should be increased, but that it should be paid for. If there is any contract, that was the contract, and for this reason, that without increasing the weights the work could not be done, and supposing the Company had appealed to other parties to have it done, they must have paid the same amount to anybody else. That is my view.

Lord Ormidale—That is exactly my view, as I believe I have already explained. I may say that I also hold that the written order, supposing it had been in the strictest possible form the contract prescribed, did not require to bear that I, Stewart, order that these girders shall be of additional weight; it did not require to bear any such express order. It is enough that the defenders have produced written authority for the work, and this, I think, they have done in the certificated written statements of Mr Stewart, the Company's engineer.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the pursuers against Lord Curriehill's interlocutors of 23d April and 29th May 1877, Recal the said first interlocutor in so far as it finds that the pursuers are liable in a penalty of £50 per week in respect of their delay for twelve weeks in completing the work beyond the time stipulated in the contract: *Quoad ultra* adhere to said interlocutor: Recal the interlocutor of 29th May 1877: Find that the pursuers are entitled to payment of £911, 3s. 2d. for the excess of weight of trough girders over the scheduled weight, and of £175, 9s. 8d. for setting such girders: Find that the pursuers are entitled to payment of £5, 10s. for lengthening iron bolts, and £7, 9s. 6d. for indiarubber washers: Reserving to the pursuers any claim competent to them to obtain possession and delivery from the defenders of iron material delivered at Cardiff and not used, and for which the pursuers claimed £114, 2s. 10d., which has been disallowed: And applying these findings, Find the defenders due to the pursuers the sum of Four thousand six hundred and five pounds four shillings and fourpence, with interest thereon at the rate of five per cent. from 14th September 1876 till paid; and decern: Find the pursuers entitled to expenses, subject to modification, till and including the 29th of May 1877; and find neither party entitled to expenses since that date: Appoint the account of expenses to be lodged, and remit to the Auditor to tax the same and report."

Counsel for Pursuers (Reclaimers)—Fraser—Rhind. Agent—R. P. Stevenson, S.S.C.

Counsel for Defenders (Respondents)—Lord Advocate (Watson)—Trayner—Darling. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, November 9.

FIRST DIVISION.

[Lord Young, Ordinary.

SMITHS *v.* CHAMBERS' TRUSTEES.

(*Ante*, p. 58.)

Trust—Powers of Trustees—Writ—Testing Clause—Effect of Conveyancing Act 1874 *on Distinction between Probative and Improbative Deeds.*

The following opinion gives the Lord Ordinary (Young's) reasons of judgment in this case, which were not previously reported:—

The leading question argued before me, and on which the case apparently turns, regards the effect of a creditor's arrestment to preclude testamentary trustees from exercising a discretionary power conferred upon them by the trust-deed to modify a provision to a beneficiary. The question arises in these circumstances:—The late Mr Robert Chambers by his will conveyed his estate to trustees, with directions, *inter alia*, to pay a certain proportionate share to his son James at a term so specified that it might arrive sooner or later according to circumstances, but with power to postpone the payment in whole or in part in their discretion, paying interest only, and to convert it, or what was withheld (also wholly or partially), into a mere life interest if they saw fit, paying in that case the capital to his issue or others, as specially directed. After a part of the provision had been paid, but while the remainder, apparently a considerable part (the exact amount being immaterial to the legal question), was still unpaid, and the judgment of the trustees regarding it unsignified, the pursuers, being creditors of James, used arrestment in the hands of the trustees for their debt, and on this arrestment are now pursuing a furthcoming. The trustees answer (to the furthcoming) by pleading their power to modify the provision as already specified, which they contend the arrestment does not put them instantly to exercise or renounce, and I am of opinion that the answer is good. The clause declaring that provisions to children "shall at my death vest in those surviving me" is plainly immaterial—1st, because the right given to any child is not thereby enlarged or freed from subjection to any power of modification created by the deed respecting it; and 2d, because the declaration is satisfied, according to its language and plain meaning, and consistently with the power, by excluding children who predeceased the testator. Nothing could vest under the deed except what the deed gave, and if that was subject to modification by the trustees or any others in the exercise of a power lawfully conferred by the giver, so necessarily was the right by his gift, which he declared should vest at his death. Nothing whatever has occurred to deprive the trustees of the right, or indeed to relieve them of the duty, of exercising according to their judgment the power conferred upon them with respect to so much of this provision as is still unpaid, and it does not occur to me that anything short of payment, which to the extent of it is a definitive exercise and execution of their judgment, can exempt the provision from the control of the trustees, to which it is subjected by the deed to which it owes its existence. I as-

sume that the power itself is not bad for repugnance or otherwise, and that indeed was not alleged. It was urged that the power must be exercised in order to be operative, and so it must no doubt, except only as regards the right and duty of exercising it or not, as the trustees see fit in the due performance of their trust. The execution of a power is not necessary to its existence, and it is the existence of a power under a subsisting trust that is pleaded in answer to the action. That the power was not well created, or that it has fallen by the elapse of time or otherwise, would be a good reply; but if still capable of execution, the mere fact that it has not yet been exercised otherwise than by keeping the funds in the hands of those who have it is no reply at all. The power may be exercised by a full or partial payment to the child, and, so far as any payment extends, the power is exhausted by execution. Payment has in fact been made to some extent, and the trustees explain that the circumstances of the trust have not admitted of payment being made of the remainder, and that the manner in which they may exercise their powers respecting it (and which they must necessarily exercise one way or other) will, as it lawfully may, depend on future circumstances, regarded or not in connection with past events, of a character to influence their judgment legitimately. If the power was well created, and still subsists, and the trustees are in good faith, I see no reply to their contention as an answer to the pursuers' demand for decree of furthcoming.

The only answer made was that the power was by the arrestment destroyed or so paralysed as to be incapable of being exercised thereafter otherwise than by making immediate payment. But arrestment only attaches such right as the common debtor has. It may not even attach that (for it may not be arrestable), but it cannot attach more. How it can operate to the destruction of a power to which the right is legally subject was not explained, and does not occur to me. If the power is good and subsisting with respect to the child (the common debtor), it must be so with respect to his creditors attaching his right, which is not enlarged by their attachment. If the power is bad or has lapsed, that result must be reached irrespective of the arrestment, which does not affect the question in any way that I can see. If the right of the pursuers' debtor was to demand the money, the pursuers by force of their arrestment may, to the extent of their debt, demand it in his stead, and otherwise not. I have stated my reasons for holding that he has not that right under existing circumstances. The defenders announced their intention to restrict his right to a liferent, and settle the capital on his issue. Whether they shall do so or not is immaterial to the present question as I regard it, for if, as the pursuers contend, the arrestment terminated the power, the defenders can no longer exercise it, and if not, as I think, it subsists to be acted on by the trustees according to the ordinary rules of trust law, which do not without direction to the contrary, express or implied, require the trustees to come to a determination at any particular time, or sooner than in the exercise of a reasonable discretion they see fit. The circumstances may well be such as to entitle them, and even make it their duty, to keep the matter in suspense. Should they see fit to pay, they will thereby, but only to the extent of the payment, determine the power by execution. With respect to so much of all or any of the provisions as they may retain under the trust they have no choice but to retain it subject to the power which attaches to it by the trust-deed, and imposes on them a duty which they have undertaken and are bound to perform. That duty, from the nature of the power which raises it, requires that the trustees shall have a continuous regard to the welfare of the truster's children, and pay them the capital of their provisions in whole or part, or the termly interest only as may seem most conducive to their welfare from time to time according to circumstances, which are liable to change. The fair performance of this duty (which requires no deed) is an exercise of the power. To settle the capital of a provision on a child's issue would require a deed, but such a deed would not become irrevocable while the trust subsisted and the child lived, and might be revoked by simple cancellation and payment, which, in the absence of evidence to the contrary, would be attributed to a legitimate change of intention on the part of the trustees in the due execution of their trust. People may differ as to the expediency of conferring on trustees such power over children's provisions, but the law allows a father (or a stranger) to confer it if he please. It is not repugnant to the gift, for it is a condition of it by the deed of gift, and, as I have said, a lawful condition.

The pursuers made no claim to any interest on their debtor's provision current or in arrear at the date of the arrestment, probably because there were no arrears, and any current interest was trifling in amount, and the right to it of an alimentary character. However this may be, the claim was confined to the capital, and with respect to it the opinion which I have expressed renders it unnecessary for me to consider whether if the common debtor had right to it the arrestment would fail by reason of the declaration in the trust-deed that all the provisions under it should be deemed alimentary and unattachable for debt. Had I to determine that question, I should probably determine it in the negative, on the ground that a testator cannot by such declaration protect from attachment by creditors a sum of this magnitude, payment of which he has directed to be made. It was objected by the pursuers that the declaration, if otherwise effectual, is nevertheless bad, because of the part of the deed where it occurs, viz., the testing clause. With reference to this objection, I have to remark—1st, That since the Conveyancing Act 1874 the distinction between probative and improbative is so slight that it consists only in the presence or absence of the designation of the witnesses, which (to the effect of making the deed probative) may be appended to their subscriptions by themselves or others at any time before the deed is recorded or founded on in Court—(see sec. 38 of the Act.) 2d, That no deed whatever need be probative or is exposed to objection "because of any informality of execution," it being sufficient that the party "using or upholding the same" shall prove that it was in fact subscribed by the granter or maker and the two witnesses whose subscriptions it bears—(see sec. 39 of the same Act.) The distinction still preserved, and resting on so slight a circumstance

as the presence or absence of the designations of the witnesses, only affects the burden of proof, and is explained, so far as I can see, by no other consideration than this—that the designations being given before the deed is founded on in Court, any party interested may inquire regarding the execution, and so aver specifically that the deed is not genuine, or that an addition has been improperly made after execution, if his inquiry shall warrant such averment; but if that, on the contrary, the means of inquiry are withheld by omitting to give these designations till after the deed has been founded on in Court, it is reasonable to put the party using it to prove that it was in fact subscribed as it stands. The policy and effect of this change of the law is to exclude all objections to a deed consistent with the fact that it was subscribed as it stands by the granter and witnesses; to create a *prima facie* presumption (which may be rebutted) of that fact if the witnesses are designed, and otherwise to allow and require the user of the deed to prove it. This *prima facie* presumption is precisely all that the term "probative" now signifies. That this change is fundamental enough to close the old chapter of our law regarding probative writs, the testing of deeds, and testing clauses, and to make the old decisions on these subjects worthless for future reference, is, I think, plain. There was something to be said for rules which limited the possibility of fraud, but after long experience, and, as some thought, suffering under them, it was at last determined by the Legislature that they did more harm than good (as excessive precautions often do); and appealing to my own experience and study, I must confess that I cannot recal a case in this Court in which any of them operated otherwise than as a formal or technical objection to a genuine and honest deed—that is, otherwise than iniquitously and deplorably. They were not unfrequently supported by positive evidence of the fact (to ensure which was their professed and only legitimate purpose) that the deed was subscribed by the maker and was his genuine deed, and I do not now remember a case in which the success of any of them was accompanied with any reasonable doubt of that fact. I must consider the present objection with reference to the existing law, and so considered, I think it is inadmissible. The only point of it is that when deeds are subscribed it is usual to leave a space to fill in the names and designations of the writer and witnesses, which may be legitimately filled in after subscription; that this was probably done here, and that improper advantage may have been taken of the opportunity so afforded to introduce the declaration in question without authority from the maker of the deed. This is quite in the spirit of the reasoning on which the laws swept away by the recent Act were founded and built up, for it rests on a fanciful supposition that a fraud which it was possible to commit was committed. Even *prima facie* to presume such a fraud, which is a species of forgery, without averment or evidence, would be a strong proceeding, but the proposition that it must be so presumed without regard to the fact, and that the presumption is incapable of being rebutted by evidence, is, I think, unworthy of serious consideration. There is no presumption that anything in a deed was improperly—that is, without the authority of the maker—inserted after execution. Such insertion may be averred and proved, but is not presumable. A blank left anywhere may imply authority to insert some things and not others, and the result of inquiry following upon relevant averments, may be to strike out parts of a deed as unauthorised, but *prima facie*, and until the contrary is shown, everything in the deed above the subscription is presumably authorised. A blank may be left in any part of a deed and filled up with the maker's authority, express or implied (according to circumstances), after subscription. In the absence of anything to the contrary, subscription presumes authority for the whole deed as it stands, and an averment that a blank was left and afterwards filled up is immaterial, without adding that it was improperly filled up without authority. The deed before us is probative, for the attesting witnesses are designed, and besides, the pursuers, who claim under it, are parties "using and upholding" it as well as the defenders. Either party may aver the improper and unauthorised insertion of anything, but in the absence of such averment, which if made would require proof, the deed which both parties found on must be taken as it stands. I need hardly observe that the arrangement of deeds in customary clauses is mere matter of convenience, and that any purpose may be effectually expressed in any clause, subject only to the risk of being misapprehended if found in strange company, or overlooked if not in its proper place.

I need say nothing about the validity of the arrestment, which will stand with any virtue that may be in it, and may, for aught I now decide, give a preference and found a furthcoming hereafter and under other circumstances. In existing circumstances I refuse decree of furthcoming, on the grounds generally expressed in the second and third pleas for the defenders, and which, with the explanations which I have given, I sustain.

Friday, November 23.

FIRST DIVISION.

[Lord Young, Ordinary.

ROSSMORE'S TRUSTEES *v.* BROWNLIE AND OTHERS.

Superior and Vassal—Effect of decree in a Tinsel of Superiority under Act 1474, *cap.* 57.

The forfeiture of superiority following upon decree in a declarator of tinsel of the superiority under the Act 1474, c. 57, is temporary, and subsists only for the lifetime of the vassal.

Superior and Vassal—Forfeiture of Superiority under the Act 10 *and* 11 *Vict. c.* 48, *sec.* 8.

Where a vassal obtained, under section 8 of the Act 10 and 11 Vict., cap. 48, a decree of forfeiture of superiority against the heir of line and heir-male of the last mid-superior, who held a Crown title feudally complete, but did not call in the process trustees of that mid-superior who had a personal right to the mid-superiority, the Court *reduced* the decree and