Lord Adam—I am of opinion that signeting a summons does not imply any assertion or exercise of judicial authority. It is a mere warrant granted in the Queen's name to persons properly authorised to cite a defender before a Court. The question of jurisdiction arises when the person so cited appears to answer, and the question is not whether at any former time the defender was or was not subject to the jurisdiction of the Court, but whether at the present time he is now subject to it. That being so, I think the arrestments are valid, and that the reclaimers are entitled to be preferred.

Lord Shand was absent from illness.

The Court pronounced this interlocutor:—

"Having heard counsel on the reclaiming-note for John Drynan and mandatory against Lord M'Laren's interlocutor of 15th June 1887, and considered the cause, Recal the said interlocutor so far as it finds with reference to the claim of the said John Drynan and mandatory 'that when the summons at their instance containing a warrant for arrestment passed the signet, jurisdiction had not been founded against Thomas Walls, and consequently that the said warrant for arrestment and the execution of arrestment following thereon are null and ineffectual:' Find that the decree and the arrestment founded on by the said claimants are not open to any objection on the ground that the Court had no jurisdiction to pronounce the said decree; . . . and remit to his Lordship with power to decern for the expenses now found due, and decern."

Counsel for the Reclaimer—Sir C. Pearson—Sym. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Claimants Firth, Sons, & Company—Gloag—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Thursday, February 2.

FIRST DIVISION.

MONTGOMERY'S TRUSTEES *v.* MONTGOMERY.

Marriage-Contract—Trust—Denuding—Alimentary Liferent.

The trustees under an antenuptial marriage-contract were directed to hold the trust funds, to which the husband had contributed £16,000 and the wife £2500, and pay over the income to the spouses and the survivor. It was declared that this income should be strictly alimentary. Upon the death of the longest liver of the spouses the trustees were directed, in the event of there being two children of the marriage then alive, to pay to them, at majority or on marriage, the sum of £12,000 equally between them. The residue of the capital of the trust funds was, in such event, to be at the disposal of the husband, "or his heirs, executors, or assignees." After the death of the wife, when there were only two children of the marriage surviving, the husband called on the trustees, on his discharging his right to the liferent of the marriage-contract funds so far as they exceeded £12,000, to denude of the surplus in his favour. *Held* that the trustees were not bound nor entitled to denude.

By antenuptial contract of marriage dated 10th and 16th June 1835 entered into between James Montgomery and Mrs Eleanora Anstruther Thomson or Montgomery, Mr Montgomery bound and obliged himself to pay, and did thereafter pay, to the trustees therein named the sum of £16,000. Mrs Montgomery bound and obliged herself to pay, and did thereafter pay, to the trustees the sum of £2500. The trustees under the marriage-contract were appointed to hold the trust-estate and to pay the free income during the subsistence of the marriage to the spouses on the receipt of the husband, and on the dissolution of the marriage to the survivor. It was further declared "that the free interest or annual proceeds aforesaid so to be paid over to the said James Montgomery and Eleanora Anstruther Thomson, or the survivor of them, shall be strictly alimentary, and shall not be arrestable or affectable by the debts or deeds of the said James Montgomery and Eleanora Anstruther Thomson, or either of them, or of the survivor, or by the diligence of their, his, or her creditors."

With regard to the disposal of the capital of the trust funds after the decease of the longest liver of the spouses it was provided, *inter alia*, that the trustees should hold the capital for behoof of the child or children of the said intended marriage, and the issue of such child or children, whom failing as thereinafter written, and should pay over the said capital to the said child or children, or the said issue, at the times and in the manner following, viz., if there should be only one child who should attain majority, or, being a daughter, should be married, and should survive the longest liver of the spouses, or die leaving lawful issue, then to such child or issue the sum of ten thousand pounds; if there should be two children or their issue, then to such children or their issue the sum of twelve thousand pounds equally between them; and it was provided that "in either of the above events of there being only one or two children, the residue of said trust capital shall be at the disposal of the said James Montgomery or his heirs, executors, or assignees;" if there were three or more children or their issue, the whole of the trust capital was to be paid over to such children or their issue equally, share and share alike, but subject to a power of division to Mr Montgomery. Payment was to be made at the term of Whitsunday or Martinmas immediately after the decease of the longest liver of the spouses, and the majority of the children, or their marriages if daughters. Failing children of the marriage and their issue who should survive the longest liver of the spouses and attain majority, or, being daughters, marry, the trustees, or trustee acting for the time, were directed to pay over, assign, and convey to and in favour of "the assignees, executors, or nearest of kin of the said James Montgomery and Eleanora Anstruther Thomson respectively the whole of the said trust capital, and that in the proportions respectively advanced by or for them as herein specified."

Mrs Montgomery died on 8th January 1878, predeceased by one child, Archibald Montgomery, who died unmarried and intestate, and survived by her husband and by three children, Clementina Margaret Montgomery, James Frederick Montgomery, and John Conrad Montgomery. Miss Montgomery died unmarried and intestate in the year 1885.

This was a special case, to which the marriage-contract trustees were the first parties, and James Montgomery was the second party.

The second party maintained that in consequence of the children of the marriage being reduced to two in number, the first parties were bound, on his renouncing and discharging *pro tanto* his liferent, to denude in his favour of the trust-estate in so far as the same exceeded the principal sum of £12,000, being the provision made in the marriage-contract in the event of there being only two children of the marriage or issue of such children. The first parties maintained that as the provision of the liferent in favour of the second party was declared to be strictly alimentary, and not arrestable or affectable for his debts or deeds, or the diligence of his creditors, the second party was not *in titulo* to renounce or discharge his liferent in any part of the trust-estate, but that the first parties were bound to hold the whole capital of the trust funds so long as the second party survived. The first parties also maintained that they held the whole trust funds as fiduciary fiars, and in security of the provision to the children of the marriage whatever their number.

The following question was submitted for the opinion of the Court—"(1) Whether on the second party renouncing and discharging his right to the liferent of the marriage-contract funds, so far as they exceed £12,000, the first parties are bound to denude of the surplus in his favour?"

Argued for the first parties—(1) The trustees could not pay over the balance of the capital if they retained £12,000 in their hands. The question was settled by *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200. The present case was *a fortiori* of that. The right of the husband to the estate was made in express terms an alimentary liferent. The authorities proceeded on the principle that a testator is entitled to put a restriction on his gifts to protect them against possible danger—*White's Trustees* v. *White*, June 1, 1877, 4 R. 786; *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858; *Smith* v. *Campbell*, May 30, 1873, 11 Macph. 639; *Barron* v. *Barron's Trustees*, July 7, 1887, 24 S.L.R. 735. (2) The trustees held as fiduciary fiars. They were instructed to invest the funds. If only £12,000 were retained and invested, a fall in securities might reduce the amount of the capital when it became payable.

Argued for the second party—It being admitted that there were only two children of the marriage who could take any benefit under this deed, a large balance of trust funds remained. The second party was entitled to have this balance paid over to him on his renouncing his liferent (1) because the radical right was in him, and (2) because there were no trust purposes to which this balance could be applied. It was not proposed to terminate the trust; it had to be continued in order to protect the interests of the children of the marriage. All the second party proposed was to take out of the trust funds the free balance of residue. The state of matters which had occurred was foreseen and provided for by the spouses, because in the clause providing for there being only two children of the marriage it was declared that the residue of the trust capital was to "be at the disposal of" the second party, "or his heirs, executors, or assignees." The second party had a right to renounce his liferent, because the alimentary character which attached to the fund *stante matrimonio* was lost on the dissolution of the marriage, as the purposes for which it was declared alimentary were at an end. Two other circumstances favoured the claim of the second party. (1) The greater part of the trust funds came from his side of the house, and (2) this was the case of a husband renouncing, and not a wife, with regard to whom the law of Scotland had always shown a desire to afford protection—*Martin* v. *Bannatyne*, March 8, 1861, 23 D. 705; *Menzies* v. *Murray*, March 5, 1875, 2 R. 507; *M'Lean's Trustees* v. *M'Lean*, Feb. 23, 1878, 5 R. 679; *Livingstone* v. *Livingstone*, Nov. 5, 1886, 14 R. 43; *Urquhart's Trustees* v. *Urquhart*, Nov. 23, 1886, 14 R. 112.

At advising—

Lord President—In this case the arguments of the parties are rested on one side on the case of *Corbet* v. *Waddell*, 7 R. 200, and on the other on the case of *Martin* v. *Bannatyne*, 23 D. 705. It appears to me that neither case has any application to the present circumstances. The case of *Corbet* was a case of a subsisting marriage-contract trust; both parents were alive, and so were the children, and therefore there were interests to be protected of every kind contemplated in any marriage-contract. The only question was whether an alimentary liferent settled on the husband, and a contingent right to part of the fee of the marriage-contract funds, was attachable by the diligence of the husband's creditors, he being bankrupt. In *Martin's* case the whole trust purposes had been fulfilled, and there were no longer any interests to protect. In short, the marriage-contract was not an operative deed, but had come to an end. Now, that is not the case here. Here the marriage-contract undoubtedly still subsists, for although the marriage has been dissolved by the wife's death, the children's interests remain and are provided for, and the husband has an alimentary liferent of the trust funds. Therefore it appears to me that this case is not to be decided on authority, but on the true construction of the marriage-contract. The husband or his father provided £16,000, and the lady £2500, and both sums were paid to trustees. One of the purposes of the trust was to provide a strictly alimentary liferent to the spouses jointly, and to the survivor, of the interest of the entire trust funds. That is the leading purpose of the deed, and then we find a clause disposing of the capital. By that clause it is provided that "the said trustees, or trustee acting for the time, may hold and retain the said capital for behoof of the child or children who may be procreated of the said intended marriage, and the issue of such child or children, whom failing, as hereinafter written, for behoof of the persons or person to whom, on their failure, the same is likewise hereinafter provided, and shall account for and pay over the said capital to the said child or children,

or the said issue, at the times and in the manner following." Then follow provisions in particular events to the children, and these are very clearly made. If only one child arrives at majority, or if a daughter is married, and survives the longest liver of the spouses, then the sum of £10,000 is to be paid to the child. If two children fulfil these conditions, then £12,000 is the sum to be paid. If three children should stand in this position, then the entire trust capital is to be divided among them equally, but subject to a power of division by the husband. Now, that is the whole scheme of the trust, and it is provided that in either of the two first events of there being only one or two children, then the residue of the trust capital is to be at the disposal of the husband. The deed then provides for the case of there being no child of the marriage, or issue of such children, at the death of the longest liver of the spouses. In that event the capital is to be paid over to the representatives of the spouses in proportions similar to the contributions from which it derived its existence.

This is not a deed difficult of construction. I think the different events contemplated are clearly dealt with, and the provisions are made in plain language. The part of the deed requiring construction is that which speaks of the residue of the capital in the event of there being one or two children of the marriage. The capital as originally provided amounted to £18,500, and it is explained to us that from various favourable causes it is now more. Thus in the event of only one child satisfying the provisions of the marriage-contract and surviving both the spouses, then the residue would be the difference between £10,000 and the amount of the capital, and if there are two children, then the residue would be the difference between £12,000 and the amount of the capital. Now, it is to be observed that there are no directions to the trustees in any event to pay over the residue. In the event of no child at all surviving the spouses, then there is a direction "to pay over, assign, and convey to and in favour of the assignees, executors, or nearest of kin of the said James Montgomery and Eleanora Anstruther Thomson respectively the whole of the said trust capital, and that in the proportions respectively advanced by or for them as herein specified." In short, in that case the £16,000 provided by the husband was to go to his representatives, and the £2500 to those of the wife. There is a distinct direction to pay over the amount, but as regards the residue—that is, the difference between £10,000 or £12,000 and the capital—there is no direction to pay at all. What is directed is, that the residue is to be at the disposal of the husband or his heirs or executors or assignees. Now, I do not think that that means any more than that he might dispose of the residue by a deed to be effectual after his death. I think that this is clearly a power of testamentary disposal, and the use of the word "assignees" makes no difference in my view, because trustees in a testamentary disposition are assignees, and if so, it is plain that it was not intended by the marriage-contract that the so called residue should ever be paid to the husband in his lifetime.

If, indeed, it had happened that it was not necessary to keep up the marriage-contract for the protection of interests, it might have followed, on the authority of many cases, that the capital might have come into the hands of the husband during his lifetime. For example, if the two existing children consented to put an end to the trust, that might have been a different case. For if they had consented to take payment now by an agreement with their father I do not think the trustees would have had any interest to interfere. But this is not the case, and we cannot do anything that may be adverse to interests under the marriage-contract. All we know is that there are two children who are entitled to £12,000. It has been said that it would be enough security to them if the trustees were to retain the £12,000, and pay over the balance to the husband. I do not think that that would be within the meaning of the marriage-contract. It might be safe, but I think they are bound under this deed to do more. I take this marriage-contract to mean that it shall be kept up in the events which have happened in order that the intended benefits to the children may be secured, and that the whole fund is to remain in trust for this purpose. It is possible that if the trustees were to set apart and invest £12,000, it might transpire when the rights to it emerged, and payment was demanded, that the security had fallen in value, and that the money or part of it had been lost, and the provisions would not have that security which the marriage-contract contemplates. But if the trust must be kept up till the children can claim the money, what of the husband's position? All that is provided for him is an alimentary liferent of the trust funds which he is entitled to draw. I do not know if he has any interest to have the provision to him converted from an alimentary into a non-alimentary provision, and I do not know if we could aid him in doing that. All we know is that he is entitled under this deed to an alimentary liferent of the entire trust funds, and we must accordingly find that the trustees are not entitled to pay over the surplus.

Lord Mure concurred.

Lord Adam—We are not here dealing with a marriage-contract or a trust which has failed, or one in which the purposes have been implemented, or one which has become inoperative. Here the marriage-contract rules a subsisting trust, and that being so, the question is, what construction are we to put on it in order to carry out the intention of the parties to it? Now, the husband is to receive an alimentary liferent of the whole trust funds. The fourth purpose provides for the disposal of the fee, and then it will be observed that directions are given as to what is to be done after the death of the longest liver of the two spouses—that is to say, what is to happen on the death of the husband, he being the survivor. At the death of the longest liver the trustees are directed to pay £10,000 if there is one child, and £12,000 if there are two children. I agree with your Lordships that the absence of any direction to pay the balance of residue to the surviving spouse is significant, and like all the other directions points to this, that the disposal thereof is to take place at the death of the longest liver. What is not said is that Mr Montgomery shall have the disposal of any part of the resi-

due during his life. It is evident he is not to be allowed to handle the money; he is to dispose of it by *mortis causa* settlement, and if not, then it goes to his heirs. This was evidently what was in the mind of the parties when the marriage-contract was made.

Lord Shand was absent from illness.

The Court found that the first parties were not entitled or bound to denude in favour of the second party of any surplus of the marriage-contract funds in their hands beyond the sum of £12,000.

Counsel for the First Parties—Gloag—H. Johnston. Agents—Henderson & Clark, W.S.

Counsel for the Second Party—Mackay—Martin. Agent—F. J. Martin, W.S.

Saturday, December 24, 1887.

FIRST DIVISION.

DICK *v.* RUSSELL AND ANOTHER.

Arrestments--Recall--Colliery Labourer--Precarious Wage—Alimentary Provision.

The wages of a colliery labourer were 12s. per week, but his employment was precarious owing to an accident. Under his father's settlement he was entitled, as an alimentary provision, to the income of a share of residue, which yielded on an average 12s. per week. He was unmarried. Arrestments were used, upon a decree for expenses, to attach the latter sum. In a petition for recall of these arrestments—*held* that the petitioner's income was not more than sufficient for his support, and arrestments recalled.

This petition was presented by John Dick, colliery labourer, Hamilton, for the recall of arrestments used in the hands of the trustees acting under his father's settlement.

This settlement directed the trustees to hold the residue for the liferent use allenarly of the truster's surviving children, and to pay to them the interest half-yearly, which provision was declared to be for their alimentary use allenarly, and not affectable by their debts or deeds, or liable to the diligence of creditors.

In an action at the instance of the petitioner against the trustees for the reduction of this settlement he was unsuccessful, and the defenders obtained a decree against him for £290, 13s. 2d. of expenses. Mrs Dick, the defender's stepmother, was one of the trustees, and a defender in the action. She died during the dependence of the action, and her executrices, Mrs Margaret Dick or Russell and Annie Dick, were sisted in her place. Upon this decree arrestments were used in the hands of the trustees by Mrs Dick's executrices.

John Dick then presented this petition for recall of the arrestments, in which he averred—"That in December 1879 the petitioner, while employed in a tanyard in Hamilton, fell into a vat containing a boiling liquid, and was so seriously injured that he was bedfast for six months, and he has not yet recovered, and never will entirely recover from the shock which his system then sustained. He is besides suffering from a dropsical affection in his feet and legs which prevents him from working save at light labour. His employment is accordingly precarious, and when working he only earns about 12s. a-week or thereby. That the petitioner, while he is anxious to meet the heavy obligations incurred by him under the said decree, is unable to set aside towards that object any portion of the alimentary income from his father's estate, and he at present depends upon it for his support. The said alimentary income is not of an excessive amount, as it only averages about 12s. per week, and the action of the said Mrs Margaret Dick or Russell and Annie Dick in endeavouring to attach the same by arrestment is incompetent, unreasonable, and oppressive."

The respondents lodged answers, in which they stated—"The petitioner is a flesher by trade, and is at present employed as a flesher in Hamilton. He is unmarried, able-bodied, and is subject to no incapacity, physical or mental. The respondents are unaware of any accident having happened to the petitioner as stated in the petition. The respondents believe and aver that the petitioner is in receipt of a wage sufficient to aliment and maintain him suitably to his position and station in life, and they therefore submit that the petition should be refused with expenses."

At advising—

Lord President—There is no doubt that the fund held by the trustees is alimentary. The only doubt is whether the man's income is excessive, his aggregate income being about 24s. per week. I cannot say that I think that is more than is necessary for the support of a man in his position. If he were able to earn larger wages the case would be different, but it is evident that he is not, in the proper sense of the term, able-bodied, and that he cannot earn more than 12s. a-week, and that even that is somewhat precarious. He is a labourer in the pits, and his work is apt to be interrupted owing to the state of his health. His wages therefore depend on his being constantly in employment. In these circumstances I am for recalling the arrestments.

Lords Mure and Adam concurred.

Lord Shand was absent from illness.

The Court recalled the arrestments.

Counsel for the Petitioner—Guthrie. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for the Respondents—Deas. Agent—Robert D. Ker, W.S.
