trustees of Mr and Mrs MacDiarmid are, or separately Mrs MacDiarmid as an individual is, liable to pay to two co-obligants in a cash-credit bond for £2500 the proportion for which she is bound in the bond. The history of the case is that Mr Peter Jamieson, a good many years ago had a cash-credit bond in the bank for £5000, and in 1885 an arrangement was made by which a part of the money—£2500—was paid up. But a new bond was entered into by Mrs MacDiarmid and the two pursuers for £2500, and the question is, in the first place, whether under that cash-credit bond the trustees of Mrs MacDiarmid can be called upon out of the trust-estate in their hands to pay the proportion effeiring to Mrs MacDiarmid.

Now it is to be noticed that the original bond for £5000, for her proportion of which, as succeeding to Mr Jamieson, Mrs MacDiarmid would have been liable, and which might have been exacted from her share before the estate was handed over to the trustees, if it was sufficient to meet it or to such extent if it were not, was though not discharged in actual form delivered up by the creditor the bank, and the obligation under it was extinguished, the creditor the bank being satisfied that the time had come for giving up the bond. In these circumstances I agree with the Lord Ordinary, in the first place, that there can be no claim against Mrs MacDiarmid's marriage-contract trustees in regard to the new cash-credit bond for £2500.

The pursuers also claim against Mrs MacDiarmid. They say:—"We were called upon to pay up the sum in that bond for £2500, we have done so, and Mrs MacDiarmid must now pay her share." The pursuers have no assignation of the bond. They do not sue her as in right of the creditor; all they say is that they have been called upon to pay up a certain sum in a cash-credit bond, that they have paid it up, and that Mrs MacDiarmid whose name is in the bond must pay up her share. That really comes to the simple question, whether supposing they had not paid up the bank could have called upon her to pay up.

After considering the matter I have come to the conclusion that the Lord Ordinary is right in holding that the bank could not—that Mrs MacDiarmid was not in a position, being a married woman, to incur this personal obligation.

We must, accordingly, I think, adhere to the interlocutor of the Lord Ordinary.

LORD YOUNG—Mrs MacDiarmid's share of her father's succession—her father died in 1872—amounted, we are informed upon record—there is no evidence—to about £6000. She married in 1875, and the money being still extant undiminished, she put it into the hands of her marriage trus-

tees under an antenuptial contract for her and her husband in succession in liferent, and her children in fee. In respect of this succession of hers, and only in respect of it and within the amount of it, she was liable for a debt of her deceased father from whom she got it. The amount of that debt was £5000, and the creditor therein was the National Bank.

We are informed that in 1885 the debt was brought formally as an existing obligation, of which payment was then required by the bank, before the beneficiaries on Mr Jamieson's (the father's) estate—that is, before Mrs MacDiarmid and her husband, and her two sisters and their husbands. In that year the bank demanded payment of this debt of £5000, and she and her husband, as her curator, were required to consider a proposal whereby, on the one hand, the amount of the debt was to be reduced to £2500, and on the other hand two individuals, or rather one individual and the estate of the other, who were bound as joint obligants along with her, were to be discharged. I shall immediately notice, so far as I think necessary, the details of the proposal, but in the meantime I point out that it regarded a then existing liability attaching to Mrs MacDiarmid in respect, and only in respect of, her separate estate inherited from her father. And the primary, most general, and most interesting question in the case seems to be, whether or not a married woman with a separate estate, and who in respect of it is under a certain liability which is enforceable against it or out of it, can with the consent of her husband lawfully enter into a transaction respecting that liability of hers.

That a particular transaction may be impeached as unconscionable or inequitable I assume, but the question which I now propound is only this—whether any transaction whatever with a married woman on such a matter is impossible according to the law of Scotland. That question necessarily implies the existing relation of debtor and creditor between the married woman and the party proposing or willing to transact with her, and I cannot assent to the proposition that the law prohibits a married woman from transacting with her creditor upon any terms, however just and however advantageous to her and to her estate, which she holds subject to that creditor's debt. Nor does it signify in my opinion that the transaction proposed involves, whether of necessity or mere convenience in carrying it out, the granting of a new obligation by her to her creditor. Further, I think it is immaterial to the question of her legal ability to transact, that her creditor had other debtors bound jointly with her in the same debt, and that they also were parties to the transaction.

Now, it is the Lord Ordinary's opinion, and assented to by all the parties, that in 1885 Mrs MacDiarmid was debtor to the National Bank for £5000 in respect of the cash-credit bond of 1871, to which her father was a party, and that her separate estate was subject to be attached in payment. On the other hand, she was, as matters stood, entitled to demand total relief from each of James Jamieson her brother and William Jenkinson junior, relief to the extent of one-half from William Jenkinson senior, or rather from his representatives for he was dead in 1885, and a rateable proportion from each of her two sisters who were in exactly the same position as herself.

Now, with no evidence before us and no averment, I am not in a position to estimate what was the value of that right of relief against the Jenkinsons. It may have been more or less valuable or altogether worthless. I cannot tell; I have no means of knowing.

Such exactly was her position when the transaction immediately in question was proposed. The proposal was that Jenkinson senior's estate and Jenkinson junior should pay to the creditor £2500, being one-half of the debt, and be discharged from the obligation. Whether they were good for that without aid from others I cannot tell, or whether they were good for more, or whether that claim of relief against them for any part of the other half would have been worth a farthing I cannot tell. The proposal was that the Jenkinsons should pay £2500, being one-half of the debt, and be discharged of their obligation, and that the remaining half should stand as a debt of James Jamieson and of Mrs MacDiarmid, and her two sisters, or their husbands, who were willing to be bound for their wives.

It is I think plainly immaterial with whom the proposal originated, or what were the motives for it. It seems just and reasonable enough on the face of it. It clearly could not be effected without being submitted to them, and intelligently consented to by them and by every person interested, and primarily by the creditor (the National Bank), who was demanding payment of the whole £5000, and had admittedly a good claim against all the obligants in the bond for the whole. That the proposal was submitted and intelligently assented to by the bank is clear enough. They were willing to take payment of one-half of the debt and to discharge the Jenkinsons, although the Jenkinsons were liable to them for the whole. But they were willing, as a matter of prudence, to take payment of one-half of the debt and discharge the Jenkinsons, and to take the members of the Jamieson family as the only debtors for the other half.

The creditor on the debt being thus content to assent to the proposal, were the debtors also content and in a position validly to signify that they were? That they did each and all of them in fact signify consent is undoubted and admitted. Whether or not Mrs MacDiarmid could validly do so is the only question. It may, I think, be assumed that the state of matters as existing when the proposal was submitted could not be changed, whether to her prejudice or benefit, without her consent and that of her husband; but the proposition now urged is that she and her husband were not at liberty to consider any proposal for a change, and must of

legal necessity reject any such proposal, however beneficial in their opinion and in fact, so that their assent to any change must be set aside as illegal and invalid, That is not according to my view. Confining myself to the question of Mrs MacDiarmid and her husband's power to act in that matter, I am of opinion that they were at liberty to consider any proposal for a modification or change of a subsisting debt upon her and her estate, and to assent to it or not as they saw fit. This, however, is subject also to the operation of the rules of law and equity, according to which a married woman may repudiate an obligation into which, even with her husband's consent, she has been misled to her prejudice.

I have said enough to indicate that in my opinion, differing from that which your Lordship has expressed, the validity of Mrs MacDiarmid's obligation by the bond of 1885 cannot be considered irrespective of the obligation which was clearly and admittedly upon her in the bond of 1871, if, as I have pointed out, that prior and immediately enforceable obligation was what she and her husband were dealing with and arranging, when they subscribed the bond of 1885. What they had to consider, and I have no doubt did consider, was whether it was reasonable and for her advantage to substitute the one obligation for the other. To represent the two as unconnected, and to take the last as a voluntary, gratuitous, cautionary obligation by a married woman is, I think, unreasonable, and indeed contrary to the fact.

In the interest of Mrs MacDiarmid and her sisters it may, or not, have been judicious and prudent to consent to the discharge of the Jenkinsons on payment of one-half only of the existing debt, in consideration of the consequent restriction of their own liability to the other half. That was the question which they and their husbands, charged with their interests, had to consider and make up their minds upon. They did so, and I venture to ask, what reason have we to affirm that they did not judge and act sensibly and prudently in the matter?

In the account of the bank under the old bond £5000 stood at the debit of James Jamieson and William Jenkinson. Under the new arrangement, with the new bond substituted for the old, one moiety or £2500 was discharged, while the other moiety was put to the debit of James Jamieson alone, with Mrs MacDiarmid and her sisters and their husbands as cautioners. We are told —I have already observed that we have no evidence in the case at all—but we are told that "The said James Jamieson never made any payments to account of the said £2500 remaining outstanding from the date of the new cash-credit bond in December 1885, nor of the interest accruing thereon. This sum was merely the half of the original credit of £2500 for which Peter Jamieson's estate was liable, transferred to James Jamieson's name on the continued security of the beneficiaries on his father's estate, including Mrs MacDiarmid for her share in that estate. James Jamieson left this £2500 standing overdrawn, as it had always stood, after as before the date of the new bond."

I think it will appear sufficiently from what I have said that what was proposed, considered, and assented to was merely the discharge of the Jenkinsons upon payment of one-half of the debt by them. The granting of a new obligation or a new bond had really no effect in the matter. If Mrs MacDiarmid and her husband, and the other sisters and their husbands, had simply signified their assent to the discharge by the bank to the Jenkinsons upon payment of £2500, thereby giving up their claim of relief against them, and accepting the limitation of their own obligation to the other £2500, everything would have happened exactly as it did. The £2500 would have stood undiminished at the debit of the account, and the cautioners would have been liable for it, and could not have pleaded the discharge of the Jenkinsons to which they had assented as any ground for relieving them, as without such consent they might, upon the rule of law that a creditor in a debt cannot discharge any of the cautioners without the consent of the others, or if he does he will liberate the others as well as those whom he has consented to discharge. But everything would have been exactly the same without any new bond at all upon the liberation of the Jenkinsons upon paying up one-half of the debt being consented to. The amount of the debt would have been the same—£2500 paid up, the remaining £2500 standing, not one whit of difference being made by its being put to the debit of James Jamieson instead of James Jamieson and William Jenkinson.

In the absence of evidence I am unable to say that that arrangement was detrimental to the interests of Mrs MacDiarmid. Her interests and those of her sisters were identical, and in the absence of anything to the contrary, I feel constrained to attach importance to the judgment of all the parties at the time, on which they certainly acted. Under the arrangement, assuming its validity, Mrs MacDiarmid's share of the ultimate loss is about £800. Can we affirm judicially that she was misled into it to her injury, and that her loss would have been less or nil had the proposal of 1885, which she and her husband assented to, been rejected? Her liability is measured, as the Lord Ordinary points out, by the amount of what she got from her father. But her liability would remain whatever she did with it — although she spent it. Her liability for the debt of her father by the bond of 1871 is measured by the amount of her succession to him. She put the amount of her succession into the hands of marriage trustees. Now the question whether or not the pursuers have a direct claim against the capital of the fund in the hands of the marriage-trustees is, I think, a subsidiary question, and it may be a question of no interest whatever. I do not know what amount of separate estate Mrs MacDiarmid may have. I have no information. Of

course if there are no funds recoverable the pursuers will take nothing by any decree, but if she has estate to meet the claim, irrespective of the funds in the hands of the marriage-trustees, that will certainly be liable and may be attached.

She has been drawing the liferent of this £6000, we are told, for the last seventeen years. I do not know whether that has been accumulating or not. I have no means of knowing, very likely it has, or to a considerable extent. She continues to draw the liferent that is the income of this £6000, termly, and will as long as she lives, and her husband thereafter through her, that is to say, through her succession to her father, and through her making a disposition of what she succeeded to, will also enjoy it if he survives her. I should think that if there is separate estate, the protection of the children's interest in these funds in the hands of the marriage trustees ought to have effect.

I said it was a subsidiary question, and possibly one of no interest whatever, whether there is a direct claim upon the capital, for the trustees would be entitled to retain the income for the future until this £800 was made up. It would be a substantial benefit, I assume, to the pursuer to have decree establishing her liability and their liability if there is any separate estate, and that would be quite consistent with the protection of these funds in the hands of the marriage trustees so far as the children are concerned.

Liability of this sort is not to be got quit of by putting the possession of the fund in the hands of marriage trustees, any more than it is got quit of by spending it. It would not have been affected in the least degree, although the remedy might have been diminished, if it had been spent upon her trousseau or spent in any other way. She is still liable to the extent of her succession to her father, and her liability in respect of that is what she arranged by the arrangement and transaction leading to the bond of 1885.

Your Lordship has said—and I entirely agree with it—that the question is the same as if the bank had been demanding payment. The bank has been paid. The other two sisters were married to gentlemen who were too honest and honourable not to stand by the obligation under which they came. Accordingly they have paid the bank. It has been observed that there is a technical plea open to Mrs MacDiarmid from the form of the obligation, viz., that it is by her with her husband's consent, which is not open to them, because they came forward directly and undertook the obligation in respect of their wives' succession to their father. But if they (the pursuers) had not paid, the bank would have been the claimants, and supposing the bank claimed the £800 from Mrs MacDiarmid and her husband under the obligation in that bond, could they say they never meant to implement it, that they did not mean the bank to discharge the Jenkinsons as with their consent, and in reliance upon the obligation which they expressed in that bond which they handed to the bank, and when the bank came to demand payment upon that bond upon which they desired the bank to rely, could they say—"Oh! Mrs MacDiarmid is a married woman and is not liable, we never meant to pay, we intended to deceive you;" or if that was not their intention at the time, what has occurred to justify that contention now?

I think the case would have been all the same had the bank been making a demand upon that bond which was given to them containing her and her husband's consent to the discharge of the Jenkinsons on the footing that they would not be liable for the other half of the debt, notwithstanding there was no relief against the Jenkinsons as there was before. I think that defence to an action at the bank's instance demanding payment would have been bad.

It only makes the case more heartless that Mrs MacDiarmid and her husband are proposing to throw the whole liability upon the other two sisters and their husbands. I could not express my opinion of that conduct without using strong language.

My opinion is that this bond is enforceable according to its terms, as being substituted in modification of a prior and admitted obligation for a larger amount, and that the Lord Ordinary's interlocutor ought therefore to be altered.

LORD RUTHERFURD CLARK—I agree with the Lord Ordinary.

LORD TRAYNER—If I could distinguish in this case between what is to be considered the equity of the pursuers' claim, and the legal rules which seem to me to determine the rights of the pursuers, I should have a good deal of sympathy with the claim the pursuers put forward against the defenders. But I do not think I am entitled to proceed upon equity when the rights of parties are clearly determined by the strict rules of law. I am therefore of opinion that the Lord Ordinary's judgment, which I think is according to law, should be affirmed.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Vary Campbell — Cooper. Agents — Wylie, Robertson, & Rankin, W.S.

Counsel for the Respondents Mr and Mrs MacDiarmid — Guthrie — Crole. Agents— R. R. Simpson & Lawson, W.S.

Counsel for the Respondents, Marriage-Contract Trustees—The Lord Advocate—Dundas. Agent—John T. Mowbray, W.S.