settlement." Now, the persons already acting under that trust are administering the wife's estate only, and I see no reason for supposing that it was in the mind of this testator, that when his new trustees should come to act they were to be confined to the administration of his own separate estate. I think that would be a very violent construction of the language used, and I am unable to force upon it that meaning. Now, if he intended to appoint two new trustees to act along with the others under the existing trust, and if it was incompetent to make such an appointment, the question is whether we can sustain it as an appointment for a different purpose, namely, of trustees to act upon his own separate estate. I think we cannot, because that is not the expressed intention of the testator. We cannot assume that, if it had been clearly before his mind that the persons whom he was now appointing could not act as trustees under the mutual trust-disposition at all, but could only act as trustees for his separate estate, he would have directed such a severance of the administration as that. It may be a perfectly workable arrangement to administer the two trust-estates separately; it may not; we do not know. It may be an exceedingly inconvenient and unnecessarily expensive thing to direct the administration under two separate trusts. Therefore it appears to me that we cannot assume that the testator would have done what he has expressed in this codicil no clear intention of doing.

We were referred to the case of *Welsh* v. *Welsh's Trustees* as an authority against the view which I have just now expressed, but it does not appear to me to be an authority in point. In the first place, there was in that case a much clearer separation of the two trusts in the original trust-deed than I find in the present case, but what is more material is that the question whether the surviving spouse either could appoint or had, in point of fact, appointed trustees to act upon her separate estate was not raised before the Court, and was not considered. The only question raised was whether her deed recalling the nomination of trustees upon the husband's estate, and appointing new trustees in their place, was good or bad. What the Court held, as the Lord President said, was that under the powers conferred by that trust (because the decision proceeded entirely upon a consideration of the trust-deed) the lady was not entitled to innovate on the settlement of her husband's estate either as to administration or as to destination. And then his Lordship goes on to say that, that being so, the three questions put to the Court must necessarily be answered in the negative, but when one turns to those three questions, it appears that there is not one of the three that raises the point we are now considering, and therefore the case does not appear to me to be an authority. All the parties concerned appear to have been satisfied that Mrs Welsh's appointment was good so far as regards her own estate, but whether they were justified in that conclusion or not, I do not know, because the question was not brought before the Court in any form.

I am therefore of opinion that we ought to find, in answer to the first question, that Mr Malcolm and Mr Goldie were validly assumed as trustees on both Mr and Mrs M'Dougall's estates, and answer the second question in the negative.

LORD M'LAREN—I concur entirely in the opinion delivered by Lord Kinnear.

LORD ADAM—I also concur.

The LORD PRESIDENT was absent.

The Court, in answer to the first question, held that Malcolm and Goldie were validly assumed as trustees on both Mr and Mrs M'Dougall's estates, and answered the second question in the negative.

Counsel for the First Parties—Dundas—Blair. Agent—A. C. D. Vert, S.S.C.

Counsel for the Second Parties—Leslie. Agent—W. C. B. Christie, W.S.

Counsel for the Third Parties—H. Johnston—Craigie. Agents—Constable & Johnstone, W.S.

Saturday, July 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DOWNIE'S CURATOR BONIS AND ANOTHER *v.* MACFARLANE'S TRUSTEES AND OTHERS.

Succession—Gift in Fee subject to Condition—Power of Disposal.

By his trust-disposition and settlement a testator made various provisions in his wife's favour, adding "by acceptation hereof she binds herself to execute a settlement of her own affairs so as that my own relatives shall have at least the two-thirds of what may be at her disposal," and in a codicil he stated—"It is to be distinctly understood that at my wife's death, or previously, she is to leave all means at her disposal, two-thirds to my sister's family . . . and the other one-third to . . . anyone else she thinks proper." *Held* (*aff.* judgment of Lord Kyllachy) that the obligation imposed upon the wife by acceptance of the provisions in her favour only applied to her power of disposal by testamentary deed, and that she was free to dispose of her estate, including the provisions which she had received under her husband's settlement, by deeds *inter vivos*.

Trust—Assignation—Fee or Spes Successionis—Power to Revoke.

A granted a deed whereby she assigned a bond to trustees, and directed them (1) to pay her an annuity of £70, with the declaration that the trustees should be entitled to increase the same to such extent as they might think reasonable; (2) to accumulate the bal-

ance of the income during her life; (3) upon her death to pay the residue to B and C; and (4) in the event of both the residuary legatees predeceasing her without issue, to pay the residue to the truster's own heirs and assignees. The assignation was duly intimated, and the trustees entered upon the administration of the trust. *Held* (*aff.* judgment of Lord Kyllachy) that the deed was irrevocable.

Assignation of Moveables—Delivery—Possession.

A disponed her furniture to B. The deed contained no reservation in A's favour, and was duly delivered and registered, but A remained in possession of the furniture. *Held* (*aff.* judgment of Lord Kyllachy) that the deed was effectual against a bequest of the furniture by A.

Succession — Trust — Direction to Invest Legacies in Alimentary Annuities—Repugnancy.

A testator by trust-disposition and settlement made certain provisions in his wife's favour, adding, "by acceptation hereof she binds herself to execute a setlement of her own affairs so as that my own relatives shall have at least the two-thirds of what may be at her disposal, to be invested in life annuities on the lives of my nephews and nieces free of the *jus mariti* of the husbands of the females, and not subject to the debts or deeds or the diligence of their creditors, . . . declaring, as it is hereby expressly provided and declared, that it shall not be in the power of the children of my sister to sell, assign, or convey his or her share of . . . the income to be derived from my wife's settlement, the same being purely an alimentary gift, and my trustees are hereby peremptorily enjoined to apply the same for behoof of said children." In a codicil he stated—"It is to be distinctly understood that at my wife's death, or previously, she is to leave all means at her disposal, two-thirds to my sister's family, to be invested for them, and not paid in cash." . . .

The wife, having accepted the provisions in her favour contained in her husband's settlement, became bound by the condition imposed upon her thereby. She left a trust-settlement, in which, after referring to her husband's settlement, she directed her trustees to apply a portion of her estate in purchasing alimentary annuities for his nephew and nieces.

Held (*aff.* judgment of Lord Kyllachy) that they were entitled to payment of their legacies free from any restriction, in respect that the testator had not directed his wife to create a trust for protection of the alimentary annuities, and no trust had been created by her.

The late John Macfarlane, writer, Stirling, died on 26th December 1876, survived by a widow, but by no children. He was also survived by a sister, Mrs Downie. He left a trust-disposition and settlement, dated in 1875, by which he conveyed his whole estate to trustees, and directed them (4) to pay his wife a legacy of £5000, restrictable to £1000 in the event of her second marriage; (5) to make over to her as her absolute property the whole furniture and effects in his dwelling-house and outhouses, including his horse and carriage; (6) to retain the residue of his means and estate, and to pay the liferent of the same to her so long as she remained his widow; (7) to pay her so long as she should remain a widow as much of the capital of the residue as they should see proper, so that she might be kept comfortable and respectable. At the end of the series of provisions in favour of the widow, the settlement proceeded, "and by acceptation hereof she binds herself to execute a settlement of her own affairs, so as that my own relatives shall have at least the two-thirds of what may be at her disposal, to be invested in life annuities on the lives of my nephews and nieces free of the *jus mariti* of the husbands of the females, and not subject to the debts or deeds or to the diligence of their creditors, . . . declaring, as it is hereby expressly provided and declared, that it shall not be in the power of the children of my sister to sell, assign, or convey his or her share of . . . the income to be derived from my wife's settlement, the same being purely an alimentary gift, and my trustees are hereby peremptorily enjoined to apply the same for behoof of said children." In a codicil of July 1875 he provided:—"It is to be distinctly understood that at my wife's death, or previously, she is to leave all means at her disposal, two-thirds to my sister's family, to be invested for them and not paid in cash, and the other one-third to Nina Patterson and Maggie Cook, or anyone else she thinks proper."

On 21st February 1887 the widow executed a trust-disposition (which was registered on 12th March), by which she assigned to George Lawrie and others, as trustees for the purposes therein mentioned, a bond No. 5947, dated 5th June 1877, granted by the Trustees of the Clyde Navigation in favour of Mrs Macfarlane for the sum of £5000 sterling, but only to the extent of £2000 of the sum therein contained. The deed bore to be granted for the love, favour, and affection of the granter for the legatees therein named, and its purposes were—(1) Payment of the expenses of the trust; (2) payment to the truster of a free alimentary annuity of £70 sterling, to be increased in the event of the trustees considering the truster's total income insufficient for her proper maintenance and support, to such extent as the trustees should think reasonable and necessary; (3) Accumulation of the balance of income during the truster's life; (4) As soon as convenient after the truster's death the trustees were directed to "pay or assign and convey the residue of the said trust-estate to and between the said Robert Patterson and his sister Nina

Patterson, wife of the said William Holbrook, equally share and share alike, or to the survivor of the said Robert Patterson and Mrs Nina Patterson or Holbrook wholly," subject to the declaration that, if either of the residuary legatees should predecease the truster leaving issue, such issue should be entitled to the share or shares which their parent would have taken by survivance; (5) lastly, in the event of both the residuary legatees and their issue predeceasing the truster, the trustees were directed to pay over the residue to the truster's own heirs and assignees. The said deed was declared to be irrevocable.

Mrs Macfarlane also executed a trust-disposition in similar terms in November 1892, which was registered on 1st April 1893, by which she conveyed another bond of the Clyde Trustees for the sum of £1000 to another set of trustees for behoof of members of a family named Cook.

Both these assignations to trustees were duly intimated to the Clyde Trustees, and formal transfers were endorsed on the bonds. The trustees nominated accepted office, and entered upon the administration of the trusts.

In September 1892 Mrs Macfarlane executed a disposition, by which she conveyed the whole of her household furniture, as detailed in an inventory annexed, to a Mrs Miller and her heirs and assignees, with full power to the disponees to uplift and receive the said articles and effects at any time, and consented to registration of the deed for preservation and execution. The deed was duly delivered, and was registered in the Books of Council and Session on 15th December 1893, but Mrs Macfarlane remained in possession of the furniture till her death.

Mrs Macfarlane also left a trust-disposition and settlement by which she conveyed her whole estate to trustees, and after referring to her husband's wish as to the settlement of the estate at her disposal, she directed her trustees with a portion of her estate to purchase three life annuities, one of which should be made payable to each of his nephew and nieces, William, Elizabeth, and Mary Downie, the bond of annuity in each case to provide that the annuity should be strictly alimentary, and should not be assignable or terminable by the annuitant or attachable by his or her creditors, and further, in the case of Elizabeth and Mary Downie, the bond to provide that the annuity payable thereunder should be exclusive of the *jus mariti* and right of administration and all other rights of any husbands they might marry, and not affectable by the debts or deeds of such husbands.

Mrs Macfarlane died on 9th January 1894.

In August 1894 John Gillespie Murray, *curator bonis* to William Downie, nephew of Mr Macfarlane, and Mrs Downie or Macleod, niece of Mr Macfarlane, they being the only surviving children of Mr Macfarlane's sister, Mrs Downie, brought an action of declarator and reduction against Mr Macfarlane's testamentary trustees, the trustees under the Patterson trust, the trustees under the Cook trust, and Mrs Miller, in order to have it found and declared (1) that by his trust-disposition and settlement and codicil the late John Macfarlane had effectually made it a condition of the acceptance by his spouse . . . of the provisions therein conceived in her favour, that she should bequeath to the family of his deceased sister Mrs Mary Macfarlane or Downie . . two-thirds of the estate which she, his said spouse, might have at her disposal at the time of her death; that upon the death of her husband, the said John Macfarlane, the said Mrs Macfarlane, in the full knowledge of said conditions, accepted the provisions in her favour under the said deeds, and that by her acceptance thereof she became bound accordingly to bequeath to the children of the said Mrs Mary Macfarlane or Downie, or to such of them as should be alive at her death, two-thirds of the estate which should then be at her disposal; and (2) that Mrs Macfarlane was not entitled to defeat or impair the said children's rights, or to diminish the estate upon which they were entitled to rank, by any testamentary or *mortis causa* deed or conveyance, or by any *inter vivos* deed or conveyance of a gratuitous or of a simulate or collusive character in fraud of her said obligation, and that the said William Downie and Mrs Mary Downie or MacLeod, as surviving children of the said Mrs Mary Macfarlane or Downie, and as creditors in the obligation undertaken by the said Mrs Macfarlane, were entitled to two-thirds of her estate as at her death, including therein all the estate falling under any such deeds or conveyances which the said Mrs Macfarlane may be found to have executed or granted; and (3) that the said trust-disposition, dated 21st February . . . and the said trust-disposition dated 24th November 1892 . . . executed by the said Mrs Macfarlane, and also the conveyance of furniture executed by Mrs Macfarlane in favour of Mrs Miller, were invalid and ineffectual *quoad* the pursuers, and that the estate falling under them fell to be taken into account in estimating the share of Mrs Macfarlane's estate to which the pursuers were entitled. Reduction of Mrs Macfarlane's *inter vivos* deeds was also sought.

The pursuers pleaded—"(1) The late Mrs Macfarlane having accepted of the provisions in her favour under the settlement of her husband the late John Macfarlane, the pursuers, as the surviving nephew and niece of the said John Macfarlane, are, in respect of the condition imposed upon such acceptance by Mrs Macfarlane, entitled to decree of declarator as craved, with expenses. (2) The trust-dispositions granted by Mrs Macfarlane being truly of a testamentary nature, are incapable of affecting the rights of the pursuers over the estate thereby conveyed. (3) The conveyance of furniture granted by Mrs Macfarlane never having been followed by possession, is in-

sufficient to bar the claims of the pursuers upon the estate falling thereunder. (4) In any case the said deeds and conveyance are reducible at the instance of the pursuers, in respect that (*a*) they are gratuitous and in fraud of the pursuers' rights; (*b*) they are fictitious and collusive and in fraud of the pursuers' rights; (*c*) the truster was not truly divested of the estate thereby conveyed; (*d*) in so far as the deeds did take effect before the granter's death, the trusts thereby constituted were truly for the truster's own benefit."

It was pleaded, *inter alia*, for Patterson's and Cook's trustees—"On a sound construction of the said testamentary writings, Mrs Macfarlane was entitled to dispose *inter vivos* of the whole funds belonging to her; and the estate conveyed to these trustees having been vested in them by her under an irrevocable deed duly recorded and intimated, the conclusions for reduction of the said deed are incompetent."

Mrs Miller pleaded—"(6) The said conveyance of furniture being an effectual transference to this defender of the articles therein mentioned, or of the right thereto in question with the pursuers, the pursuers have no claim thereto."

Upon 13th February 1895 the following interlocutor was pronounced by the Lord Ordinary (KYLLACHY):—"The Lord Ordinary having considered the cause—neither party having moved for a proof—Finds, decerns, and declares in terms of the first declaratory conclusion of the summons: Finds it unnecessary to deal with the second declaratory conclusion, and dismisses the same: *Quoad ultra* assoilzies the defenders from the conclusions of the summons, and decerns, &c.

"*Opinion.*—In this case the first question is as to the construction of Mr Macfarlane's settlement. I am of opinion that upon its just construction it imposes an obligation on Mrs Macfarlane in the event of her accepting the provisions in her favour which it contains, to leave to her husband's relatives two-thirds of whatever estate might be at her disposal at the time of her death, including in that category not only what might remain of her own separate estate, or of such capital sums as might be advanced to her by her husband's trustees under the seventh purpose of his settlement, but all estate, howsoever derived, of which she at the time of her death had the power to dispose. In particular, I see no reason for excepting from the obligation the legacy of £5000 left to her by her husband, nor do I find sufficient ground for excepting the furniture also left to her by her husband's settlement.

"The next question is as to the pursuers' title to sue for reduction of the special dispositions made by Mrs Macfarlane after her husband's death, in so far as these dispositions encroach on the two-thirds of her estate which she was bound to leave to the pursuers. This point was raised by one of the defenders, but was disclaimed by the others. I need only say that it does not appear to me that there is any doubt as to the pursuers' title to sue for declarator and for reduction to the effect set forth in the summons.

"I may dispose similarly of another objection of a technical character, viz., that the pursuers should have concluded for reduction of Mrs Macfarlane's settlement. I see no necessity for such a reduction. I do not know that the pursuers' claim is necessarily adverse to that settlement, which does not profess to deal with specific subjects or specific funds. But if it is adverse, it is no more so than any other claim of debt by which the general succession of the deceased may be diminished.

"The real and substantial question in the case is, whether the three special dispositions executed by Mrs Macfarlane after her husband's death, and in the form of *inter vivos* deeds, are to be taken into account as reducing the estate at her disposal at the time of her death. *Ex facie* they have, or profess to have, that effect, but the pursuers maintain that they cannot be allowed so to operate (1) because they were gratuitous; (2) because they were on their just construction revocable and testamentary; and (3) because if that character cannot be attached to them upon their construction, that was yet their true character, anything else being nominal and fictitious, and understood by all the parties to be so.

"I have considerable doubt as to the relevancy of the pursuers' averments with respect to the last of these grounds of reduction. It is averred in general terms that the various deeds were simulate and fictitious, but with the exception of the fact which is admitted with respect to the furniture, viz., that it remained in the deceased's possession, no facts or circumstances are set forth in support of those general averments.

"Indeed, I rather inferred from the debate that the fictitious character of the deeds was deduced from the deeds themselves. In any case, the pursuers did not move for a proof, but asked a judgment on the deeds as they stand, coupled with the admissions on record, and as the defenders appeared to concur, I have taken the case upon that footing.

"Two of the dispositions (which were granted in favour of trustees) relate to specific investments, viz., a bond and part of a bond by the Clyde Trust. The third is a disposition of furniture in favour of the defender Mrs Miller.

"It is not disputed that all these deeds were gratuitous, and I have first to consider whether it was in Mrs Macfarlane's power to diminish the sum at her disposal by gratuitous deeds. On this point I am of opinion in the affirmative. The obligation imposed upon her, and which she undertook, applied only, in my opinion, to what she was free to dispose of at her death. If she chose—with respect to any part of her estate—to divest herself during her life absolutely and irrevocably of the power of disposition, she was, I think, free to do so onerously or gratuitously.

"The question, therefore, comes to be

whether it can be affirmed upon the terms of the deeds—taken along with the admission of parties—that the three deeds in question, or any of them, were truly revocable and testamentary. On this matter the question arises differently with respect to the two trust-deeds, and with respect to the conveyance of the furniture.

"The two trust-deeds are in similar terms, and both convey to trustees—in the one case a bond and in the other case part of a bond by the Clyde Trust. Their purposes are, speaking generally—(1) Payment to the truster during her life of an annuity, not exactly, but closely corresponding, with the annual interest on the security; (2) increase of the annuity if, in the trustees' opinion, necessary for the truster's maintenance and support; (3) payment of the residue, after the truster's death, to certain of her relatives, and, in the event of their predecease, to the truster's heirs and assignees. The trustees were directed to intimate the conveyance to the Clyde Trust, and they did so. They were also directed to enter at once into possession and administration, and they appear to have done so. Both trust-deeds were expressly declared to be irrevocable.

"I am not able to hold that these deeds were, on their just construction, testamentary—that is to say revocable—and intended only to regulate the lady's succession. Reference was made to the cases of *Spalding* v. *Spalding's Trustees*, 2 R. 237, and *Forrest* v. *Robertson's Trustees*, 4 R. 22. I do not consider that the present case can be assimilated to either of these cases. It comes nearer to the case of *Turnbull* v. *Tawse*, 1 W. & S. 80, and *Smitton* v. *Tod*, 2 D. 225. The dispositions here were in each case of specific funds, not of the *universitas* of the truster's estate, or of her estate at her death. They were deeds intended to take effect, and did take effect, during the truster's life. There was no postponement of the trustees' possession and administration; and (what is at least an element) there was in each case an express declaration of irrevocability. I consider, in these circumstances, that Mrs Macfarlane could not have revoked either of these trust-deeds, and therefore that the securities conveyed were no longer at her disposal in the sense of her husband's settlement.

"It remains to consider the case of the furniture. The deed here is not a trust-deed, nor can it be suggested that it is, on its just construction, testamentary. It bears to be an absolute and irrevocable disposition of the furniture, as per inventory annexed, and it is provided that the disponee may uplift and receive the articles and effects at any time. There is no reservation in the granter's favour, and it is not alleged that the deed was not delivered to the grantee, or was delivered under any suspensive or other condition. On the other hand, it is alleged and admitted that no delivery of the furniture was ever made. It is admitted that it remained in Mrs Macfarlane's use and possession until her death.

"Now, it is not, I think, enough to make the deed inoperative that delivery under it was postponed. The property in the furniture did not pass. It might, no doubt, have been attached by Mrs Macfarlane's creditors. But although the property did not pass, yet if the transaction was a real transaction, the furniture was no longer at Mrs Macfarlane's disposal. The question, therefore, is whether it can be inferred, from what is admitted as to the old lady's continued possession and use, that the true transaction was different from what was expressed—that is to say, that it was understood and agreed between her and Mrs Miller that the deed should only operate as a will, and that she should still be at liberty to deal with the furniture as her own.

"Now, I do not think I should be justified, from the mere fact that the possession of the furniture was in fact retained, to draw the inference suggested. That fact, with other facts, might go to support such an inference; but, again, there might be facts tending the other way. All I can say is that upon the materials before me I see no sufficient ground for negativing the genuineness of the transaction which the deed expresses."

The pursuers reclaimed, and argued—(1) No one took under Mrs Macfarlane's trust-deeds until her death; these deeds were therefore of a testamentary character, and as such revocable. They were not absolute *inter vivos* conveyances. Mrs Macfarlane not only reserved to herself an annuity for her lifetime, but power was given to the trustees to increase it to any extent. It was thus plain that the property really remained her own. Although a trust was constituted in the truster's lifetime if no one took an immediate benefit, it was revocable at the instance of creditors—*Forrest* v. *Robertson's Trustees*, October 27, 1876, 4 R. 22; *Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237. The rights conferred were of the nature of *spes successionis*, which did not bar the truster from revoking—*Fernie* v. *Colquhoun's Trustees*, December 20, 1854, 17 D. 232. The case of *Smitton* v. *Tod*, December 12, 1839, 2 D. 225, relied on by the Lord Ordinary, was really in the pursuer's favour; there the deed was only held irrevocable because it followed upon a marriage-contract, and made provisions for children which were immediately enforceable. (2) There was no delivery of the furniture. Where that was the case the authorities show that the Court would hold that the deed was not intended to operate a present transfer.

The respondents maintained the soundness of the Lord Ordinary's judgment on the grounds stated by his Lordship.

At advising—

LORD M'LAREN—The question argued under this reclaiming-note is whether certain deeds of gift executed by the deceased Mrs Macfarlane of property which came to her from her husband are invalid, as being in contravention of the conditions upon which the property was left to her.

Mrs Macfarlane's husband, by his testamentary settlement, dated in January 1875, made what seems to have been very liberal

provisions in favour of his wife. These included (1) a legacy of £5000, restrictable to £1000 in the event of her second marriage; (2) a gift of the furniture and effects in his dwelling-house and pertinents, including his horse and carriage; (3) a liferent of the residue so long as the lady should remain a widow; and (4) in the same event, Mr Macfarlane's trustees were directed to advance to her as much of the capital of the residue as should be necessary for her comfortable maintenance.

But these gifts were subject to a condition which is expressed in the will, and more fully in a codicil executed by the testator six months later (July 1875), and which is expressed as follows:—"It is to be distinctly understood that at my wife's death, or previously, she is to leave all means at her disposal two-thirds to my sister's family, to be invested for them, and not paid in cash, and the other one-third to Nina Patterson and Maggie Cook, or anyone she thinks proper."

Now, Mrs Macfarlane, by three deeds of gift, executed in the form of trusts to take effect in her lifetime, made over a substantial part of the investments inherited from her husband to her own relatives, and also made a gift of the furniture while retaining the use of it, and these acts are said to be contrary to the condition imposed upon her by her acceptance of her husband's estate.

It is not disputed that conditions limiting the grantee's power of disposal of a bequest or subject of gift are binding on the grantee personally. It may not be possible without vesting the subject in trustees to give complete protection to the eventual beneficiaries. But it may safely be affirmed that a gratuitous alienee would be affected by such a condition in the same manner as his cedent; indeed, it is elementary that a mere donee can have no right to the subject of gift except such as his cedent had power to give. Accordingly, if the deeds in favour of Mrs Macfarlane's relations are contrary to the conditions which affected Mrs Macfarlane's right of property, the husband's relations have a clear title and right to reduce these deeds, and to have the investments brought into Mrs Macfarlane's executry for distribution in terms of her own and her husband's testamentary intentions.

The question is, then, whether in fair construction Mr Macfarlane's codicil puts his wife under a disability to dispose of her share of his estate by acts *inter vivos?*

In any view of the meaning of the will and codicil, the condition can only apply to the gifts of capital—that is to say, the legacy of £5000 and the corporeal moveables. As to the liferent of the residue, if we accept the definition of a usufruct, as a right of consuming the fruits of the subject, a condition binding the grantee to dispose of the liferent in a particular way would plainly be repugnant to the grant, and would make the liferent useless. But in relation to the legacy of £5000 and the specific legacy, it is quite intelligible that Mr Macfarlane might intend that his wife should only have the liferent use of these things, with a power of testamentary disposal to the extent of one-third, the other two-third parts being settled on his own heirs.

If such was his intention, it is very strange that the testator did not put his gift in this form. He designs himself as a writer, and his will and codicils bear evidence of the possession of competent skill to express clearly the usual purposes of a family settlement. It may be assumed that Mr Macfarlane knew the difference between a gift in fee, subject to a condition, and a gift in liferent with a limited power of disposal. But so little did he think of reducing the effect of the special legacy to a liferent that he provides in the case of the residue (which is given only in liferent) that his wife may have as much of the capital as is necessary to her comfortable maintenance. The reason why I have put this point is that I think the construction for which the pursuers contend would practically reduce Mrs Macfarlane's position to that of a liferenter, because the argument is that she was bound to preserve the £5000 intact for the benefit of her husband's heirs.

But, again, it is quite intelligible that a man of business, having confidence in his wife's prudent management of property, might wish to put the capital, or a part of the capital, of his estate at her absolute disposal, subject to this condition only, that so much of it as might be extant at her death should be subject to a tripartite division. I hold, with the Lord Ordinary, that the latter is the true meaning. The words used in the codicil are that she is to "leave" all means at her disposal in certain proportions. "Leave" is certainly a testamentary word—it means the disposal of what can no longer be retained. Then the property to be left is "all means at her disposal,"—in other words, whatever she had not already put out of her power. And, again, the words "at her death or previously" can only mean by a testament executed on deathbed, or by a more formal instrument executed while in health, but *intuitu mortis*. I do not find in the language of this clause any indication of a wish to control the disposal of the estate by Mrs Macfarlane, and I repeat that I have difficulty in understanding how a person can have a beneficial estate of personalty in fee and yet be unable to dispose of it either *inter vivos* or *mortis causa* except in a particular way.

If I have correctly interpreted the language of Mr Macfarlane's testamentary writings, if the testator really only meant a qualification of his wife's power of testamentary disposal, the pursuer's case must fail, because, in making the gifts in question, Mrs Macfarlane was only exercising her proprietary rights, and there can be no fraud or injury to heirs, but only a disappointment of expectations, when a proprietor in fee gives his property away.

In this view it is hardly necessary to consider very carefully the form of the two deeds of gift. The money is made over to trustees in trust for the granter for life and

for the persons named and designated in fee. The cases of *Smitton* v. *Tod* and *Turnbull* v. *Tawse*, cited by the Lord Ordinary, are examples of such a mode of settling property, but it is unnecessary, as I think, to found on authorities to prove that a person may settle his own property by a trust so as effectually to divest himself and to bar revocation. The specialty in this case is that the destinations under these trusts render the fee contingent. But it is just because there are contingent interests to be protected that a trust is necessary in such cases. If an immediate gift were intended, it would have been quite competent, without a trust, to take the title to the investments in the names of Mrs Macfarlane in liferent and the immediate grantees in fee. The deeds are declared irrevocable, and are so in form and substance. They are, of course, subject to be cut down, like any other deed, on extrinsic grounds; but the only extrinsic ground put forward is the effect of the husband's will and codicil, and this I have already considered.

Reference was made in the argument to the cases relating to conveyances in defraud of legitim; but I am satisfied on consideration that the questions there considered have no true bearing on the present case, because Mr Macfarlane does not propose by his will and codicil to put his wife in the same position towards his heirs as that in which a parent stands with respect to the disposal of his personal estate. He has himself defined the quality of the right which he has given to his wife, and his will and codicil are the only true measure of his wife's rights.

On the subject of the gift of the furniture, I am content to rest my judgment on the Lord Ordinary's statement of the law. It may be that Mrs Macfarlane's creditors would not be bound by the gift so long as she retained the possession of the furniture. But that would only be because our law does not make any special provision for the publication of gifts of this description. We have no registry of bills of sale, and creditors are entitled to look to their debtor's estate as a fund of credit while he remains apparently undivested. In a question between parties who are each claiming on a gratuitous title, there is no room for the application of the principle of ostensible or reputed ownership. I am of opinion that the reclaiming note should be refused.

LORD KINNEAR—I am of the same opinion. I agree with Lord M'Laren and with the Lord Ordinary that the obligation imposed upon Mrs Macfarlane by her husband's will was applicable only to such part of her estate as she might be in a position to dispose of by will, and that the trust-conveyances and the conveyance of the furniture do not affect any subjects which were, in the sense of her husband's will, at her disposal at her death.

I do not think that it could be maintained that the deeds could be set aside as gratuitous alienations, if it is clear that they are not revocable at the instance of the granter herself. But then it is said that they are not irrevocable; and so far as the trust-conveyances are concerned, the argument is based on two considerations. First, it is said that the granter reserved to herself a right which is inconsistent with an absolute conveyance; and, second, that the rights given to the persons intended to be benefited were contingent.

On the first point the pursuers relied not only on the reservation by Mrs Macfarlane of an alimentary annuity of £70, but also upon the additional stipulation in her own favour that, if the annuity should be insufficient, the trustees were to be entitled to increase it indefinitely to such an amount as they might think reasonable. If this came to no more than a mere reservation of the granter's liferent, it would not import any power to revoke the conveyance of the fee. But it is said that the right to demand an increase of the annuity implies a right to re-acquire the entire property. The answer is conclusive that the right to obtain the addition is not dependent upon the will of the granter herself, but is subject to the discretion of the trustees, which would have been only exercised in accordance with the conditions of the trust. The argument is that under cover of the power to increase the trustees might have given back the fee of the estate. But that could only have been done by direct breach of trust, for they were charged with a trust to protect the fee for the persons to whom it was given.

If that ground is not sufficient, it seems to be clear, for the reasons given by Lord M'Laren, that there is nothing in the nature of the interest of the ultimate fiars which should prevent the gift from being irrevocable. It is said that there is no vested right, because in the case of all the beneficiaries actually named dying without issue, there is an ultimate destination to the heirs and assignees of the truster herself. But then, as Lord M'Laren has said, the argument really comes to this, that it is impossible to protect a contingent interest by means of a trust, and that it is an absolutely untenable proposition. The fee could not be vested during the granter's life in all or any of the persons whom the granter intended to benefit, because it could not be known till her death which of them, if any, would survive to take. But it was vested in trustees for the protection of contingent interests, and so long as it was possible that beneficiaries might survive to exclude the heirs and assignees of the granter, the trustees were bound to hold against the granter herself, and therefore if there had been no authority upon the question I should have agreed with Lord M'Laren. But the point arose in *Turnbull* v. *Tawse*, where the trust was in similar terms for the benefit of persons whose interests were contingent on survivance. There was a clause of survivorship and a gift to issue, and in the event of all the beneficiaries dying before the granter, there was an ultimate destination in favour of Mrs Turnbull's heirs and assignees. Upon these grounds it was held in this Court, that as the beneficiaries under Mrs Turnbull's deed had nothing

more than a *spes successionis*, the trust was revocable by Mrs Turnbull herself. But that judgment was reversed in the House of Lords, on the ground stated by Lord M'Laren, that there was an effectual investiture of trustees in the fee to protect contingent interests. I therefore agree with Lord M'Laren and the Lord Ordinary upon the two deeds.

In regard to the conveyance of furniture, it seems to me conclusive that it was not only recorded as a probative deed, but also for execution by virtue of an express clause in the deed; and therefore that the donees were in the position of having a decree of Court for delivery of the furniture, which they could enforce against the donor by diligence.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court recalled the Lord Ordinary's interlocutor in so far as the defenders, the trustees of the Patterson and Cook Trust, and Mrs Miller were concerned: Dismissed the 1st and 2nd declaratory in so far as directed against these defenders, and of new assoilzied them from the remaining conclusions of the summons: In so far as the defenders Mrs Macfarlane's trustees were concerned, adhered to the Lord Ordinary's interlocutor so far as it assoilzied them from the conclusions other than the 1st and 2nd declaratory conclusions, and found them liable in expenses: Opened up the record and allowed a minute of amendment for the defenders, Mrs Macfarlane's trustees, to be added thereto.

In the record as amended Mrs Macfarlane's testamentary trustees made the following statement:—"In pursuance of the provisions of Mr Macfarlane's settlement and codicil, the sum which Mrs Macfarlane was taken bound to settle upon the pursuers falls to be held in trust for them on such terms as will give full effect to the alimentary nature of these provisions prescribed by Mr Macfarlane, and the persons bound to execute the trust are either the present defenders, as Mrs Macfarlane's representatives, or else Mr Macfarlane's trustees. The defenders are prepared to administer the said trust for behoof of the pursuers, or to deliver the funds subject to it to Mr Macfarlane's trustees, so that the trust may be administered by them according as the effect of Mr Macfarlane's settlement and codicils may be interpreted by the Court. By no other means can the alimentary character impressed upon the said provisions by Mr Macfarlane be effectually maintained."

They further pleaded—"(9) It having been Mr Macfarlane's intention, according to a sound construction of his settlement and codicil, that the alimentary character impressed by him upon the annuities which his wife became bound to settle upon the pursuers should be rendered effectual by a continuing trust; and it having further been his intention that the said trust should be administered by his wife or her representatives, by whom the funds for the said annuities fell to be provided, said annuities ought to be taken by the present defenders in their own names as trustees for behoof of the pursuers. (10) Alternatively, it having been Mr Macfarlane's intention that the trust to be constituted for rendering the alimentary character of the said annuities effectual should be administered by his own trustees, in whom he had constituted a continuing trust which cannot be closed during the lifetime of the pursuers, the funds to be invested in said annuities fall to be paid over by the defenders to Mr Macfarlane's trustees, to be held by them in trust for the pursuers."

Parties were thereafter heard on the question raised by the amendment.

Argued for Mrs Macfarlane's trustees—Mr Macfarlane was most anxious that the funds should be protected, and they thought it their duty to see this done. There were here two sets of trustees, both capable of carrying out Mr Macfarlane's wishes, the only question was which should act. In *Allan's Trustees* v. *Allan*, December 12, 1872, 11 Macph. 216, the daughter beneficiaries received their money, but only on granting receipts acknowledging that it was excluded from the *jus mariti* of their husbands; whereas in the cases of *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786; *Smith* v. *Campbell*, May 30, 1873, 11 Macph. 639; *Cosens* v. *Stevenson*, June 26, 1873, 11 Macph. 761; and *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858, the trustees were not allowed to denude. The machinery of a trust being in existence should be maintained.

Argued for the pursuers—There was doubtless a declaration that the funds were to be alimentary, but no trust was provided for administering them. The Court would not provide the machinery of a trust if the testator had failed to do so. The duty of the trustees for Mrs Macfarlane was to pay, not to hold. Mr Macfarlane's trustees were really not intererested in this matter; the direction was given to his wife alone. Even although there was a direction to invest, the beneficiaries could afterwards realise the investments, and the Court would not put them to this loss. They held a right of absolute fee, and everything repugnant to the full exercise of such a right was properly to be disregarded. The recent cases of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, and *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199, were conclusive on this point.

At advising—

LORD M'LAREN—When this case was last advised the substantial questions at issue were disposed of, but before the interlocutor was pronounced a question was raised, whether the legatees under Mrs Macfarlane's will, appointed in terms of the agreement with her husband, were entitled to receive payment of their legacies unconditionally, or whether they were put under certain restrictions and disabilities in virtue of the provision in Mr Mac-

farlane's trust-disposition and settlement. The subsidiary question was also raised, whether, if Mr Macfarlane did impose restrictions, Mrs Macfarlane's trustees were in a position to hold the legacies in trust for the purpose of giving effect to her husband's trusts. The primary question is as to the meaning and effect of the clause in Mr Macfarlane's trust-disposition and settlement, in which he tells his wife how she is to dispose of the share of the estate which she was bound to reserve for the legatees. The provision is that by acceptance hereof "she binds herself to execute a settlement of her own affairs so as that my own relatives shall have at least the two-thirds of what may be at her disposal, to be invested in life annuities on the lives of my nephews and nieces, free of the *jus mariti* of the husbands of the females, and not subject to the debts or deeds or to the diligence of their creditors." There is, I think, in this clause an expression of a wish or intention on the granter's part that his relatives should receive their interests in such a shape as should render the property inalienable and unattachable by their creditors. The expression of such a wish may or may not be effectual, according as machinery is or is not provided for carrying it into effect. It has been long settled that the Court will not supply the means for protecting property against creditors, or for restricting the rights of legatees. If there is a trust constituted for the special purpose, and the trust fails, the Court will supply the deficiency by the appointment of new trustees or a judicial factor, but the Court will not set up a trust to protect a legatee against himself, unless it is clear that the settlor has directed the constitution of such a trust. I fail to see in the passage referred to anything which can be construed as a direction to Mrs Macfarlane to create a continuing trust for the preservation of the life annuities. And again, it is clear that Mr Macfarlane's trustees are not charged with any such duty; they are to hold for Mrs Macfarlane, and at her death to hand over the money to be administered under her will.

Now, Mrs Macfarlane's settlement on this subject is merely an echo of the direction contained in her husband's settlement, and the result would seem to be that the legatees are entitled, at all events, to receive payment of their shares subject to a declaration that they are inalienable and not attachable by creditors. No machinery is provided for retaining the capital so as to protect it against the voluntary acts of the legatees or the diligence of their creditors. I ought to have noticed that the case for restriction is not improved by the codicil, because all that is said there is that the shares are to be invested for the legatees, and not to be paid to them in cash. The only importance of the codicil is that it accentuates the conclusion that no alimentary trust was intended to be constituted, but only an investment subject to the declaration that the provisions were to be alimentary.

In this state of the facts, and on this interpretation of the wills of the testator and his wife acting as his mandatory, the question arises, whether the legatees are bound to submit to the restrictions which would result from a literal compliance with the truster's directions. On this subject there is a considerable body of authority, some of the cases being applicable to gifts in fee, some of them to liferents and annuities. With regard to annuities, I do not know that anything special would be held if they were declared to be alimentary. Where a testator gives a legacy in the shape of an annuity to be purchased for the legatee, it is quite settled that the legatee is entitled to payment of the sum directed to be invested, because it is always in the power of the legatee to realise the annuity, and it is not right that he should be subjected to the disadvantage of having to buy up the investment at a diminished price, with no benefit to any person except the insurance company, who would naturally make a commission or profit on the transaction.

In the case of *Dow* v. *Kilgour's Trustees*, January 31, 1877, 4 R. 403, the Lord Justice-Clerk (Moncreiff) said—"I have nothing to add except this, that I hope it will be clearly understood that we have decided this case on the general principle, and on no specialty. The ground on which we proceed is that recognised in England as well as here, that an act which, if done, can be at once undone by the person having interest, will not be directed by the Court to be done." The same principle was recognised in the case of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, which was decided in a Court of Seven Judges. Now, the principle as stated by Lord Moncreiff covers the case of an alimentary annuity, and I am not for making a new and unsubstantial distinction in favour of alimentary annuities which are not protected by a trust. In applying the principle to the present case we have to consider what would be the effect of a bond of annuity in favour of any of these legatees containing a clause limiting their right to that of an alimentary life interest, and declaring that it is to be inalienable. In such a case there might be, as I suggested in the course of the argument, a difficulty in selling the right, because a purchaser might think that until the point had been settled by decision the title would be doubtful. But if the purchaser were found and a sale effected, could anyone challenge the sale? I think not, because the hypothesis is that there are neither conditional institutes nor trustees who are charged with the duty of holding the money. Their functions are at an end when they have made an investment. I need hardly say that a qualification of a right which no one is in position to enforce is no qualification at all. Accordingly, the right of a purchaser of an annuity in such terms would be just as good as if the investment were on the face of it unqualified, as in the case of an ordinary annuity. Having reached this re-

sult, that the annuity may be sold, it follows that it can also be adjudged. There can be no such right in the owner of any description of property as that he may enjoy it and dispose of it, but can keep it unattachable by the diligence of his creditors. Whoever has a power of voluntary sale holds the property subject to the attachment of creditors in course of law. If a bond of annuity containing an alimentary restriction has no other effect than to put the legatee to possible inconvenience, it follows that the legatee is not bound by the condition, and that the trustees are not entitled against his will to attempt to enforce it.

There have been cases where the Court has sanctioned payments under receipts, which took note of the restrictions, but these cases prove nothing, because it was admitted on all hands that the insertion of restrictions on the right of enjoyment in a receipt has no effect.

The result in my opinion is that there is no right in anyone to insist on the alimentary restriction, and that the legatees are entitled to payment of their legacies.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court found that the pursuers were entitled to two-thirds of Mrs Macfarlane's estate as at her death, free of any trust.

Counsel for the Pursuers—Mackay—C. K. Mackenzie--Constable. Agents--Dundas & Wilson, C.S.

Counsel for Mrs Macfarlane's Testamentary Trustees — Jameson — M'Lennan. Agents—Philip, Laing, & Co., S.S.C.

Counsel for Mrs Macfarlane's Trustees, Patterson Trust—Guthrie—James Reid. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for Mrs Macfarlane's Trustee, Cook Trust—W. Campbell—Crole. Agent—W. B. Rainnie, S.S.C.

Counsel for Mrs Miller—Graham Stewart. Agents—Mylne & Campbell, W.S.

HOUSE OF LORDS.

Tuesday, March 19.

(Before the Lord Chancellor (Herschell), and Lords Watson, Macnaghten, Morris, and Shand.)

ALSTON'S TRUSTEES *v.* GIBSON.

Cautioner—Guarantee—Agreement to Give Guarantee — Mercantile Law (Scotland) Amendment Act 1856 (19 *and* 20 *Vict. cap.* 60), *sec.* 6.

C. R. & Co. wrote to G. offering him an investment upon the security of an estate in Ceylon, for which they acted as agents, and saying, "It is an excellent security, apart from our guarantee of principal and interest." G. replied, accepting the investment, "with C. R. & Co.'s guarantee of principal and interest."

Held that C. R. & Co.'s letter amounted to a distinct offer of a guarantee, which became operative as soon as it was accepted, and the loan which was to be the consideration for it was made.

This was an action at the instance of Alexander Gibson against the testamentary trustees of the deceased George Alston for payment of the sum of £7000.

George Alston, who died in 1884, had been a partner of the firms of Campbell, Rivers, & Company, and Alstons, Scott, & Company, and the object of the action was to enforce against his estate a liability alleged to have been undertaken by both these firms.

The averment upon which the pursuer's claim was based was to the effect that in 1883 he had, on the application of Campbell, Rivers, & Company, advanced the sum of £7000 on the security of a mortgage over an estate in Ceylon, and upon the security of their personal undertaking, given on behalf both of Campbell, Rivers, and Company, and Alstons, Scott, & Company, to repay the money.

The defenders admitted that the money had been lent by the pursuer, but denied liability. They pleaded, *inter alia*—"(6) The alleged guarantee not having been expressed in writing, the defenders are, in respect of section 6 of the Mercantile Law Amendment (Scotland) Act 1856, not liable in payment of the said mortgage, interest, and expenses."

The section is quoted in the opinion of Lord Wellwood.

The material circumstances of the case as disclosed by the proof were as follows:—Campbell, Rivers, and Company, and Alstons, Scott, & Company, were separate firms carrying on business in Glasgow and Ceylon respectively. In 1883 the firm of Campbell, Rivers, & Company, consisted of George Alston and four other gentlemen of the name of Alston, and the firm of Alstons, Scott, & Company consisted of the firm of Campbell, Rivers, & Company, or the members of that firm, with the addition of two partners, Buchanan and Bois, who conducted the business in Ceylon. At the time of the transactions in question in this case the business of Campbell, Rivers, & Company was to act in Glasgow as agents of Alstons, Scott, & Company. As part of their business, the firm of Alstons, Scott, & Company acted as agents for persons owning estates in Ceylon, rendering or procuring them assistance on the security of these estates. Among others they had made advances to a considerable extent to Richard Mant, the owner of an estate called "Roeberry."

In 1879, with Mant's authority, a loan of £7000 was obtained by Campbell, Rivers, & Company, from J. W. Hutchison. The terms of the loan were that the money should be repayable in three years—*i.e.*, in February