agent should go from here to London. At all events, the Auditor is satisfied that the pursuer might have been represented by a clerk. But that makes it all the more necessary to consider carefully the objection taken to cutting down the commissioner's fee, and considering that he was taken away for so long, he ought not to have less than six guineas a-day, which I think is very moderate. As to the other objections, they are very easily disposed of, with one single exception. As far as regards Nos. 2, 3, and 7, they all relate to matters of which the Auditor is the best judge. He has materials for forming an opinion which we have not, and if we entered into the matter we should be superseding a highly qualified officer of Court. I am therefore for repelling these objections. The 8th is another objection of that kind, which if we were to entertain, would require an examination of all the tracings and all the skilled witnesses in order to see whether they would have been required. Here, again, we should be interfering unnecessarily with the discretion of the Auditor. That leaves only Nos. 4 and 5, which relate to counsels' fees for the second and third days of the trial. The Auditor has allowed double the maximum fee for the first day, and here I think he was right. The case was a very heavy one, one of the heaviest I ever remember. Comparing it with the Esk Pollution case, to which reference has been made, it would have lasted as long, and been quite as anxious and laborious, and so I am disposed to go a little further than the Auditor, and to sustain the objection to his deduction from the second and third days' fee, and to give double the maximum rate. We now come to the objections for the defenders, which are two in number, 1st, as to the Auditor's allowance of fees to two accountants, and 2nd, as to the sum allowed by him for models.

The pursuers applied for a certificate that certain skilled witnesses were necessary. I do not think that two accountants are usually necessary, but in the time in which the work had to be done it required two, each on a separate part of the case, and each has verified the work of the other. The Auditor has allowed for that, and I think he was right in the particular circumstances of the case.

As to the models, I do not know how we can review this finding of the Auditor without taking skilled advice, and if I were to take advice from anyone on the matter it would be from Mr Milne. The demand of the defenders for delivery of the models is quite novel. They say that if they pay for them they are entitled to have them. It is clear they cannot have them at cost price, whatever they might be if they were willing to pay a profit on them. But I do not think they can really be held entitled to have them at all. The models were made for a distinct purpose, and may reveal trade secrets, and I think the pursuers are entitled to keep them; they were admittedly necessary for the trial and the cost of their preparation must therefore form part of the expenses.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the Auditor's report on the pursuers' (Tannet, Walker & Company's) amount of expenses, No. 4870 of process, and also on the notes of objections for the said pursuers and the defenders Hannay & Sons respectively, No. 4871 and 4872 of process: Sustain the fourth and fifth objections for the said pursuers to the effect of allowing additional payments to counsel and clerks, amounting together to £71, 5s. 9d.: Sustain also the sixth objection for the pursuers to the effect of allowing an additional payment of £13, 13s. to the Commissioner Mr J. R. Buntine: Repel the remaining objections for the said pursuers, also the defenders Hannay & Sons' objections, and decern: And with the above variation, approve of the Auditor's report, and decern against the defenders Hannay & Sons for payment to the said pursuers of £2062, 5s. 2d., the taxed amount of their account, and also of the additional sums of £71, 5s. 9d. and £13, 13s. above specified, the said three sums amounting altogether to £2147, 3s, 11d.

Counsel for Tannett, Walker & Co.—Blair. Agents—Hunter, Blair & Cowan, W.S.

Counsel for Hannay & Sons—Balfour. Agents—Webster & Will, S.S.C.

Thursday, February 26.

SECOND DIVISION.

[Lord Gifford, Ordinary.

M'DONALD'S TRUSTEES *v.* M'DONALD.

Marriage Contract—Reserved Power of Division—Parent and Child—Entail.

Under an antenuptial contract of marriage the wife's whole fortune was settled on the issue of the marriage, but powers were given to the parents to apportion the shares of their children. The husband having purchased after the marriage certain lands, borrowed from the marriage contract trustees a sum of £25 000, giving them a bond and disposition in security over the lands, which he subsequently entailed on the issue of the marriage and their heirs, and thereafter on a certain other series of heirs. The wife, and afterwards the husband and wife jointly, executed a deed professing to be one of settlement and division, whereby they declared it to be their will that this sum of £25,000 secured over the said lands should be settled on the eldest son and other heirs, successively in possession under the entail, and this sum the deed proceeded to "allot and apportion as the share of our eldest son, or failing him of the heir of entail succeeding to the said entailed estate," and further the trustees under the marriage contract were directed to discharge the bond over these lands, and to employ any surplus after the provisions of the younger children had been paid in purchasing lands and entailing it on the same series of heirs as that nominated by the husband in his deed of entail. *Held* (*diss.* Lords Justice-Clerk and Ardmillan) that this deed of division was not within the powers conferred by the marriage contract, in as much as it practically resulted in entailing the £25,000 on the "heirs of entail" succeeding to the estate; that there had not been a valid apportionment to the eldest son as such, and that the £25,000 fell

to be divided among the children as provided for in the case of any money remaining unapportioned.

This case came up by reclaiming note against an interlocutor of the Lord Ordinary (GIFFORD), in an action of multiplepoinding and exoneration at the instance of the marriage contract trustees of the late Lieut.-Col. John M'Donald of Dalchosnie (afterwards General Sir John M'Donald, K.C.B.), and the late Adriana M'Inroy (afterwards Lady M'Donald), against Colonel M'Donald (the reclaimer), eldest son of Sir John and Lady M'Donald, A. W. Robertson, C.A., Edinburgh, trustee on the sequestrated estate of John Alan M'Donald, (their second son) the said John Alan M'Donald, and the three Misses M'Donald, daughters of the trusters.

The fund in *medio* was the trust-estate, conveyed to the trustees by an ante-nuptual contract of marriage, dated 8th and recorded 27th September 1826, by the then Colonel M'Donald and Miss M'Inroy. The fund formed Miss M'Inroy's fortune, and amounted to about £50,000. The question for the determination of the Court was whether a settlement and deed of division, executed by the spouses on the 8th July 1837, was a valid exercise of the powers reserved to them under the antenuptial contract. When this antenuptial contract of marriage was entered into Colonel M'Donald was possessed of the heritable estate of Dalchosnie, which, on his part, he settled upon the children of the marriage, with the provision that he should have power to execute an entail of the estate, calling in the first place the children of the marriage, in their order. The lady, Miss M'Inroy, on her part conveyed her fortune to the trustees under the marriage contract for these purposes, *inter alia*, that after the death of the trusters the trustees should pay over or assign the whole property and accumulations to the children to be procreated of the marriage, and that in such proportions, at such times, and under such conditions, as the trusters should by deed appoint; and failing such deed of apportionment, the money should be divided between the surviving children in such a manner that the share of each son should be in proportion to that of each daughter as six is to four, —none of the daughters, however, to be entitled to more than £10,000. The particular clauses of the marriage contract are given *verbatim* in the opinion of the Lord President as subjoined. Six children, one of whom predeceased the parents, were born of the marriage.

Soon after the execution of the marriage contract Sir John purchased the two estates of Loch-Garry and Kinloch-Rannoch at the price of £28,000, of which he paid £3000, while he borrowed the remaining £25,000 from the marriage contract trustees, who took an heritable bond over the two estates in security for the amount. The estates thus purchased, together with that of Dalchosnie, were entailed. In these circumstances, Lady M'Donald, on 16th March 1837, executed a holograph deed of settlement and division, having reference to the marriage contract. This deed was recorded on 27th November 1872. The leading clauses were as follows: — "I do now hereby declare that it is my will that Colonel M'Donald shall have the liferent use of my whole property during all the days of his life if he survives me, just as I myself would have if I survive him: That it is my will, in regard to the division of my property amongst my family after his death, that the estates of Kinloch-Rannoch and Loch-Garry, purchased by my said husband, and of the price of which £25,000 was paid from my funds, shall be settled on my eldest son and other members, of our family in succession, our boys and their heirs-male having priority according to the dates of their birth, and our girls and their heirs-male in like manner: This sum of £25,000, being the share of my property which I allot to my eldest son or heir. And as to the remainder of my property, I will that after the death of Colonel M'Donald my whole funds, beyond the sum of £25,000 settled as above, shall be equally divided among our younger children; it being provided that in case such funds may exceed £10,000 to each younger child, the excess above £10,000 shall all fall to the eldest son or heir as above, with the view to its being laid out in the purchase of land for him, and entailed with the other estates upon his heirs for ever: And further, considering that my said husband proposes to alter the destination of the paternal estate of Dalchosnie from that fixed by our contract of marriage by entailing it upon our heirs-male and female in succession, I therefore do hereby give, grant, and dispone my whole estate, heritable and moveable, to and in favour of my said husband and his heirs whomsoever, failing heirs-male and female of our marriage, and of which estate, both heritable and moveable, I have already declared that he is to have full and free liferent use during all the days of his life." Subsequently, Sir John and his wife executed a joint deed of division, also having reference to the marriage contract; this was dated July 18, 1837, and was recorded on November 2, 1866. These deeds were challenged on the ground of being in excess of the powers reserved under the contract of marriage, and as not fairly carrying out its provisions in regard to the children of the marriage. By this deed of division, also quoted *verbatim* in the Lord President's opinion, it was provided, *inter alia*, that the £25,000 secured over the two estates in question should be settled on and belong to the eldest son of the marriage (the reclaimer), and the other members of the family in succession, being heirs in possession of the entailed estates—the same being declared to be his share of the £50,000 in question; and the trustees were directed on the truster's death to renounce and discharge their bond for that amount over the said estates. The rest of the £50,000 was directed to be divided equally among the other children of the marriage, but it was provided that any sum in excess of £10,000 to each of the said other children should fall to the eldest son or heir of entail, with the view of its being laid out for the purchase of land to be entailed upon him and his successors. General Sir John M'Donald died on June 24, 1866, and his widow on November 7, 1872.

The pursuers, as trustees, pleaded that under the marriage contract they were liable only in once and single payment of the trust-estate, and that on payment thereof to those found entitled thereto they should be discharged. Colonel Alastair M'Iain M'Donald, the eldest son of the marriage, claimed to be ranked and preferred on the fund *in medio* to the sum of £25,000, to be paid to him absolutely, either under the joint settlement and deed of division of 18th July 1837, or under the holograph deed of division of 16th March 1837. Otherwise he claimed the £25,000 under the conditions specified in the deed of division; or finally,

he claimed one-fourth of the £25,000 as his share under the marriage-contract, on the footing that the share of a son was to be in proportion to that of a daughter as six to four.

Colonel M'Donald pleaded—"(1) Under the settlement and deed of division executed by Sir John and Lady M'Donald, the claimant is entitled to payment of the sum of £25,000, without the limitations and conditions attached to the appointment thereof, in respect that the said limitations and conditions are ineffectual, not being authorised by the power of appointment in the marriage-contract. (2) If the said limitations and conditions are held to be well imposed, effect falls to be given to the appointment of the said sum by the spouses in terms of the said deed. (3) In the event of its being held that the said settlement and deed of division does not contain a valid exercise of the joint power of appointment by the spouses, the claimant is entitled to payment absolutely of the sum of £25,000, under the holograph deed of settlement and division executed by Lady M'Donald on 16th March 1837. (4) In the event of its being held that neither of the said deeds of settlement and division constitutes a valid exercise of the reserved power of appointment, the claimant is entitled under his father's and mother's contract of marriage to one-fourth of the fund *in medio*."

The pleas of the Misses M'Donald were—"(1) Lady M'Donald's deed of 16th March 1837 is ineffectual as a deed of division, in respect that it was executed by her Ladyship alone in the lifetime of her husband. (2) The deed of Sir John and Lady M'Donald of 18th July 1837 is also ineffectual as an apportionment, in respect that it gives a large portion of the fund to persons not objects of the power. (3) No valid deed of division or apportionment having been executed either by Sir John and Lady M'Donald jointly, or by Lady M'Donald as the survivor, the marriage-contract funds fall to be divided among the children of the marriage who survived Lady M'Donald in the proportions specified in the marriage-contract, and the claimants are consequently entitled to be ranked and preferred in terms of their claim. (4) In the event of any of the deeds condescended on being held to constitute an effectual apportionment, the claimants ought to be ranked for the shares to which they are entitled under such deed or deeds."

The Lord Ordinary (GIFFORD) pronounced the following interlocutor and note:—

"*Edinburgh, 26th June* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, deeds produced, and whole process—Finds that there was no valid or effectual exercise of the power of direction and appointment reserved to the late Sir John M'Donald and Dame Adriana M'Inroy or M'Donald, his spouse, or to the said Lady M'Donald, if survivor, in the contract of marriage between them, dated 8th September 1826; and finds that the estate of the said Lady M'Donald, settled by the said marriage-contract, being all and whole Lady M'Donald's whole share and interest of every kind in the estate of or under the will of the deceased James M'Inroy, her father, falls now to be paid, divided, and assigned to and among the surviving children of the marriage in the same manner as if no division or appointment had been made or attempted under the said power: Finds accordingly that the fund *in medio* in the present action, being the estate of the said Lady M'Donald, settled by the said marriage-contract, falls to be paid or assigned to and among the claimants, Colonel Alastair M'Iain M'Donald, John Alan M'Donald, Miss Elizabeth Moore Menzies M'Donald, Miss Adriana M'Donald, and Miss Jemima M'Donald, being the whole children of the marriage between the said Sir John M'Donald and Lady M'Donald who survived the said Lady M'Donald, or to and among the respective assignees, legal or voluntary, of the said children, and that in the following shares and proportions, namely, that the share of each son of the marriage shall be in proportion to the share of each daughter of the marriage as six is to four, declaring that none of the daughters of the said marriage shall be entitled to more than £10,000: Reserves meantime all questions of expenses; and with these findings, appoints the case to be enrolled that the other points in the case may be disposed of, and final decrees of preference pronounced; and grants leave to any of the parties to reclaim against this interlocutor.

"*Note.*—The chief, and indeed the only serious question in this case, relates to the validity and effect of the attempted exercise of the power of division and appointment reserved to Sir John and Lady M'Donald in their antenuptial contract of marriage. There are other questions as to the effect of assignments, and of John Alan M'Donald's sequestration, but these do not appear to be attended with any serious difficulty, and if the question of division were settled they could at once be disposed of. It is thought best to determine the questions arising on the exercise of the power of division and appointment first, leaving the others over in the meantime.

"The Lord Ordinary had the advantage of a full and able argument as to the validity of the various deeds of appointment, with an ample citation of authorities. The view which he has taken admits, however, of being explained very shortly.

"The power of division and appointment is a power to divide and appoint the payment of Lady M'Donald's estate to and among the children of the marriage surviving Lady M'Donald. Nothing vested in predeceasing children, and by the terms of the contract of marriage they are out of the case.

"By the marriage contract the trustees are expressly directed, on the death of the surviving spouse, 'to pay over or assign' the whole of the sums and property in question to the surviving children. No doubt there is a power reserved to divide, and to affix time and conditions to the payment; but still this power must be so exercised as to be consistent with the leading and governing direction that the whole fund is actually to be paid over or assigned to the children. In the Lord Ordinary's view, therefore, there is no doubt either about the objects of the power—they are the surviving children—or about the subject-matter of the power—that is, the proportions, the time, and the conditions in, at, and under which the whole fund is to be paid or assigned to the children.

"Now the Lord Ordinary is of opinion that this power, so understood and read, has not been validly or legally exercised either by Sir John and Lady M'Donald jointly, or by Lady M'Donald alone, as the surviving spouse.

"(1) The Lord Ordinary is disposed to lay out of view altogether the holograph deed by Lady M'Donald alone, dated 16th March 1837. That deed was executed during the subsistence of the

marriage, and as the Lord Ordinary reads the power, it could only be executed during the subsistence of the marriage by the joint act of both spouses. Then the deed bears on the face of it to have been executed for a temporary purpose, and while the formal deed was being adjusted. The formal deed was executed by both spouses on 18th July 1837, and thereupon the temporary deed of March 1837 was superseded, and became unavailing. The Lord Ordinary does not think the temporary deed of March 1837 could ever be revived by implication, or indeed otherwise than by the express act of the spouses, or of Lady M'Donald, reviving or renewing it; for even although the subsequent deeds of appointment should turn out to be inept in law, these deeds, and not the temporary deed of March 1837, express the last act and will of the appointers. The deed of March 1837 is no longer the deed left by the appointers as their exercise of the power. Still further, the Lord Ordinary thinks that the deed of March 1837 is in law subject to the same objections as the subsequent deeds.

"(2) There is a further question, whether the deed of declaration by Lady M'Donald, dated 25th August 1866, can be read as a deed of appointment under the power, seeing that the whole power had been previously exercised and exhausted by the joint deed of division and appointment executed by both Sir John and Lady M'Donald on 18th July 1837. The Lord Ordinary inclines to think that if the power of division and appointment had been duly and validly exercised by Sir John and Lady M'Donald *stante matrimonio*, then Lady M'Donald could not alter or revoke the joint deed after her husband's decease. It is true the power is given by the marriage-contract, not only to the two spouses, but to Lady M'Donald, if she be the survivor; but the Lord Ordinary inclines to think that the true meaning of this is, that it is only failing the exercise of the power by the two spouses that the surviving wife may exercise it alone. To give the surviving wife a power of revoking the joint deed would be to read the power of division as giving to the wife alone, the husband only consenting during the subsistence of the marriage. This does not seem to be the fair meaning of the deed.

"It does not appear necessary, however, to decide this question, for, in the Lord Ordinary's view, the same kind of legal objections which apply to the joint deed of 18th July 1837 apply also to Lady M'Donald's deed of 25th August 1866. Both, therefore, may be considered together.

"(3) The Lord Ordinary is of opinion that these deeds are invalid in law, in respect that they give a part of the fund, and a material part of the fund, to persons who are not objects of the power. It seems quite settled in England, and the rule is equally applicable to Scotland, that a power to appoint in favour of children will not authorise an appointment to grandchildren. The leading authority is *Brudenell* v. *Elwes*, 1 East, 442, 7 Vesey, 382, in which case the deed contained the same expressions as to conditions, &c. as the marriage-contract in the present case; but see a great number of other cases quoted and commented upon in Sugden on Powers, 8th Edition, p. 664 to p. 673. The fair result of these cases seems to be, that unless a contrary intention is indicated, grandchildren are not embraced in a power to appoint among children. So the rule is broadly stated by Lord St Leonards. See also, among Scotch cases, *Cuninghame* v. *Cuninghame*, 2 Paton's Appeal Cases, 434.

"Now if this be so, the deeds of July 1837 and August 1866 are both bad. The first virtually constitutes the eldest son the mere liferenter of £25,000, the sum being invested in land, and settled by a strict entail upon a long series of heirs, embracing not only grandchildren but collaterals of Sir John M'Donald, not blood relations of Lady M'Donald at all. The other deed constitutes John Alan M'Donald a mere liferenter for his alimentary liferent allenarly, and his children in fee. This seems *ultra vires* of the spouses, or either of them. Even if grandchildren were included as objects of the power (and the Lord Ordinary does not see how this can be made out from the deed), one-half of the fund—£25,000—is by the deed of directions so entailed and tied up that neither children nor grandchildren might ever get one sixpence of the fee. This is not to divide and appoint among children, but to divert from and exclude children altogether.

"A class of cases was adverted to where appointments to grandchildren were supported, or limited settlements on the children upheld, the child interested consenting. The principle of these cases is, that the appointment of the sum to the child himself stands good as an appointment, and then the settlement or limitation is effectual, not as the act of the appointers, but as the act and settlement of the child himself. These cases are inapplicable to the present case, because the children were not consenters to any of the deeds of appointment, and do not even yet assent thereto, but, on the contrary, in the present action repudiate and dispute the same.

"Another class of cases was referred to, where the appointment was held to stand good, and the illegal condition or limitation was held *pro non scripto*. The Lord Ordinary thinks that these cases also do not apply here, for it is not a condition attached to an appointment that is challenged, but an absolute diversion of a large portion of the fund, or of the fee thereof, from the proper objects of the power. The whole of these questions and cases are fully discussed in Lord St Leonards' book, to which reference is made.

"(4) The Lord Ordinary thinks that any of the children may object to the invalidity of the deeds of appointment, and he is further of opinion that if the deed of appointment is invalid by reason of giving a large portion of the fund to persons not the object of the power, then the appointment is void altogether. It is so, because it can never be told how the appointers would have appointed the diverted portion of the fund.

"No doubt there may be a partial appointment, as was ruled by the House of Lords in *Smith Cunninghame* v. *Anstruther* (H. L., 25th April 1872; L. R., 2 Scotch Appeals, 223); but that is where a portion of the fund is not appointed at all, and where the partial appointments are made from time to time. But where the appointers deal with the whole fund, and illegally divert a considerable portion of it from the objects, there seems no alternative but to set aside the appointment altogether. It would be unsafe, and might be inequitable, to hold the illegally diverted portion as simply unappointed, and to divide it equally or rateably among the objects of the power.

"Among other authorities, the following cases

bearing on these points were referred to:—*Watson* v. *Marjoribanks*, 17th February 1837, 15 S. 586; *Marder's Trustees* v. *Marder*, 30th March 1853, 15 D. 653; *Ormiston* v. *Ormiston*, 24th January 1809, Hume, 531; *Baikie's Trustees* v. *Oxley*, 14th February 1862, 24 D. 589.

"Appearance was very properly made at the debate for the trustees, who called attention to the possible interest which the unborn children of Mr John Alan M'Donald might have under Lady M'Donald's deed of 25th August 1866. The Lord Ordinary thinks that it was *ultra vires* of Lady M'Donald to limit John Alan M'Donald's right to a liferent allenarly, and give the fee to his children. But seeing that this point could not be stated by John Alan M'Donald himself, he taking an opposite view, it was quite right for the trustees to call attention thereto.

"Mr John Alan M'Donald and his trustee made a motion for a payment to account. If the present views of the Lord Ordinary are affirmed, the Lord Ordinary thinks this motion reasonable; but so long as it is doubtful whether Mr M'Donald has more than a mere liferent, it would not be safe to give him or his trustee a payment of capital."

This interlocutor was reclaimed against by Colonel Alastair M'Iain M'Donald, the eldest son; and, after hearing parties, the Second Division appointed the cause to be reheard before seven Judges.

Argued for the Reclaimer—(1) The real question here is whether this condition was one which might be fairly annexed. (2) If Sir John and Lady M'Donald had no right to make this condition, what would be the result? Then we maintain that in point of fact they tried to make it a condition, but that, having failed, we become entitled to the £25,000. If the condition is bad it simply flies off, and we must get this sum of money. (Sugden on Powers; *Carver* v. *Bowes*; *Campf* v. *Jones*; *Hewitt* v. *Lord Dacre*; *Woolrych* v. *Woolrych*; *Churchill* v. *Churchill*.) (3) Assuming that the condition was not a good one, we have next the question whether the younger children had any right to state the objection. These younger children do not say that their share is too small or too large, their rights are in no way effected; all they do say is that the eldest son has too little—that in place of getting this fund of £25,000 absolutely placed under his control, he has only a restricted and qualified right to it. This is not in the mouth of the younger children, the eldest son having said, These conditions may be bad, but I am willing to take under them. (*Crawford* v. *Graham*.) The case which is mainly founded on (*Watson* v. *Majoribanks*) as establishing the doctrine that the objection competent in the mouth of one child can be equally insisted in by another, does not bear out that view. Colonel M'Donald can take this if he chooses, the objection is in his mouth and his alone. The money would be at once applied in paying off the debt on Loch-Garry if he takes it under the conditions, and the arrangement otherwise entered into by his consent cannot alter this. (*Moir's Trs.*; *Craik* v. *Craik*; *Traill* v. *Traill*; *Douglas* v. *Douglas*; *Thomson*; *Halkett*; *Stuart*; *Erskine*; *Dicks*.) There is an uncontradicted series of cases warranting the support of this deed, unless there be any challenge on the ground of *bona fides*, and there is none here.

The gift of the son must be read without the condition. There are here two elements—(1) A distinct gift of the value; (2) A direction how it is to be paid; but the clause is distinct in itself as to allotment.

Authorities for Reclaimer—*Moir's Trs.*, 9 Macph. 848, Scot. Law Rep.; *Sugden on Powers*, 515-6, 8th ed; *Carver* v. *Bowes*, 2 R. and M. 304; *Campf*, v. *Jones*, 1837, 2 K. 756; *Hewitt* v. *Lord Dacre*, 1838, 2 K. 622; *Woolrych* v. *Woolrych*, 1859, Johnstone's Reports, 63; *Churchill* v. *Churchill*, 1867, 5 L.R. Eq. 44; *Crawford* v. *Graham*, 6 D. 589, and Lord Justice-Clerk there; Erskine iii., 8, 39; *Craik* v. *Craik*, 1728, M. 12,894; *Traill* v. *Traill*, 1737, M. 12,985; *Douglas* v. *Douglas*, M. 13,002; *Munro*, Feb. 18, 1810; *Macneil*, Jan. 27, 1826; *Thomson* v. *Children*, 1762, M. 13,018; *Dicks*, 1776, 5 Br. Suppl. 420; *Halkett* v. *Halkett*, 5 Br. Suppl. 625, M. 15,416, rev. 2 Pat. 231; *Stuart* v. *Stuart*, 2d March 1815, F.C.; *Erskine*, 4 S. 357, 17th Jan. 1826.

Argued for the Respondents—We may consider four questions. (1) What is the first construction of this marriage contract? (2) Is the joint deed a valid exercise of the powers conferred by the marriage contract? (3) What is the effect of the joint deed? (4) Who are entitled to object?

On the first point we maintain that a just construction of the marriage contract was that each child should have a share in the fee which the parents could not effect, and that consequently any such act on the part of one or both of the parents by which any part of the fund was taken away from the children is invalid.

On the second point, that the deed is not a valid exercise of the powers because (*a*) it limited the eldest son's right to what was practically a liferent, and (*b*) it gave a share to persons (viz., the heirs of entail, Sir John's collaterals), not included in the power under the marriage contract.

On the third point; the effect is to vitiate the attempted exercise of the power *in toto* and to cause an equal division (*Gerrard* v. *Butler*.) There was not a valid exercise with a superadded condition, the condition itself was such as to completely vitiate the whole deed.

On the last point; all persons who are objects of the powers are entitled to object.

Authorities for Respondents—*Lassense* v. *Tierney*, 1 Macnaughton and Gordon, 562; *Gerrard* v. *Butler*, 1855, 20 Bevan, 541; *Watson* v. *Majoribanks*, 15 S. 586, and Lord Corehouse there; *Stevenson* v. *Hamilton*, 1 D. 181; *Baikie's Trs.* v. *Oxley*, 24 D. 589, 14th Feb. 1862; *Marsden's Trs.*, 28 L. J. Chancery, 906; *Birley* v. *Birley*, 27 L.J. Chancery 569; *Lady Mary Topham*, 32 L.J. Chancery 81. And cases referred to by the Lord Ordinary in his note.

At advising—

Lord President—The question before the Court in this action is, whether the settlement and deed of division by Sir John and Lady M'Donald, dated July 18, 1837, was a valid exercise of the powers conferred on them by their antenuptial contract of marriage.

In arriving at a decision on the point it is necessary, in the first place, to attend to the terms of the powers conferred, and the nature and terms of the deed conferring those powers. The spouses entered into the marriage-contract on September 8, 1826, and at that time Lieut.-Colonel (afterwards Sir John) M'Donald was heritable proprietor of the estate of Dalchosnie. This estate by the mar-

riage contract was settled upon the issue of the marriage, and there were provisions for the execution of a deed of entail calling the children to the succession in due order. The lady, Miss M'Inroy, also had a considerable fortune in the hands of her father's trustees, and by the marriage contract she, on her part, conveyed this fortune, amounting to some £50,000, to certain trustees for the following purposes, as mentioned in the contract, viz., "That the said trustees and their foresaids are to hold the same in trust for the conjunct liferent right and use allenarly of the said John M'Donald and Adriana M'Inroy, and in manner after mentioned, viz., the said trustees shall, during the subsistence of the said marriage, pay over the interest or produce of the same to the said John M'Donald and Adriana M'Inroy, and after the dissolution of the said marriage by the death of either of the parties, shall pay over to the said Adriana M'Inroy, in case she survive the said John M'Donald, the whole of the said interest or produce during all the days of her natural life; and in the event of the said John M'Donald surviving the said Adriana M'Inroy, they shall pay over to him the sum of £750 sterling of the said interest or produce yearly during all the days and years of his lifetime, payable the said annuity in advance by two equal instalments half-yearly, and commencing the first half-yearly payment at the first term of Whitsunday or Martinmas happening after the death of the said Adriana M'Inroy, with interest of the said instalments from the time they become due till payment; and after the death of the survivor of the said parties, then the said trustees shall pay over or assign the whole of the sums and property to be liferented in manner aforesaid to the child or children to be procreated of the said intended marriage, and that in such proportions, and at such time, and under such conditions, as the said John M'Donald and Adriana M'Inroy shall by any joint deed, or as the said Adriana M'Inroy, in case she shall be the survivor, shall by any deed or writing signed by her, direct and appoint; and failing any such direction and appointment, then the said trustees shall, after the death of the survivor of the said John M'Donald and Adriana M'Inroy, stand possessed of the whole of the sums to be liferented as aforesaid, for behoof of the children of the said intended marriage, in the following shares and proportions, viz., that the share of each son of the marriage shall be in proportion to the share of each daughter of the marriage as six is to four, that is, the share of each son in the divisions shall be one third more than the share of each daughter; it being declared that none of the daughters of the said marriage, if there be a son or sons who shall arrive at the age of twenty-five years, or who shall leave a child or children, shall be entitled to more than £10,000, and any sum beyond £10,000 shall go to the son of the marriage, if there shall be only one, or shall be divided between or among the sons, if there shall be more than one; and declaring that should the children of the said marriage be all sons, they shall be entitled to an equal division of the foresaid sums among them; and in like manner, if the children of the said marriage be all daughters, they shall also be entitled to an equal division of the foresaid sums among them, it being only in case of there being both sons and daughters of the marriage that the foresaid division in the proportions of six to four is to take place; and declaring that the shares of the child or children of the marriage shall be payable after the death of the survivor of the said John M'Donald and Adriana M'Inroy as follows, viz., the share of the son or sons shall be payable upon his or their attaining the age of twenty-five years complete, or sooner if the said trustees think fit, and the shares of the daughter or daughters on her or their also attaining the age of twenty-five years, or upon the day of her or their respective marriages, if such marriage is made with the approbation of the said trustees, whichever of these events shall first happen; and declaring that the shares of any of the said children shall not become vested interests until after the death of the survivor of the said John M'Donald and Adriana M'Inroy." As to the rest of the deed, it is only necessary to notice that the provisions made to the children are by certain clauses declared to be in full satisfaction of all claims for legitim. The lady's entire fortune was thus settled on the children of the marriage, and vested in trustees for their behoof. Until the death of the parents the shares of the children did not become vested interests, but the parents could not alter the settlement on them.

There were, it appears, six children the issue of this marriage; of these one predeceased Sir John, but the rest survived him. Soon after the execution of this marriage-contract Sir John M'Donald purchased for the sum of £28,000 certain additional lands of Loch-Garry and Kinloch-Rannoch; and to enable him to pay the purchase money application was made to the marriage-contract trustees, who advanced £25,000, and took an heritable bond over the lands purchased. The rest of the price, some £3000, was provided by Sir John from his own private funds. It was in these circumstances that the spouses executed the deed of settlement and division now under consideration.

This deed of division has been challenged upon two distinct grounds—(1) in so far as it exceeds the powers conferred on the spouses by the marriage-contract; and (2) in so far as it does not carry out the provisions of that contract. The marriage-contract, the purchase of Loch-Garry and Kinloch-Rannoch, and the borrowing of the money on the bond, are narrated at length in the deed of division. The deed then proceeds—"And it being our desire to settle definitely, onerously, irrevocably, and mutually the whole of the said estates of Dalchosnie, Loch-Garry, and Kinloch-Rannoch, belonging to me, the said John M'Donald, and also to divide, apportion, and settle the whole property, heritable and moveable, including the said sum of £25,000 secured over the said lands of Loch-Garry and Kinloch-Rannoch belonging to me, the said Adriana M'Donald, on ourselves and our family, and failing our heirs-male, so far to alter the destination in the marriage-contract with regard to Dalchosnie as to settle it with the other lands on heirs-female of the present marriage, giving them a preference and priority to heirs-male of any subsequent marriage: And that in order to effect that object, I, the said John M'Donald, have of this date executed a deed of entail of the said lands of Dalchosnie and Loch-Garry and Kinloch-Rannoch in favour of my said wife and myself, and the survivor of us in liferent, and to the heirs therein mentioned in fee, and which deed of entail was granted by me in consideration of the declarations and apportionment hereinafter made in regard to

the property of the said Adriana M'Donald, my wife." On these considerations the spouses declare and appoint as follows:—"*First*, It is our will that in the event of the said John M'Donald surviving me, the said Adriana M'Donald, he shall have and enjoy the liferent use of my whole property during all the days of his life, just as I myself would have enjoyed it if I had survived him." This first provision is a plain violation of the contract of marriage, but, however, that is not the point at issue, and it is only worthy of notice as being the very first provision of this deed, which professes to be executed in virtue of the powers conferred by the marriage-contract. Then we have two further provisions:—"*Second*, That it is our will that the said sum of £25,000 secured over the said estates of Loch-Garry and Kinloch-Rannoch shall be settled on and belong to our eldest son, and other members of our family in succession, being heirs in possession of the entailed estate—the sum of £25,000, being the share of my (the said Adriana M'Donald's) property, which we, the said John M'Donald and Adriana M'Inroy or M'Donald, have allotted and apportioned, and do hereby allot and apportion, as the share of our eldest son, or failing him, of the heir of entail succeeding to the said entailed estate; it being our desire and appointment that the said trustees under our marriage-contract before narrated, or the survivors of them, should immediately on the death of the survivor of us renounce and discharge the said heritable bond, and disburden the said lands and estates of Loch-Garry and Kinloch-Rannoch of the same; and *Third*, As to the remainder of the property belonging to me, the said Adriana M'Donald, it is our will that after the death of the said John M'Donald, in case he survives me, the whole funds beyond the said sum of £25,000, settled as above, shall be equally divided among our younger children, exclusive of the heir: It being provided that in case such funds shall exceed £10,000 to each younger child, the whole excess above £10,000 shall all fall to the eldest son or heir of entail as above mentioned, with a view to its being laid out in the purchase of lands, and entailed with the other estates upon him, and the heirs called in the foresaid deed of entail, through the whole course of succession." The provisions which follow were intended to meet the contingency of there being no surviving children. These also are inconsistent with the marriage contract. One half of the whole fortune of Lady M'Donald is disposed of in this manner. It had already been disposed of in the purchase of lands added to the entail. This portion then would no longer be subject to division, as it was not possible according to the scheme devised by the spouses that it could properly be allotted at all. The trustees under the provisions of this deed of division were not to *pay* money, as it is contemplated by the marriage contract that they should do, but they were to renounce and discharge the bond over Loch-Garry and Kinloch-Rannoch. In short, they were to make a present of this £25,000 to the heirs of entail in their order. It would have practically been just the same thing if the provision of £25,000 had been made prior to the purchase, and the trustees had been directed to purchase land and entail it.

There is also a provision that after the payment of this bond, if funds are left more than sufficient to pay the £10,000 for each child, then the surplus is to be handed over to the eldest son or heir of entail with a view to the purchasing and entailing of land. I must say that I think this is not a provision or transaction within the powers of the spouses. It is quite beyond the contemplation of the marriage-contract. Had such a thing as this been within the power of Sir John and Lady M'Donald, then the whole money could have been tied up, and trusts could have been employed by which the money would have been fettered as effectually as if it had been entailed. The marriage-contract does not empower any action of this kind, but merely gives the spouses a right to apportion the shares of their children, and for them to have acted in this way is clearly a violation of the provisions of the contract.

I am of opinion, with the Lord Ordinary, that this is a bad deed of settlement and division—that it must be held to be bad *in toto*; and consequently that this £25,000 falls to be divided in the manner directed by the contract of marriage.

The LORD JUSTICE-CLERK read the following opinion;—

The questions we have to decide depend on the nature and extent of the *jus crediti* acquired by the children of Sir John and Lady M'Donald under the marriage contract of their parents. The rights of the children, whatever they are, depend wholly on contract, and must be determined by the intention of the contracting parties, according to the fair import and meaning of their obligation. When parents settle their own property by antenuptial contract on the future issue of the marriage, the children are creditors, not beneficiaries; and such rights of distribution or control as may be reserved to the parents are rights of property, not trusts in any sense, whether these be reserved solely to the owner of the property settled, or communicated to the other party in the contract, who necessarily acquires them for an onerous consideration. The position of the spouses in such a contract differs entirely from that of trustees having power conferred by a third party to distribute property in which they never had, and cannot acquire, an interest—as widely as obligations founded on contract differs from those founded on trust. In such a case as the present, the intentions of the persons who made the reservations, as expressed in their execution of the contract, may be of some moment, although their intention has been expressed in a formal instrument. In a case of trust the intentions of the trustee are of no moment at all, in construing the extent of his power. This distinction may not go far to the decision of the present case; but it was clearly illustrated by Lord Curriehill in the case of *Baikie*; and given effect to in the case of *Moir's Trustees*; and much of the terminology used in the argument seemed to lose sight of it.

There is no ambiguity as to the intention of the parties to this contract of marriage and deed of apportionment. Lady Macdonald, to whom the fund apportioned belonged, has left no doubt as to what she meant, and what she wished to do. She evidently thought that when she reserved to herself the power of annexing to her distribution such conditions as she thought fit, she retained to herself as much power over the destination of her own fortune as General M'Donald possessed over the property which he settled as its counterpart. She

wished this £25,000 to descend in the same line as the land estate, and the younger children and their descendants to have the same interest in the one as they had in the other, in addition to the absolute right to their own very substantial shares. There may have been in this a misconception and an excess of her legal power; but I see nothing in these very careful instruments inconsistent with the truest regard for the interests of her family, or in the slightest degree savouring of selfishness. She was much better able to judge wisely on this subject than we can be; and my inclination, as well as my duty, prompts the desire to give effect to the wishes she has expressed, in so far as not in clear excess of her powers.

I have no doubt that the whole fund provided by the marriage contract was fully apportioned; and that no part of it remained unapportioned. The terms, as well as the manifest intention, of the instrument make this clear. The scope of the deed is to divide the whole fund into two parts, one consisting of the specific sum of £25,000 secured over Loch-Garry, and the other of the remainder of the fund. The latter half is to be devided among the younger children, with a certain condition in favour of the heir in the event of the share of each child exceeding £10,000. These shares are thus finally fixed; and although they do not reach £10,000, they form a substantial provision. Beyond this the younger children were excluded from any interest in the fund, the whole surplus being of course allotted to the only other child, the heir or eldest son, but with a superadded limitation as to its ultimate use or disposal.

The course followed in the deed is this—In the first place, General M'Donald narrates that in consideration of the declaration and apportionment following, he had so far altered the entail of Dalchosnie as to call the heirs-female of his marriage with Miss M'Inroy before the heirs-male of any subsequent marriage, and that he had settled the estates of Loch-Garry on the same series of heirs, which he was otherwise under no obligation to do. He might have divided Loch-Garry among his children, or he might have conveyed it to his second son, or he might have left it to the eldest son in fee-simple. The apportionment, then, was not without consideration, and the benefit remains both to the eldest son and the younger children.

Then come the words relative to the separate portion allotted to the eldest son, and secured over Loch-Garry. They consist of three divisions, 1st, the expression of intention, 2d, the allotment itself, and 3d, the discharge to be granted after the allotment has taken effect. [*Reads.*]

I can find no room for doubt that this is an absolute allotment to the eldest son of this specific sum of £25,000. The words are precise and unambiguous, and, as I shall show immediately, the superadded direction to the trustees is inconsistent with any other reading of them.

This direction requires a little attention, as its full meaning does not seem to have been thoroughly apprehended. In considering whether it involved any excess of power, it is enough that we deal with the case which has actually occurred.

That which has occurred is precisely that which was contemplated. Colonel M'Donald took up the estate of Loch-Garry on his father's death in 1866, under the conveyance granted in consideration of this apportionment, and of course became the debtor to the trust in the bond over it to the extent of £25,000. He had a contingent prospect of becoming the creditor in this debt also, if he survived his mother; but for the six years which intervened he was personally the debtor in this bond, and might at any time have been called upon to pay it. Had any doubt arisen as to the sufficiency of the security, it might have been the duty of the trustees to realize it, and he would have been bound to pay it.

Thus at Lady M'Donald's death Colonel M'Donald became at once, by the operation of the allotment, both debtor and creditor of the trust in this sum of £25,000. The allotment took effect instantly, as payment to the trustees of the debt due by Colonel M'Donald under the bond. Colonel M'Donald ceased to owe anything to the trust, and the trust necessarily accepted the sum allotted in payment of the debt. Nothing remained but a settlement on that footing between the debtor and creditor in these mutual debts. Now, if the subject of the security had been held by Colonel M'Donald on a fee simple title, a renunciation and discharge of the debt and security would have been the only proper way of terminating the transaction. But as he was an heir of entail, and this was originally the entailer's debt, he was entitled, if he chose to demand it, to an assignation of the debt and security, that he might keep it up against the estate and the succeeding heirs. The direction to the trustees simply had the effect of excluding this right; it has no other operation; and as Colonel M'Donald could only demand an assignation after the debt was paid, it is clear that this clause only took effect because the apportionment was absolute, and was in addition to, and not a condition inherent in, the allotment itself.

There is no disguise about the object, and no doubt about the effect of this provision, although the result is more consequential than direct. The object and effect manifestly are to liberate the entailed estate from this debt, and to leave the estate so liberated entailed on the issue of the eldest son, and on the younger children and their issue in succession. It was a restriction on the heir, and a contingent benefit to the younger children. That was its nature and intention. The ultimate destination to collaterals is of no moment, and quite unworthy of the place the exigencies of the argument assigned to it. Although such was the desire of Lady M'Donald, and such, in the event which has occurred, is the effect of this clause, it was not necessarily the effect of it. It required for its operation the coincidence of two contingencies—the subsistence of the entail and the subsistence of the security. The event might easily have been otherwise—General M'Donald might have sold the estate, or have become bankrupt and his creditors might have sold it—or Colonel M'Donald might have paid the debt after his succession and before his mother's death—or the entail might have turned out invalid—or the Colonel might have disentailed it. In any of these contingencies the injunction to discharge the debt would have been either superfluous or inoperative.

Such being the nature of the deed of apportionment, two questions arise—(1) Was Lady M'Donald entitled to prevent the eldest son from demanding an assignation of the debt? (2) If not, what is the

effect of this attempted but unsuccessful restriction?

As to the first, the effect of what is done is to subject the benefit resulting from the allotment to a protected destination in favour of grandchildren and their descendants. As I have said, I throw out of view entirely the possible succession of collaterals, not so much because we were told from the bar that there are none, as that if the benefit to the remoter descendants is effectual, this part of the destination cannot affect in any practical way the question we have to decide. There is no doubt that grandchildren are not, in the sense in which that term has of late been used, objects of such a power as this. It has been frequently decided in England that under such a settlement they are not. But that is not the question, which in my opinion is, whether the interest of descendants was or was not beyond the objects of the settlement and the intention of Lady M'Donald in the reservation contained in it? Was the condition that Colonel M'Donald should discharge this debt reasonable, and if so, are the limitations to be annexed to the term "conditions" such as to exclude it? Judging only by the analogies of the law of Scotland, I should have been inclined to hold that, looking to the clear indications of intention as well as to the unlimited nature of the reservation, and looking also to the remunerative and reasonable nature of the settlement, this direction to the trustees was not beyond the conditions expressed in the reservation. The case of *M'Leod* might probably have been differently decided if the reservation had been as unlimited as that which occurs here, and would certainly have been so had the reservation been "under such restrictions and clauses irritant and resolutive as he may think fit," whatever the destination inserted in the entail might have been. But I cannot shut my eyes to the fact that this very question, under reservations quite as strong, has more than once occurred in the English Courts, and has of late years been uniformly decided against the validity of the restriction. I am therefore not prepared to differ from the judgment proposed on that ground.

On the second point, however, my opinion differs from that which has been expressed. Assuming that Colonel M'Donald could not effectually be placed under such a limitation, I am of opinion that the case must be decided on the principle laid down by Lord St Leonards (c. 10, § 3)—"When conditions are annexed to the gift not authorised by the power, the gift is good and the condition only is void." This rule only suffers two exceptions—*first*, where the condition cannot be separated from the appointment; and *secondly*, when the condition is a fraud on the power. In the present case, however, I have shown that the injunction to discharge was not only separate from, but could only take effect in addition to, an unqualified apportionment, and, indeed, no two things are more clearly separable than a conveyance of property and limitations as to its descent. As Lord St Leonards says, "the boundaries between the excess or proper execution are precise and apparent." It is no answer to this view to suggest that Lady M'Donald would not have given so large a share had she known she had no power to control the destination. This might have been said in every case in which this doctrine has been applied. An attempt to limit the object of the power to a life interest, and to give the fee to grandchildren, is the usual and very conclusive illustration of the rule. The cases, and they are numerous, in which an allotment to grandchildren has been found null, and the fee to be in the appointee to the life interest, are much stronger than the present, in which the fee is given to the object of the power, and the succession alone is limited.

Neither can the present case be brought within the category of those which have been held to have been a fraud on the power. All that can be said is, that Lady M'Donald misconstrued the terms of the reservation. There can be no doubt as to the way in which she herself construed it. If she and General M'Donald had so chosen, they might have largely increased the share of the eldest son; and if General M'Donald had made the discharge of this debt a condition of the new entail, the avowed object would have been effectually accomplished. Indeed I think it doubtful whether, if the position of parties had been reversed, and the younger children had insisted that Colonel M'Donald should clear the estate of this bond, seeing he had acquired the estate in that condition, they ought not to have succeeded. The desire to increase the entailed estate, and to raise the position of the head of the family for the time, was one perfectly legitimate on the part of Lady M'Donald, and one which all the deeds, down to her last ratification, most clearly evince. Lastly, the question is not whether Colonel M'Donald is entitled to demand an assignation of the debt and security. It is whether he is entitled to require the trustees to renounce and discharge it; and whether the younger children, who would profit by the discharge, are entitled to object to his doing so. He has elected to fulfil the condition. I am very clearly of opinion that he was entitled to do so, and that the younger children, whose shares are not affected by his choice, have no interest to interfere with or prevent his doing so. The protected destination will thus take effect—not in respect of the appointment, but in respect of his choice. It has been long settled in England, on principles of very plain justice and expediency, that in equity a valid appointment may be made to persons not objects of the power, if those who are objects of the power consent; in which case the settlement is regarded as that of the object of the power himself. Many cases to this effect are mentioned by Lord St Leonards. According to the principles of our law, I think it not open to much doubt that, ingenious as the argument was, it was *jus tertii* to the defenders to urge it. If indeed any part of the fund be unapportioned, it would not be so; but for the reasons I have already mentioned I think this proposition untenable.

LORD DEAS—The substance of this marriage-contract is, that the husband binds himself to settle the estate of Dalchosnie on the heirs-male of the marriage, whom failing, on a series of heirs therein named. The portion of the wife, on the other hand, is conveyed to trustees for the liferent use of the spouses, and with power to them to divide it among their children under such conditions as they may deem advisable.

I agree with the Lord Justice-Clerk that this is a case in which a much larger discretion is given in the use of the powers by the spouses than if they were acting by virtue of the powers conferred

on them by a third party, and with reference to a fortune which had come to them from a stranger. The money here was the wife's own, and the marriage-contract was their mutual deed. I further agree with his Lordship that there is nothing like the indication of a selfish spirit here, and I think all they have attempted to do is very reasonable, and proceeds from a natural and commendable pride—found everywhere, but especially strong in the Highlands—the desire of augmenting the position and importance of the family. The question, however, is whether this attempt has succeeded.

There is a great peculiarity in this case, in the fact that the husband, Sir John M'Donald, undertook to alter, and did alter, the destination of Dalchosnie, and in place of its going to the heirs-male of the marriage and then to other heirs-male named, excluding the heirs-female, the heirs-female are to come in, not merely to the estate of Dalchosnie, but also to the other estates immediately after the heirs-male of the marriage. Thus the female children of the marriage get a very important right, and whether they can set aside this deed of settlement and division as they are doing, and then claim under the deed of entail, is a question not before us at present, and one on which I have very great doubts.

It is an important point in this deed of apportionment that material benefits were conferred on the younger children in consideration of the mode in which they are dealt with. If what has been attempted in this deed had been confined to the issue of the marriage, I should have hesitated before interfering with the deed, but there are here mentioned collateral heirs of entail—not issue of the marriage at all, not objects of the powers—and that appears to me to be very like making an entail of this £25,000 so destined. It was said that the other members of the family were not entitled to take objection to the deed of division, and so far it is true that, generally speaking, such objection is competent only to parties whose affairs and interests are in question. But here, if the division had been confined to the objects of the power, which it was not, we do not know and have not the means of knowing that those who got less would not have got more. I am inclined to think that this case consequently forms an exception to the general rule on this point. The only plausible answer is that the younger children have no title to object because the £25,000 is the apportioned share of the eldest son, but I am afraid that the deed cannot be so read. The clause is as follows;—"The sum of £25,000 which we have allotted and apportioned, and do hereby allot and apportion, as the share of our eldest son, or failing him of the heir of entail succeeding to the said entailed estate." We have here the heir of entail brought in as the person in whose favour the apportionment was made, and the "heir of entail" elsewhere is seen to include persons not objects of the power. Had the words been "our eldest son" only, the position of matters on this point would have been different. I am inclined to look with great favour on a deed of this kind, intended as it manifestly was to maintain the status and landed possessions of the family, but I am reluctantly obliged to come to the same conclusion as that arrived at by the Lord Ordinary.

Lord Benholme—The only question here is whether the parents under the marriage contract had the power to make such an apportionment as they have done. They cannot by the conferring of supposed benefits have purchased the power if it were not given them by the marriage contract. Nor have we ought to do with the position in which these pursuers may find themselves if they are successful, and whether or not they will have to renounce the succession.

I am clearly of opinion that this power is not exercised in favour of the objects of the apportionment. The duty imposed on the trustees is to discharge the bond, not to assign it; and it comes to the same thing as if they had purchased an estate to be strictly entailed. This £25,000 is given not to the eldest son but to the heir of entail. [His Lordship then referred at some length to the case of *Munro* v. *Munro*, 18th February 1810, which established that where a certain estate was provided by a father in favour of the children of his marriage he was not entitled to entail it and satisfy the obligation in that way; and to that of *Macneil*, 27th January 1826, by which it was decided that even where there was a reserve power to entail, the father had no power to enlarge this by making as restriction altering the order of succession.] I have alluded to these cases as having an important bearing on the question now before us; here the father's estate is his own, and the question comes to be whether under the marriage contract, an onerous obligation, he is entitled practically to entail. There is an essential difference between conveying an estate and entailing it.

I do not say any more on this case, but the true point turns upon what was the duty of the parents under the marriage contract—Can it be said that the father has in any way purchased to himself a power the deed gave him not? I do not think so, and accordingly am of opinion that we should adhere to the interlocutor of the Lord Ordinary.

Lord Neaves—I concur in the views expressed by the Lord President, and would only add a few sentences.

(1) I am unable to see in this case that the position of the parties gives them any support in doing what by the deed of division they have attempted. There are cases where such a position might exist, but in the present instance by their antenuptial contract of marriage the spouses divested themselves of all property in this fund.

(2) I think this £50,000 should be distributed among the children in fee simple. Instead of this, by what has been done the £25,000 would have been entailed, and passes in that case to the heirs of entail, whoever they may be. What then must be done with this £25,000? Are we to give it to the eldest son to do with it as he pleases? I cannot adopt that view. The whole object of the spouses was to entail this money, and for the accomplishment of this end the share of the other children was diminished. I cannot doubt that all this was contrary to the powers. I do not call it a fraud on the marriage contract, but it is an entire overlooking of it, and an attempt to defeat its provisions.

Upon these grounds, I am for sustaining the interlocutor reclaimed against.

Lord Ardmillan read the following opinion:—

The questions now before us have arisen in the distribution of the estate of Lady M'Donald, settled

by her marriage-contract with Sir John M'Donald, dated 27th September 1826. By that marriage-contract the trustees are directed to pay over or assign the whole of the property conveyed to them, including Lady M'Donald's estate now in question, to the surviving children of the marriage, in certain proportions therein set forth; but subject always to the special conditions and reservations of a power of direction and appointment in the spouses by joint deed, or by the deed of Lady M'Donald alone if she was the survivor.

I am of opinion that the question must be decided according to the construction and effect of the joint deed of division and appointment executed by Sir John and Lady M'Donald on 18th July 1837. Lady M'Donald had previously executed a holograph deed of settlement and division, of date 16th March 1837, her husband being then alive. I agree with the Lord Ordinary in considering this deed to be ineffectual. As an indication of her wishes in regard to the succession of her family, the consideration of this deed may not be altogether excluded, and of these wishes I do not think there can be much doubt. But it is not effectual as a deed of appointment.

Again, after the death (on 24th June 1866) of Sir John M'Donald, his widow, Lady M'Donald, executed a trust-disposition and settlement, and also a deed, called a deed of declaration, with reference to the contract of marriage. I concur with the Lord Ordinary in holding this deed to be ineffectual as a deed of appointment. I think that the power of making division and appointment under the marriage-contract had been exercised and exhausted by the joint deed of division and appointment executed by Sir John and Lady M'Donald in July 1837.

Therefore, it is on the terms and effect of this joint deed of division and appointment this question really depends. Even if it were possible, which I greatly doubt, to give any direct effect to the separate deeds by Lady M'Donald, I think that the same objections which are urged against the joint deed of the spouses could be equally urged against the separate deeds.

If the appointment in favour of the eldest son had not been qualified by directing the transmission of the landed estate along a series of heirs of entail, I can see no good reason for refusing effect to the appointment in his favour. The power here exercised is of a nature and character which the law views favourably. Where a power of appointment or apportionment is conferred by marriage-contract on parents for distribution of the parental property among the children of the marriage, the discretion of these parents is more ample, and the exercise of the power is more favourably construed, than where the power is conferred by a party beyond the contract, or is enjoyed by a party not the parent. This principle of construction has been, I think, repeatedly recognised. Many considerations combine to support as reasonable, natural, and legitimate, such a division and apportionment as has been directed by the joint deed of these parents; and the fact that they are the parents, and that this is their deed—their joint deed—and the clear expression of their united will, cannot be without weight. There were funds sufficient to provide for the younger children, and at the same time to gratify the wish — natural enough anywhere, and particularly so in the Highlands of Scotland, cherished and expressed by these parents—to secure to the eldest son the succession to a good landed estate. It appears to me that if this was clearly the expressed will of these parents—of both parents jointly,—and separately of the lady whose fortune constituted the fund for division, then a distribution according to that will should be favourably considered.

If there had been no entail, I have really no doubt that the appointment as here made to the eldest son would have been valid and effectual. I think that the parents could have bought an estate for him—that they could have made the purchase of an estate by himself a condition of his portion, and that it might have been stipulated that on failing to fulfil that condition his portion should be reduced, say to £1000; or, to put the case otherwise, I think that, if the estate had existed, but had been burdened with a debt, the parents could have, in like manner, directed that the sum provided to the eldest son should be applied to payment of that debt, so that the eldest son should get the estate free from the debt; or they might have directed the sum to be expended in building a mansion-house, planting woods, or draining lands. All this, I think, might have been effectually done if there had been no entail. The effect of the tailzied substitution I shall afterwards consider. Before doing so, I must say that I am, however, of opinion, that by the mere securing of the succession to the children of the eldest son after their father's death the apportionment would not have been made void. This is a question of some nicety; but I do not think that the apportionment in that case would have been void. I admit that all the fund to be apportioned must be primarily divided among persons who are legitimate objects of the power. I also admit that where there is a power of appointment limited to children, a grandchild cannot be substituted for a child. The child cannot be omitted and the appointment made to the grandchild. I am also disposed to admit that even in the case of a power exercised by parents, the fee or capital of the share appointed cannot be effectually given to a grandchild, (the liferent only being given to the child), unless this be done by arrangement with the child. Such an arrangement makes the apportionment valid, as being truly bestowed on the child apart from such an arrangement. I do not doubt that an appointment to a grandchild is void, but this is the case of an appointment of a mere liferent to the child. But the right which the proprietor of an entailed estate takes is not in law a mere liferent. According to our law such proprietor is a limited fiar—limited only so far as fettered. If he consents to take the estate with the limitation on his fee created by the entailed substitution of his own children—grandchildren of the maker of the appointment—I am not prepared to say that the appointment is null and void—that the absolute and unqualified gift to him would have been valid, but that the limited and qualified gift is void. The question is difficult. None of the authorities quoted are directly applicable. I have carefully considered it on principle, and I am of opinion that an appointment by entail in favour of a child and his children is not void. It is, at the same time, very natural. There are many reasonable and legitimate presumptions in favour of the power and of the discretion of the parents making such an appor-

tionment in a marriage-contract; and I feel satisfied that it was the wish and will of both parents to make such appointment in the present case.

But then, it is true that, after the children of the eldest son, there is in this entail a substitution of heirs, who may at some remote period be in the line not of direct lineal descent, but of descent collateral to Sir John M'Donald. So far as I can see there is no reasonable prospect—there is scarcely an intelligible possibility—of such a result, to the prejudice of any of these younger children or their families, for they themselves are in the series of substitute heirs of entail; no collateral could succeed till they are exhausted, and so far as appears there is no collateral who could succeed. Still, viewing the question and the probabilities of result in a strictly legal aspect, I cannot differ from your Lordships on this first point so far as it goes. I am of opinion that, in so far as this sum, or the land in which it is invested, is settled on heirs collateral to Sir John M'Donald, the appointment is not effectual, since these collateral heirs are not legitimate objects of the power. But there is no such collateral: and I rather think that the substitution in favour of ultimate collaterals may be legitimately separated from the appointment to the eldest son.

A further question next arises. Assuming the appointment to be void in so far as the right of the eldest son is limited and qualified by the possible succession of collaterals under the entail, may not the eldest son throw off the illegal and invalid qualification, and take the sum appointed, free from the added quality which alone destroys its effect as an apportionment? On this point I have been very much impressed by the opinion which has been given by the Lord Justice-Clerk, and in which I concur. The usual elements of an effectual apportionment are here present. The whole fund directed to be apportioned has been here disposed of. No one who ought to have been provided for has been omitted. There is not even an elusory share given. There has been no unwarrantable augmenting of the eldest son's provision, to the injury of others. No one can now take to the prejudice of any one of these younger children; and to each and all of them shares suitable and adequate according to parental discretion have been provided. The only thing which has been done beyond or against the power of appointment conferred by the marriage-contract is, not the giving of any share to any person now existing beyond the power, but only the limitation of the share of the eldest son,—the qualification by ulterior destination of that share, which, unqualified and unlimited, would have been unquestionably his own. This raises a very peculiar question, and a question quite different from that raised in the case of *Munro* in 1810, or or the case of *M'Neill*, mentioned by Lord Benholme. These were cases where the heir on whom the limitation was laid took objection, as he had an interest to do. But in the present case who can challenge it? Since an unlimited and unfettered right could have been effectually given him, he alone has been injured by the limitation of his right. But where is the injury to any other? The provision of the large sum of £25,000, if given in excess of power, might indeed have been an injury to others; but that provision is in regard to amount not objected to. It was in itself undoubtedly legal, within the power, and according to the will of the parents. The limitation of the provision was an injury to no one but to the eldest son himself; and I doubt very much whether the limitation of his right—a right good if not limited—can be founded on by others as rendering the provision void. Take this illustration— Suppose there is a fund of £30,000 for distribution among five—that one person within the power gets £5, that another gets £20,000, and that the balance is divided among the three remaining. Then suppose that the one who gets £5 is contented, and accepts it without objection, could any of the others, desiring to get rid of the apportionment, object to the £5 share as elusory? The appointee takes it, and makes no complaint, and raises no question. Its limited or even elusory character does indeed impair his right and operate to his prejudice; but if he does not complain, and if no bad faith or conspiracy is alleged, I do not think that any other claimant could in that case take the objection that his share was unduly limited. Now the present case is very similar. The ulterior destination of the landed estate in which the share is invested operates no evil to any of the other claimants,—certainly no present injury,—prospectively no evil while they live, or their children live, or their grandchildren live, for no one can succeed preferably to them. It is truly only a limitation by ulterior substitution in very remote, almost impossible and scarcely conceivable contingency; and so far as the interests of any of these claimants are concerned it can have no effect whatever. On this point I have felt very great difficulty. I appreciate the force of the remarks made by the Lord President and also by Lord Benholme and Lord Neaves; but I am not satisfied that the effect of this tailzied substitution is to make void the whole appointment. I can find no authority which quite reaches the point; and, so far as the authorities do go, I accept them. On principle, I am disposed to think that, in so far as the share of the eldest son is bestowed by the deed of apportionment, it is well and effectually bestowed, and I think that the destination to his children does not destroy the appointment. I admit that, in so far as the right thus bestowed has been qualified and limited by ulterior destination to collateral heirs, that qualification and limitation is ineffectual if it impair the rights or diminish the shares of the other parties interested in the apportionment. But this impairing of other rights, or the limitation of other shares, is not in my opinion the effect of the limitation. I cannot see how the ulterior substitution can impair the shares, or diminish the interests, or injure the prospects, of the parties now objecting on any contingency in regard to succession, which reason can fairly contemplate, or which law can legitimately accept. Nothing is limited, nothing is impaired in value, except the portion conferred on the eldest son. The limitation on him may or may not be effectual as against him, but he does not object, and no other right or interest is injured. If he who might have had the portion without limitation is content to take it under the the limitation, I do not see how any one else can complain. I concur generally in the views so clearly explained by the Lord Justice-Clerk, and having thus stated the difficulties which occur to me, and which I have not been able to overcome. I shall not trespass longer on your Lordships' time.

LORD JERVISWOODE—I am very sensible of the importance of this case, and also of the perspicuity of the observations which have fallen from the Lord Justice-Clerk and Lord Ardmillan, but after careful consideration of the circumstances I am clearly of the same opinion as the Lord President and the majority of your Lordships.

The Court adhered to the interlocutor of the Lord Ordinary, with expenses.

Counsel for Col. M'Donald (Reclaimer)—Fraser and Moncrieff. Agents—H. G. & S. Dickson, W.S.

Counsel for John Allan M'Donald—Watson and Trayner. Agents—Dewar & Deas, W.S.

Counsel for Misses M'Donald—Clark, Q.C., and Balfour. Agents—Webster & Will, S.S.C.

Counsel for A. B. M'Grigor and Pursuers—Millar, Q.C., and Marshall. Agent—A. J. Napier, W.S.

Saturday, February 28.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

CAMERON'S TRUSTEES *v.* GOW AND OTHERS.

Succession—Testament—Preference—Specific Legacy—General Bequest.

A testatrix having left by will and codicils thereto sums amounting to more than the estate when realised, a question as to abatement arose among the beneficiaries. The trustees thereupon raised a multiplepoinding to have it decided. *Held* that certain legacies being specific were preferential, and that all the others must suffer proportional abatement.

Observed, p. Lord Justice-Clerk—That a condition of legacy was not preferable, and that there was nothing more here.

This was a reclaiming note against an interlocutor pronounced by Lord Ormidale on 22d November 1873, in an action of multiplepoinding and exoneration at the instance of the only accepting and acting trustees under the will of the late Margaret Cameron, pursuers and real raisers, against the children of Benjamin Gow and others, beneficiaries under the will. The purposes of the trust were—(1) For payment of the truster's debts, deathbed and funeral expenses, and the expense of executing the trust; (2) For payment of any legacies which she might thereafter bequeath by any writing under her hand; (3) To deliver to her sister the whole furniture belonging to her at the time of her death; (4) To convey to her sister all her estate, heritable and moveable, so far as existing in kind, which belonged to her father, and to which the truster succeeded at his death; (5) To pay to her sister the difference between the actual value of the said estate bequeathed in the fourth place and the sum of £3000, at which sum, for the purposes of her deed of settlement, the truster estimated the value of the share of her father's estate to which she succeeded; (6) To pay and convey to her sister all her estate, heritable and moveable, so far as existing in kind, which belonged to her sister, Marianne Cameron, and to which the truster succeeded on the death of her sister Marianne; (7) To pay to her sister Elizabeth the difference between the actual value of the said estate bequeathed in the sixth place and the sum of £3800, at which sum, for the purposes of her deed of settlement, the truster estimated the value of the share of her said sister Marianne's estate, to which she succeeded. And it was thereby provided that in the event of the truster conveying to her sister Elizabeth, during her life, any portion of the estate to which she had succeeded at the death of her father or sister Marianne, the value thereof, as fixed by any writing under her hand, and failing that, by her trustees, should be applied *pro tanto* in extinction of the provisions in favour of her said sister in the fifth and seventh places; (8) To hold the whole residue and remainder of the truster's means and estate in trust, for the purposes and for behoof of the persons whom she might appoint by any writing under her hand, and failing such appointment, for behoof of her sister Elizabeth Cameron. By the deed the truster also appointed her trustees her executors.

By codicil, executed by the truster on 30th January 1869, she directed her trustees—(1) To set apart and invest, and hold and administer the sum of £5000, for the liferent alimentary use allenarly of Benjamin Gow, residing in St George's Road, Glasgow, and Margaret Taylor or Gow, his wife, and the survivor of them during all the days of their lives, and to pay over to them and the survivor the free annual income and revenue thereof; and on the death of the survivor of the said Benjamin Gow and Margaret Taylor, the truster directed her trustees to pay over and divide the said sum of £5000 equally among their surviving children, and the issue *per stirpes* of such of them as might have predeceased. (2) To set apart and invest, and hold and administer the sum of £1000 for the liferent alimentary use allenarly of the said Mrs Jane Scott or M'Kechnie, wife of the said Robert M'Kechnie, and to pay over to her the income thereof, and upon her death to divide the said sum equally between and among the lawful children of the said Jane Scott or M'Kechnie who might survive, and the issue *per stirpes* of such of them as might have predeceased. (3) She bequeathed to each of her trustees who should accept and act until the winding up of the trust, or until his or her death, the sum of £50. (4) She directed her trustees to make payment, at the first term of Whitsunday or Martinmas after her death, of a number of legacies, free of legacy duty.

On 27th October Miss Cameron executed another codicil, which, in the fourth place, provided as follows:—"Considering that I made the provisions contained in my codicil of 30th January 1869 in favour of Benjamin Gow, my nephew, and his family, in the knowledge that my sister Elizabeth had not by her deed of settlement left anything to him, and with the view of compensating him in part; and further, considering that the said Benjamin Gow has shewn me and my said sister considerable kindness, and that I wish to put him and his family in at least as good a position as if my said sister had by her deed of settlement provided for him as I would have liked her to have done; therefore, in the first place, I leave and bequeath to the said Benjamin Gow, and in the event of his predeceasing me, his eldest son alive, but only in the event of my said sister Elizabeth not being of sound mind at the time of my death, the household furniture, silver plate, pictures, and other household plenishing of every kind belonging to me at the