I am of opinion with your Lordships that the sum assessable is the sum appearing in the books of the bank as having been remitted to this country and placed to the credit of the trust.

LORD KINNEAR—I am clearly of the same opinion. The trustees say that the average annual profits received in this country from a certain tea estate in India amount to £1684, 2s. 2d. Now, the statute says that the duty to be charged in respect of such property in the Colonies or in Her Majesty's possessions or dominions out of the United Kingdom is to be computed on a sum not less than the full amount of the actual sums annually received in the United Kingdom by remittances from Her Majesty's Colonies or dominions outside the United Kingdom. That is the case we have to consider. It is to be computed on a sum not less than the full amount received in this country on remittance from India; and then it goes on to say that in charging the duty the sum is to be computed on an average of the three preceding years, as directed in the first case, without any deduction other than hereinbefore allowed in such case. Now, there is no deduction or abatement expressly allowed in the case there referred to, but the statute prohibits the deduction of any disbursements or expenses whatever, not being money wholly or exclusively laid out or expended for the purpose of such trade or concern; and therefore the only question we have to consider is whether the Lord Advocate is not quite right in saying that the deduction claimed here is not a deduction of money laid out or expended for the purpose of the trade or concern at all, but merely a deduction of the cost of distributing nett income after it has come into this country. I am of opinion it does come into this category, and therefore I think the decision should be reversed.

The Court reversed the determination of the Commissioners and found that the deduction was not admissible.

Counsel for the Inland Revenue—Lord Adv. Balfour, Q.C.—Sol.-Gen. Shaw, Q.C. —A. J. Young. Agent—Solicitor of Inland Revenue.

Counsel for the Trustees — D.-F. Sir Charles Pearson, Q.C. — Clark. Agents —Adam & Sang, W.S.

Thursday, November 29.

FIRST DIVISION.

[Lord Low, Ordinary.

SMITH *v.* STUART.

Jurisdiction—Ownership of Heritage in Scotland—Trust—Unrecorded Trust Purposes—Right of Reversion.

By antenuptial marriage-contract a proprietor of heritable subjects in Scotland conveyed them to trustees, who were directed to hold the subjects conveyed for the liferent use of the truster's wife, and, in case of his surviving her, of the truster. Subject to these liferents the subjects were to be held for the truster's children, their rights being contingent upon their surviving the liferenters and attaining majority. In terms of a direction contained in the contract, the only portions of it which were recorded in the register of sasines were the disposition to trustees and the description of the subjects conveyed. The truster subsequently became a domiciled Englishman, and an action having been raised against him in the Court of Session, he pleaded no jurisdiction.

Held that he was subject to the jurisdiction of the Scots Courts, in respect that, as the purposes of the marriage-contract conveyance had not been recorded, he had never been feudally divested of the heritable estate thereby disponed.

Held further (by Lord M'Laren, *approving* judgment of Lord Low) that, the interests of the children under the marriage contract being contingent, the defender retained a radical right in the subjects conveyed, which was sufficient to found jurisdiction against him.

On 25th June 1878 Peter Stuart entered into an antenuptial marriage-contract with Miss Jane Eliza Hanson, whereby he conveyed certain heritable subjects in Edinburgh and Leith, of which he was proprietor, to trustees, of whom he himself was one, for, *inter alia*, the following purposes—"In the second place, the said trustees shall hold said subjects . . . for the sole liferent use and behoof of the said Jane Eliza Hanson, as from and after the date of said marriage exclusive of the *jus mariti*, right of administration, courtesy and other rights of the said Peter Stuart . . . but as an alimentary provision to the said Jane Eliza Hanson. In the third place, the said trustees shall, in the event of the said Peter Stuart surviving the said Jane Eliza Hanson, hold said subjects for behoof of the said Peter Stuart so long as he shall survive, for his liferent use allenarly. . . . In the fifth place, the said trustees shall hold the whole of the means and estate hereinbefore conveyed to them . . . for the whole children already born to the said Peter Stuart by his former marriage, and any child or children that

may be born of the intended marriage, to be divided among them equally, share and share alike . . . and declaring that the shares of the children shall not be payable if sons till they attain majority, and if daughters till they attain majority or are married, whichever of these events shall first happen, and that said shares shall not vest until they become payable; and declaring further that the shares of any child predeceasing without lawful issue the term of payment, shall accrue to the surviving children." Power of sale was given to the trustees, subject to the approval of the liferentrix in the event of her surviving her husband.

There was a direction in the deed that the first part of it containing the disposition to the trustees and the description of the subjects should be recorded. The trustees took infeftment under that direction, and were thus infeft in the subjects in trust for purposes to be specified, which were in fact not specified in their infeftment.

Subsequently to the granting of this deed Peter Stuart left Scotland and went to reside in England, which became his permanent home.

On 9th April 1894 James Smith, trustee on the estate of Henry M'Intosh, raised an action against Peter Stuart in the Court of Session, to recover the sum of £334, 5s. 9d., being the balance alleged to be still due of a sum lent to the defender by Henry M'Intosh in the year 1883.

The pursuer averred that the defender was the owner of heritage in Scotland, and was therefore subject to the jurisdiction of the Scots Courts.

The defender averred that he was a domiciled Englishman, and that he had no longer any interest in heritage in Scotland.

He pleaded—"(3) No jurisdiction."

On 20th July 1894 the Lord Ordinary (Low) repelled this plea and appointed the cause to be enrolled for further procedure.

"*Opinion.* — The question which was argued in this case was whether the defender is subject to the jurisdiction of the Court. That question depends upon whether he has a sufficient right to heritable property in Scotland to confer jurisdiction.

"Admittedly the defender had at one time considerable heritable property in Scotland, but he conveyed part of it to trustees under his antenuptial marriage-contract in 1878, and he avers that in recent years he has sold the remainder.

"In regard to the latter properties the defender produced the titles which he had granted to the purchasers, and *ex facie* of them he is completely divested. But the pursuer had not seen these titles until they were produced at the bar, and if the question of jurisdiction depended upon whether or not the defender was truly divested of these properties, I could not dispose of it at this stage.

"The pursuer, however, contends that the defender has a sufficient interest in the heritable properties conveyed to his marriage-contract trustees to found jurisdiction—[*His Lordship then narrated the purposes of the marriage-contract*].

"I do not think that the fact that the defender is infeft as one of the trustees in the property has any effect in the way of founding jurisdiction in this case, and the question depends upon whether he has a sufficient beneficial interest in the property held by the trustees. The defender argued that he had not, because, in the first place, he had reserved no rights to himself in the property, except an alimentary liferent in the event of his wife predeceasing him; and, in the second place, the right which he has under the trust is not a right in the heritable property conveyed to the trustees, but only to the free income, in a certain event, of a mixed estate.

"It is settled that, for the purpose of founding jurisdiction, the value of the property, or of the right in the property, is of no moment. Nor is the character of the title of any moment. The one thing essential is that the party should have a right in or to immoveable property situated in Scotland.

"In the case of *Kirkpatrick* v. *Irvine*, 17 S. 1200, *aff.* 2 Rob. 475, it was held that possession of a bare mid-superiority, alleged to be of no value, and defeasible at the pleasure of the disponees, was sufficient to found jurisdiction.

"In *M'Arthur* v. *M'Arthur*, 4 D. 354, it was held that a person having right to a property as apparent heir, although he had neither made up titles nor entered into possession, was subject to the jurisdiction of the Court. In that case Lord Fullerton, who gave the leading opinion in the First Division, entered into a very elaborate examination of the law upon the point, which he summed up in these words —'The only principle which I am aware of then is, that, there being a subject of any value, however small, within the jurisdiction, and admitting of being made available to the possessor through the means of a judgment of the Courts of this country, these Courts have, *eo ipso*, jurisdiction to pronounce such judgment.

"In the case of *Charles* v. *Charles' Trustees*, 6 Macph. 772, it was held that a beneficial interest in a heritable estate held by trustees under a settlement was sufficient to found jurisdiction; and, finally, in the case of *Fraser* v. *Fraser & Hibbert*, 8 Macph. 400, it was held that a party who had a lease of a shooting lodge in Scotland was subject to the jurisdiction of the Court.

"In the latter case the late Lord President laid it down—First, that the nature of the defender's title was of no importance in a question of jurisdiction; and, secondly, that his right did not require to be a right of ownership. His Lordship then said, referring to the case of a lease, 'I have come to be of opinion that the beneficial possession, whether natural or civil, of immoveable estate within the realm, whether permanently or temporarily, upon a good title of possession, is sufficient to found jurisdiction.'

"Such being the law, the question is, whether the defender has a right in the property held by his trustees sufficient to bring him within its scope? The question is not without difficulty, but I am of opinion that it must be answered in the affirmative.

"It is a general rule that a trust-conveyance does not divest the truster beyond what is necessary for the carrying out of the purposes of the trust. If the trust purposes fail, the complete right of the truster revives. In this case, if the defender's wife and children failed, the property would belong to him, because, as I read the provisions of the contract, so long as the defender lives, the beneficial fee of the property does not vest in his children. As I have said, the trust-estate does not fall to be divided among the children until the liferents of husband and wife have come to an end, and even then the shares are not payable till majority or marriage. There is, then, a special declaration that the shares shall not vest until the term of payment, and that the shares of a child predeceasing the term of payment without issue shall pass to the survivors. I think that these provisions make it impossible to come to any other conclusion than that during the lifetime of the spouses, or the survivor, nothing vested in the children, and I do not think that the fact that a limited power is given to trustees to make advances to children for their advancement in life, before the termination of the liferents, makes any difference except as regards any sum which may be so advanced.

"But if the beneficial fee has not vested in the children, I think that it is impossible to say that the trust conveyance absolutely divested the defender of all right and interest in the property, because, failing children, the trustees are holding the property for him. That appears to me to be a direct and present right in the property, and as I have said it is of no materiality to consider what is the value of the right.

"Upon the whole, I am of opinion that the plea of no jurisdiction must be repelled." . . .

The defender reclaimed, and argued—He was not the proprietor of heritable subjects, so as to be within the jurisdiction of Scots Courts. By the marriage-contract he had been formally divested of his property in the subjects, and the trustees had been invested—M'Laren on Wills and Succession (3rd ed.) p. 959. His reversionary interests were quite valueless, there being already in existence ten children and a grandchild; and any right he still had was no higher than that of a conditional institute, and no better than that of a stranger substitute. The case of *Kirkpatrick* v. *Irving*, quoted by the Lord Ordinary, did not support the respondent's proposition that the mere possession of heritage, though of no value, was enough to found jurisdiction, for a mid-superiority was of a certain value, while in the present case there was absolutely no value. Thus, too, in the case of *Fraser* v. *Fraser & Hibbert*, January 14, 1870, 8 Macph. 400, founded upon by the respondent, there was beneficial possession which differentiated it from the present case. None of the cases quoted went far enough to support the respondent's proposition—*Ferrie* v. *Woodward*, June 30, 1831, 9 S. 854. The utmost right that remained in the granter of a deed such as this marriage-contract was a *spes successionis*, and that was not a right in property or assignable as such—*Kirkland* v. *Kirkland's Trustees*, March 18, 1886, 13 R. 798; *Reid* v. *Morison*, March 10, 1893, 20 R. 510. The fact that the recording of the deed was limited did not prevent the granter from ceasing to be subject to the jurisdiction of the Scots Courts. The deed had been sufficiently recorded to show that there was a trust, and to warn thereby intending purchasers—*Bowman* v. *Wright*, January 24, 1877, 4 R. 322; Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 12. In any case, the trustees might now divest the truster effectually by recording the deed in full.

Argued for the pursuer—(1) The defender still had the radical right in the heritable subjects. There was no right vested in the children, since their right was contingent upon their survivance of the granter and arrival at majority. The right remaining in the truster was certainly at the date of the marriage-contract a valuable one, and it still remained as a vested right subject to the burden of the trust. It was therefore superior to a mere *spes successionis*, though even that would be enough to found jurisdiction. Moreover, the deed was revocable as regarded the children of the first marriage being of a testamentary character, and was only irrevocable as regarded those of the second marriage. The right to a reconveyance in certain events was a heritable right, and therefore subject to adjudication—*Fraser* v. *Fraser & Hibbert, supra*. (2) The purposes of the trust not having been recorded, the truster was still feudally invested, and he was therefore subject to jurisdiction. This case differed from that of *Bowman* v. *Wright*, because there the granter of the deed had made an absolute conveyance retaining no interest, while here he still had a substantial one. The truster could only be feudally divested by the recording of the whole deed.

At advising—

LORD KINNEAR—The Lord Ordinary has repelled the second and third pleas-in-law for the defender, which are pleas to title and jurisdiction. If the Court has jurisdiction, we have heard nothing against the pursuer's title to sue.

The defender is a Scotsman by birth and carried on business in Scotland till 1871, and the debt sued for arises out of an obligation contracted in Scotland. But he is now resident in London, and it is not maintained that jurisdiction can be founded on the *domicilium originis* or on the *locus contractus*

alone, or on both grounds combined. But the Lord Ordinary has held that the jurisdiction must be sustained by reason of the defender's possession of heritable property in Scotland. It is not disputed that in 1871 the defender stood infeft in certain heritable subjects in Edinburgh, and if he is still undivested the jurisdiction must be sustained. But he conveyed these subjects to his marriage-contract trustees for certain purposes, and the question is whether he is not divested by the operation of that conveyance. The pursuer does not depend on the value of the interest, if any, which he still retains, but upon its legal character. It is settled, first, that absolute possession or a complete vested right to a heritable estate in this country founds jurisdiction which is not limited to actions regarding the property itself, but extends to all actions of a pecuniary character; and secondly, that the value of the property is an irrelevant consideration. These principles are laid down in *M'Arthur* v. *M'Arthur*, 4 D. 354, and cannot now be called in question. After stating them with great clearness, Lord Fullerton goes on to say—"The circumstance which supports the jurisdiction is the evidence of property or effects not merely which the action does directly claim, but which it may be made to affect. The only conceivable ground of sustaining jurisdiction in such cases is not that the *res sita* is at issue in the action, but that the *res sita* may be made available through the means of a judgment pronounced in the action, and that therefore the jurisdiction of the Court in pronouncing it may to a certain extent be carried into effect." Now, at the close of the agreement it was not disputed that as matters stand the property in question is open to the diligence of the defender's creditors, because, whatever may be the personal right of the trustees or the beneficiaries for whom they hold, it is admitted that the terms of their infeftment are such as to leave the granter in the position of undivested owner. The conveyance has been recorded in the Register of Sasines in terms of a direction which excludes the trust purposes from the record. The trustees are thus infeft in trust for purposes to be specified, and no such purposes are expressed in the infeftment. It was conceded that so far as the record goes the trustees hold for the granter, or, in other words, that the granter is still the undivested owner of the estate. It follows that the estate is open to the diligence of adjudication at the instance of his creditors.

It may be that the trustees, as the defender argued, may put an end to this position of matters, and divest him effectually by recording the entire marriage-contract. But they have not yet done so, and the question of jurisdiction must be determined with reference to the position of the right when the summons was served.

I think this is a sufficient ground for decision, and that it is therefore unnecessary to consider the ground on which the Lord Ordinary has proceeded. There can be no question that a conveyance in trust for creditors with a power of sale subject to a reconveyance to the truster, if the power is not exercised, does not absolutely divest the truster, but operates merely as a burden on his radical right of property. I am disposed to agree with the Lord Ordinary that there is no sound distinction on principle between a conveyance for temporary purposes, which may, however, in a certain event involve a permanent alienation, and a conveyance in trust for contingent interests which may never emerge, and therefore that if such contingencies fail the radical right may be found to have remained all along in the granter. If that be so, the radical right must remain liable to be adjudged by the granter's creditors. But such diligence in the present case would carry nothing unless the defender survived all his existing children, and the marriage were dissolved without issue. I prefer to reserve my opinion as to the adequacy of such an interest in law to found jurisdiction. But on the other grounds I have stated I think we should adhere to the interlocutor.

LORD M'LAREN—I think that the Lord Ordinary has decided this question of jurisdiction on a sound principle, that the heritable property is only conditionally disposed of for the purpose of constituting a provision in favour of the truster's wife and children, and that the truster retains a proprietary interest in the house subject to these provisions.

If the question be whether the defender's radical or reversionary rights depends on his sasine, or on the infeftment taken by the trustees, I think that the first alternative is to be preferred. It is true that the decisions which establish the principle of a radical right in a truster depending on his original title are decisions relating to what are termed "voluntary trusts," *i.e.*, trusts which are intended to c eate a security over the estate for the benefit of the truster's creditors. But the principle does not depend at all on the particular purposes of the trust, but on the conception that the trust purposes do not exhaust the estate, and that in certain events the estate, or a part of it, reverts to the truster, and may be claimed by him as undisposed of. I do not see why the operation of this principle should be confined to trusts constituted for the benefit of ordinary creditors, or why a father who has come under obligations to his wife and children, and who conveys property to trustees in fulfilment of these obligations, should be held to have divested himself unconditionally and irrevocably. The true view would seem to be that, in the case of the dissolution of the marriage without issue surviving, the trust stands recalled, and that a reconveyance is necessary. If in the present case the trust purposes had vested the estate in the children and their heirs, or if the ultimate destination had been to the truster's heirs, or if an immediate vested right in the fee had been given

to anyone, I should have thought that this was sufficient to divest the granter.

Even if the application of the principle of radical right were doubtful, I should hold that as in this case the trust purposes have not entered the register of sasines, the trustees *ex facie* of the public records hold for the granter, and that such a title is sufficient to sustain the jurisdiction of the territorial court.

LORD ADAM and the LORD PRESIDENT concurred with LORD KINNEAR.

The Court adhered.

Counsel for the Pursuer—A. J. Young—Christie. Agent—D. Howard Smith, Solicitor.

Counsel for the Defender—Ure—Cook. Agent—Horatius Stuart, S.S.C.

Thursday, November 29.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

GARDINER *v.* J. & A. MAIN.

Reparation—Master and Servant—Compromise of Action—Relief—Joint Delinquency.

A builder was employed by a building committee to execute the mason work of a new church. The scaffolding necessary for the building operations was erected by carpenters employed by the building committee under a separate contract. In the course of the building operations the scaffolding gave way, with the result that several of the workmen employed by the builder were injured. The injured workmen raised actions of damages against the builder, which after notice to the carpenters he compromised by paying money in satisfaction of the workmen's claims without requiring an assignation of their claims against the carpenters. Thereafter the builder brought an action of relief against the carpenters, wherein he averred that the accident had been caused by no fault on his part. The court *dismissed* the action—the Lord President, Lord Adam, and Lord Kinnear *holding* that the pursuer could have no claim of relief against the defenders, as on his own showing the claims which he had compromised were illfounded—Lord M'Laren *holding* that by compromising his workmen's claims the pursuer must be held to have admitted responsibility for the injuries they had sustained, but that he had no claim of relief against the defenders, in respect (1) that there was no contract between them, and (2) that no obligation lay upon the defenders to relieve the pursuer to any extent of liability which must be held to have been incurred through his own negligence.

Opinion by Lord Kyllachy that the general rule that there can be no relief as between wrongdoers applied to cases where the wrongdoing consists only in negligence.

In 1892 John Gardiner, builder, Falkirk, contracted with the Building Committee of the Wesleyan Methodist Church to execute the mason work of a new church. J. & A. Main, joiners, undertook, in a separate contract with the Building Committee to do the joiner and carpenter work. By their contract the joiners undertook to furnish all necessary scaffolding, &c., "where required by the mason," and they erected it at the place indicated by the mason.

On 2nd September 1892, three days after the scaffolding had been put up, it gave way, and three of the mason's workmen fell to the ground and were injured.

They raised actions for damages against their employer John Gardiner. He defended the action, pleading that the joiners were the only parties liable, and intimated the actions to Messrs Main, who refused to admit liability or to defend the actions. Subsequently, after again giving notice to Messrs Main, Gardiner effected a settlement with the workmen by paying them sums of money.

On 25th August Gardiner raised an action in the Court of Session against Messrs Main, concluding for payment of £373, being the amount paid by him to his injured workmen, with the expenses incurred by him in defending the action at their instance, or alternatively for half of that sum.

The pursuer averred—"According to the usual custom in building undertakings the contract for the erection of the masons' scaffolding was not made directly between the mason and the joiner, but was included in the contract between the Church Committee and the defenders, the Church Committee contracting with the defenders on behalf of the pursuer, and taking the defenders bound to pursuer to erect the scaffolding as required by him." He further averred that the accident had occurred through the fault of the defenders in neglecting to supply a "needle" of sufficient strength to support the weight imposed upon it; that the defenders had acted negligently and culpably in this, being bound to use care and skill in making a scaffolding for the use of the masons; that the pursuer was entitled to rely on their using this care; that the faults were discoverable by the defenders through the ordinary skill of their trade, but not by the pursuer; and that the defenders were bound to relieve the pursuer of the sum paid by him, or, in the event of its being proved that there was joint delinquency, of half of it.

The defenders averred that the accident had occurred by the pursuer placing too heavy weights upon the scaffolding; and that they were under no contract with or obligation to him, being responsible solely to the Church Committee.

They pleaded, *inter alia*—"(1) No title to sue. (2) The pursuer's averments are irrelevant."

The Lord Ordinary (KYLLACHY) on 28th February 1894 sustained the defenders' first two pleas and dismissed the action.

"*Opinion.*—The pursuer in this case was the contractor for the mason work of a church in course of erection at Falkirk,