among all the documents there rehearsed, by much the most important part would seem to be the conclusions of the summons, in which the pursuers formulate their own proposal for the sustentation of the minister. Now, that proposal is that the magistrates, council, and freemen of the burgh and their successors in office shall be bound and obliged to provide the minister and his successors in all time coming with a competent and legal stipend not under the sum of £60 sterling yearly. Had decree been pronounced in these terms, proposed by the magistrates themselves, it is impossible to doubt, after the decision in the *Greenock* case, that the obligation would have the elastic meaning contended for by the present pursuer. Now, this fact seems to me to exclude the theory that the only liability ever contemplated by the burgh was liability limited to £60, and that the future ministers for all time were to be dependent solely on the seat rents for an increase of their stipend. The summons proves conclusively that the magistrates were prepared to undertake, and offered to undertake, precisely the obligation which the pursuer now asserts to be incumbent on the defenders.

The words in the decree about augmentation from the seat rents, upon which the defenders rely, seem, from the proceedings rehearsed in the decree, to have been first proposed when the case was before the Lord Ordinary (Lord Westhall). Is it to be held that they were inserted in order to abate, and have they the effect of abating, the obligation which the magistrates came into Court to undertake? No such conclusion seems at all necessary, and the explanation of the clause is very different.

It is to be observed that the administration of the seat rents was placed in the hands, not of the magistrates, council, and freemen, but of a special committee of thirteen. The primary purpose of these funds not being the support of the minister, it seems reasonable that special provision should have been made authorising the administrators of these funds at their discretion to add to the income of the minister out of the surplus of an ecclesiastical fund. It seems also reasonable enough to say, as the decree does, "the sum (that is, the augmentations granted by the committee) being no burden on the funds of the community but upon the contingent funds under their management." This means, as I take it, that the committee are to see that they do not give to the minister, except out of a surplus, the existence of which was a contingency, and do not by premature generosity to the minister, throw on the town the burdens primarily incumbent on the seat rents, such as keeping up the church and the services. The structure of the clause seems to me to forbid the theory that the words about not burdening the community apply to the legal and competent stipend—they only apply to the action of the committee.

I agree with the Lord Ordinary in considering that the power conferred on the committee does not derogate from the obligation imposed on the magistrates, and that that obligation is expressed in words, the legal significance of which, apart from some modifying context, is quite settled.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer — Jameson — W. Campbell. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for the Defenders — Guthrie — Hunter. Agent—John Macmillan, S.S.C.

Thursday, June 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

HAGART'S TRUSTEES, &c. *v.* HAGART.

(*Ante*, vol. xxxi., p. 865, 21 R. 1052.)

Marriage-Contract—Provisions to Children —Conveyance of Property "now belonging or which shall belong to me at time of death."

By antenuptial marriage-contract a wife assigned to her husband in liferent, in the event of his surviving her, and to the children of the marriage in fee, all estate that might belong to her at the time of her death. She reserved to herself no power of apportionment among the children.

The spouses subsequently executed a mutual trust-disposition and settlement in which the wife assigned to her husband, in the event of his surviving her, and to the children equally amongst them, share and share alike in fee, her whole estate presently belonging or which should belong to her at the time of her death.

Held (*aff.* judgment of Lord Stormonth Darling) that these deeds only conferred upon the children of the marriage a right to share equally in such estate as their mother might leave at her death, and did not entitle them to object to their mother disposing of her estate by *inter vivos* gifts to one of their number.

Fraud and Circumvention.

Opinion indicated by Lord Stormonth Darling that, while the law gave a remedy for circumvention when it occurred, it would not interfere to prevent circumvention. *Opinion reserved* on this point by Lord Kinnear.

Mr and Mrs Hagart were married in 1833. Mrs Hagart was then institute of entail in possession of the entailed estate of Glendelvine.

By antenuptial contract of marriage dated 15th April 1833, Mr Hagart assigned and disponed to Mrs Hagart in liferent, in the event of her surviving him, and to the children of the marriage, excepting the eldest

child (who would succeed to Glendelvine), the whole estate, heritable and moveable, that might belong to him at the time of his death, subject to a power of apportionment reserved to himself, and failing such apportionment, then equally among them. These provisions Mrs Hagart accepted as in full of her legal rights, and they were declared to be in full of the legal rights of the children of the marriage. In consideration of the said provisions Mrs Hagart granted certain provisions in Mr Hagart's favour by way of annuity out of the entailed estate, in the event of his survivance, and she also granted certain provisions out of that estate to the children who should not succeed to her therein. Mrs Hagart further assigned and disponed to Mr Hagart in liferent, in the event of his surviving her, and to the children of the marriage in fee:—"All and sundry other lands and heritages, debts, sums of money heritable and moveable, real and personal, and all goods and gear of whatever denomination, including household furniture and plenishing, that might belong to her at the time of her death," excepting always the rents of Glendelvine. By a minute annexed to the antenuptial contract of marriage, dated 2nd January 1840, the parties explained that the exclusion of the eldest child from all share in the provisions made in favour of the children was meant to apply only to the child succeeding to the entailed estate.

By bond of provision dated 8th January 1842 Mrs Hagart bound herself to grant bond over the entailed estate for the benefit of younger children for, "if three or more such children or their representatives, three years' free rent or value of the whole of the said entailed lands and estates equally among them."

By the antenuptial contract of marriage dated 30th November 1858 of Mrs Amelia Valentine Hagart or Dowie—one of the children of the marriage—Mrs Hagart declared the bond of provision irrevocable, and Mr and Mrs Hagart bound themselves that Mrs Dowie should receive an equal share with the other children of whatever means and estate they might die possessed. Mrs Dowie assigned to her marriage-contract trustees all her share.

On 27th July 1861 Mr and Mrs Hagart executed a mutual trust-disposition and settlement. By this deed Mr Hagart conveyed to trustees, of whom Mrs Hagart was *a sine qua non*, his whole estate, heritable and moveable, in trust, after payment of debts and expenses, for payment to Mrs Hagart of the free revenue of the residue of his estate for her liferent use allenarly during her life, and to his children equally among them in fee, excepting the child succeeding to Glendelvine. Mrs Hagart on her part, in addition to the annuity and provisions secured to her husband and children out of the rents of Glendelvine, disponed to and in favour of Mr Hagart, in the event of his surviving her, whom failing by his predeceasing her, to their said children equally amongst them, share and share alike in fee, excepting always the child who should succeed to Glendelvine, "All and sundry my whole estate, heritable and moveable, real and personal, presently belonging or which shall belong to me at the time of my death, including such portion of the rents of Glendelvine as shall belong to me or my executors at the period of my death, including also" all policies of insurance on her life. The spouses also revoked all former settlements made by them or either of them, "and reserved to them or either of them, during their joint lives, power to alter, innovate, or revoke the said presents in whole or in part, so far as their respective estates were concerned, and also power to the said James Valentine Hagart, in the event of his being the survivor, to alter, innovate, or revoke the foresaid trust-conveyance and purposes thereof as he should think fit."

Mr Hagart died on 14th August 1869, and was survived by Mrs Hagart. After his death the estate of Glendelvine was sold with the consent of the three eldest sons of the marriage, as the nearest heirs of entail, and in security of the provisions which she had granted to the younger children out of the estate Mrs Hagart assigned to trustees certain policies of assurance upon her life. After the disentail and sale had been carried through, the debts of both spouses paid, and the future premiums on the policies redeemed, a sum of £22,000 remained for investment, and this sum was left in the possession and control of Mrs Hagart.

In 1894, Mrs Hagart being then eighty-six years of age, a petition was presented by her surviving children (two sons and five daughters), other than her youngest son Francis, praying the Court to sequestrate the estates of the deceased Mr Hagart and of Mrs Hagart, and to appoint a judicial factor to hold and administer them.

On July 19th 1894 the Court dismissed the petition. (Reported *ante*, vol. xxxi. p. 865, and 21 R. 1052.)

On October 23rd 1894 an action of declarator was raised against Mrs Hagart by the trustees under the mutual disposition and the surviving children other than her youngest son, craving that it should be found and declared, first, that by virtue of the deeds described above "the whole residue and remainder of the estates, heritable and moveable, of the said deceased James Valentine Hagart and of the defender respectively, as at their respective deaths, subject to the liferent by the survivor of the estate of the predeceaser, was irrevocably divided and apportioned between and among the whole children of the marriage, . . . and that the defender had and has no right or power after the decease of her said husband, either by gifts *inter vivos* to one or more of her said children, or by gratuitous gifts *inter vivos* or by *mortis causa* settlement, to alter, innovate upon, or revoke the said equal division and apportionment;" and second, "that under and by virtue of a transaction and agreement entered into in the year 1871" by the defender and certain of her children in connection with the proceedings for the disentail of Glendelvine, it had been agreed

that the equal division of Mr and Mrs Hagart's estates among the whole members of the family provided for by the marriage-contract of 1833, relative minute of 1840, and mutual trust-disposition and settlement of 1861, was and should be fixed, and irrevocable, and that therefore the defender was not entitled, either by gifts, *inter vivos*, to one or more of her said children, or by gratuitous deed *inter vivos*, or by *mortis causa* settlement to alter, innovate upon, or revoke the said transaction and agreement and said equal division of said joint estates, or to prefer one or more of the said children to the rest."

There were further conclusions for decree ordaining the defender to account for her intromissions with the estate of her deceased husband.

The pursuers after narrating the deeds quoted above, averred that Mr Hagart had left estate exceeding his debts, and consisting in part of a claim for the amount of improvement expenditure laid out by him on the estate of Glendelvine, and of amounts assured by various policies on Mrs Hagart's life; that Mrs Hagart's estate at this time consisted solely of her interest in Glendelvine, and her interest, if any, in these policies; that Mr Hagart's estate could not have been extricated from that of his widow without sacrificing her life interest in the entailed estate; that in order to provide a residuary fund for Mrs Hagart's benefit it was resolved to sell the estate; that to facilitate this, in the year 1871 her three eldest sons agreed to accept sums greatly less than the true value of their interests as consideration for consenting to the disentail; that "(Cond. 10) . . . It was a condition of their doing so, and of the transaction and agreement between them and the defender, that the equal division of their father's and the defender's estates among the whole members of the family, provided for by the marriage-contract and mutual disposition, was and should be fixed and irrevocable;" that on the same footing the younger children agreed to accept the insurance policies as security for the provisions made for them by their mother, though these policies belonged to Mr Hagart's estate; that in consequence of this agreement it became unnecessary to separate the two estates, and that the two had been treated as one, and managed as such, Mrs Hagart enjoying the whole income, and Mr Hagart's trust being allowed practically to remain in abeyance.

The pursuers further averred (Cond. 16 and 17) that Mrs Hagart's health was impaired, and her mind weakened and rendered facile by age, and that she had been for some time completely subservient to the will of her youngest son, a man of loose and disorderly habits, who had gained a dominating influence over her, which he used to obtain sums of money from her, "that he had already received from her sums of money largely in excess of the sum to which his just share in the estates of his parents could possibly amount, . . . to the reduction of the capital in which her whole children are entitled to share equally."

They pleaded—"(1) In respect of the various deeds set forth in the summons, and on a sound construction of their terms, the whole residue of the estates of Mr and Mrs Hagart was irrevocably destined, divided and apportioned to and among the children of the marriage in equal shares, and the defender had and has no power after her husband's death to revoke, alter, nor innovate upon the said equal division and apportionment. (2) *Separatim.* By the transaction and agreement set forth in the summons, the joint estate of Mr and Mrs Hagart was finally and irrevocably divided and apportioned among the children of the said marriage equally, and the defender is neither entitled to revoke, alter, or innovate, upon the said division and appointment by act or deed *inter vivos*, nor by testamentary writing to take effect after her death."

The defender averred that all Mr Hagart's property had been swallowed up in paying his debts, and that the whole remaining estate belonged to her, and had been dealt with as her absolute property.

She pleaded—"(3) The pursuers' averments are irrelevant. (5) The alleged transaction and agreement can only be proved by the writ or oath of the defender."

On 9th January 1895 the Lord Ordinary pronounced the following interlocutor—"Finds that the averments of the pursuers are irrelevant to support the conclusions of the summons, except in so far as they relate to the defender's intromissions with the estate of the deceased James Valentine Hagart, and appoints the defender to lodge the account called for.

"*Opinion.*—If the averments made by the pursuers in articles 16 and 17 of the condescendence are well founded in fact, it is impossible not to sympathise to some extent with their desire to save this old lady's estate from further dilapidation. But they recently failed in an attempt to supersede her in its management by the appointment of a judicial factor, and they do not profess even now that there is any case for placing her under curatory. The present action is to be judged of, therefore, not by anything in her condition which requires the law to protect her against herself, but by the right of the pursuers, in their own interest, to restrain her in the management of her property.

"It appears that since the death of the late Mr Hagart in 1869 there has been no attempt to extricate his estate from that of his widow, and that both estates have been administered by her as one. In so far as the action seeks now to bring about such extrication, it is admittedly relevant, though the task after such an interval of time may not be an easy one. But the main object of the action is to declare that the fee of Mrs Hagart's own estate is irrevocably destined in equal shares to the whole children of the marriage, and that the defender has no right or power, either by gifts *inter vivos* to one or more of her children or by *mortis causa* settlement, to alter or revoke this equal division.

"I am of opinion that the averments of the pursuers on this part of the case are irrelevant, for the simple reason that, under the deeds which they found on, they do not and cannot pretend that their right is anything higher than a right to participate equally in whatever estate Mrs Hagart may leave at her death, and that such a right of succession—protected it may be, but still a right of succession—does not entitle the pursuers to insist that the fiar, during her lifetime, shall be restrained in the absolute use and administration of her estate. That being my view, I purposely abstain from entering on some of the topics which were discussed with reference to the construction of the deeds. It is possible that questions may arise at Mrs Hagart's death if she shall leave any deed or deeds, testamentary in their conception or effect; and it is better not to anticipate such questions.

"I do not forget the rule laid down in the leading case of *Arthur* v. *Lamb*, 8 Macph. 928, according to which Sir Charles Lamb's right over the portion of his estate destined to his children was held to have been subject to the condition 'that he could not defeat or prejudice the children's right of succession by any merely gratuitous alienations, whether by deed *inter vivos*, by disposition *mortis causa*, or by testament.' I doubt whether the kind of *inter vivos* deed there meant was anything but a gift to take effect at death, which would of course have been a fraud upon the contract in the sense explained by Lord Curriehill at p. 22 of the case of *Champion* v. *Duncan*, 6 Macph. 15. But the estate provided to the children in Sir Charles Lamb's case was one-half of the property belonging to him at the dissolution of the marriage, and was therefore capable of ascertainment during his life. Here, on the other hand, the estate provided to the children is simply what may belong to Mrs Hagart at the time of her death; and I know of no principle of law by which the children can have a voice in determining whether that is to be much or little, unless they are prepared to aver that something is being done which, under cover of an out-and-out gift, is truly intended to take effect only at death.

"So much for the deeds. The antenuptial contract of Mr and Mrs Hagart, the minute annexed thereto, Mrs Dowie's marriage-contract, and the mutual settlement, are all alike in conferring on the pursuers nothing but a right of succession.

"With regard to the alleged agreement of 1871, it is not said to have been reduced to writing, and I doubt very much whether an agreement of so unusual a character could be proved otherwise. But it is unnecessary to consider that point, because there also the pursuers' averments come to no more than this, that the equal division of the joint estates of husband and wife was to be fixed and irrevocable, that is to say, so far as the defender is concerned, that whatever she might leave at her death was to be equally divided among her children. Such an agreement, even if proved, would give no right to the children to stay her hand during her life.

"The pursuers' counsel urged that they had made such averments of facility and circumvention as would support a reduction of a will. The law gives a remedy for circumvention when it occurs, but I never heard of its interfering to prevent circumvention, and I know not who would have a title to set it in motion except the person to whose lesion the circumvention is supposed to operate, that is to say, the victim of it.

"For these reasons I shall find that the averments of the pursuer are irrelevant to support the conclusions of the summons, except in so far as they relate to the defender's intromissions with the estate of the deceased James Valentine Hagart, and with reference to these alleged intromissions I shall appoint the defender to lodge the account called for."

The pursuers reclaimed, and argued—(1) An irrevocable equality of division had been created by the marriage-contract and succeeding deeds. The provisions in the marriage-contract in case of the wife were in contrast to those in case of the husband, she having bound herself to equal division among her children without any power of apportionment such as had been reserved by him. Further, the minute of 1840 emphasised this indefeasable equality of division as to the wife's estate. By the mutual disposition of 1861, the wife—even if it were held that under the marriage-contract she had an implied power of apportionment—clearly deprived herself of it. This was a contract, and after her husband's death the defender could not in any way alter the equality of division. This equality having been created the defender was not entitled to alter it by gifts to one child which would prejudice the rights of the others. The rule laid down in *Arthur* v. *Lamb*, June 30, 1870, 8 Macph. 928, applied to such gifts. The *dictum* of Lord Watson in *Macdonald* v. *Scott*, L.R. 1893, App. Cas. 642, at p. 655, did not support the view that a parent was entitled by *inter vivos* gifts to one child to defeat provisions made to the other children. The pursuers here had a *jus crediti* which entitled them to restrain the defender from gratuitously alienating her estate—*Hogg* v. *Campbell*, March 18, 1863, 1 Macph. 647. (2) Even if the pursuers failed on the deeds, they were entitled to a proof of their averments as to the agreement of 1871, which they could prove both by correspondence and by parole evidence. (3) In any view the defender was bound to account for her intromissions with her husband's estate.

Argued for the defender—The declarator was incompetent during the life of the defender, for there might be no estate left to divide at her death. (1) The marriage-contract gave purely testamentary provisions to her children, and there was nothing in it to deprive the defender of her power of dealing with her own estate as she pleased; she was fiar now of all the estate, and accordingly she might alienate to her

children or anyone else during her life —*Macdonald* v. *Scott*. The mutual disposition was a revocable deed, and was to be regarded as containing two wills —*Mitchell's Trustees* v. *Mitchell*, June 5, 1877, 4 R. 800. If it were a contractual deed, one of its provisions would be invalid as being inconsistent with the marriage-contract, and as being actually a fraud upon it. There was no *jus crediti* in the other children under what was a purely testamentary deed, to entitle them to restrain the defender from alienating her estate. (2) The agreement of 1871, even if proved, could be of no help to the pursuers, except to show that the defender could not alter the disposition of her estates at her death, which she did not dispute. There was nothing averred as to her power of alienation by *inter vivos* gifts being restrained by this agreement. Moreover, it could only be proved by writ or oath—*Edmonston* v. *Edmonston*, June 7, 1861, 23 D. 995. (3) The burden of accounting should be thrown upon the trustees who had consented to the mixing up of the two estates.

At advising--

LORD ADAM—A petition at the instance of the present pursuers against the defender for the appointment of a judicial factor on the estates of Mr and Mrs Hagart was recently brought before us. On 19th July 1894 we refused that petition on the ground, *inter alia*, that the rights of the petitioners under the deeds on which they founded, were not clear, and that the petition was not an appropriate process for their ascertainment.

This case is the sequel of that case, and under it it is sought to have these rights ascertained and given effect to. The facts which have given rise to the litigation are so fully set forth in the previous case that it is unnecessary to repeat them here.

By the interlocutor under review the Lord Ordinary has found that the averments of the pursuers are irrelevant to support the conclusions of the summons except in so far as they relate to the defender's intromissions with the estate of her late husband, Mr Hagart. No objection was taken to this interlocutor in so far as regards this exception, and in turning to the conclusions of the summons to see to which of them the previous part of the interlocutor applies, we find that it is the first and second declaratory conclusions, which in his Lordship's opinion are not supported by any relevant averments.

By the first and leading conclusion it is sought to be found and declared that, in virtue of certain deeds there enumerated, the whole residue and remainder of the estates, heritable and moveable, of the deceased Mr Hagart and the defender respectively, as at their respective deaths, subject to the liferent of the survivor of the estate of the predeceaser, were irrevocably divided and apportioned between and among the whole children of the marriage between Mr Hagart and the defender, and that the defender had and has no right or power after the decease of her husband, either by gifts *inter vivos* to one or more of her said children, or by gratuitous deeds *inter vivos*, or by *mortis causa* settlement, to alter, innovate, or revoke the said equal division and apportionment.

As I understand, the defender does not dispute that she is not entitled to alter by testamentary settlement, or other deed to take effect after her death, the equal division of her estate among her children, but she maintains that, during her life, she remains the uncontrolled mistress of her estate and may dispose of it by gift or otherwise as she pleases; and that is the question at issue between the parties.

The first deed founded on by the pursuers is the antenuptial marriage-contract between Mr and Mrs Hagart of date 15th April 1833, and I think it only necessary to refer to the clause in the deed which ascertains the rights of the children under it. Mrs Hagart thereby assigns, dispones, and makes over to and in favour of her husband in liferent, in the event of his surviving her, and to the child or children of the marriage, whom failing to her own nearest heirs and assignees in fee, all and sundry lands and heritages other than the estate of Glendelvine—of which she was heiress of entail—debts, sums of money, heritable and moveable, that should belong to her at the time of her death, excepting the rents, mails, and duties of the estate of Glendelvine.

Mrs Hagart reserved to herself no power of apportionment among the children, and therefore it is clear that each child had a right to an equal share of whatever succession there might be. But it is equally clear that what was given then was a mere *spes successionis*—a right to share in whatever Mrs Hagart might leave. It gave them no right to her estate during her life, or to interfere with her in administering it as she chose.

The next deed to which it is necessary to refer is the mutual trust-disposition and settlement by Mr and Mrs Hagart of date 27th July 1861.

By this deed Mrs Hagart, in addition to the provisions which she had secured or might secure to her husband and children out of the rents of Glendelvine, gave, granted, assigned, and disponed to her husband, in the event of his surviving her, whom failing by his predeceasing her, to their children, equally amongst them, share and share alike in fee, excepting the child who should succeed to Glendelvine, her whole estate heritable, moveable, real, and personal, "presently belonging or which shall belong to me at the time of my death, including such portions of the rents of the said entailed estate of Glendelvine as shall belong to me or to my executors at the period of my death, and including also" certain policies of insurance therein mentioned. It will be observed that this clause is not expressed in similar terms to the corresponding clause in the antenuptial marriage-contract, because what is here conveyed is not only the estate which should belong to Mrs Hagart at the time of her death, but also the estate presently be-

longing to her—that is, at the date of the deed. I do not think that the difference in the terms of the clauses makes any difference in the result. The deed in question is a purely testamentary deed, and is only intended to come into operation on Mrs Hagart's death. There is no nomination of trustees under it as there is in Mr Hagart's part of the deed, and there is no present disposition of the estate to anyone. It was therefore clearly intended that Mrs Hagart should remain in the undisturbed possession of her estate after the execution of this deed, just as she was before. In these circumstances, as was pointed out in the previous case, a conveyance in these terms means no more than a conveyance of the estate belonging to her at her death; and that apparently is the view which the pursuers themselves take of the deed, because what they ask us to declare is that the residue of the estates of Mr and Mrs Hagart at their respective deaths was irrevocably divided among the whole children of the marriage.

I do not think it necessary to refer to the marriage-contracts of Mrs Hagart's daughters, because I agree with the Lord Ordinary that they in no way alter the rights of the children as ascertained by the deeds to which I have referred, and the result appears to me to be that the children have a right to have any estate that their mother may have divided equally among them, and that she cannot defeat this equality of division by any testamentary or other writing to take effect only after her death. But on the other hand I think the children have no *jus crediti* or other right which entitles them to interfere with Mrs Hagart in the free and unfettered control of her own estate during her life. She may spend it or dispose of it by gift or otherwise as she pleases. What the children are entitled to is only an equal share of what she leaves.

It was said, however, that a gift of part of her estate during life by Mrs Hagart to one of her children was a fraud upon the right of the other children to have an equal share of her estate. But if the right of the other children is only, as I think, to have an equal share of what she may leave at her death, it can be no fraud on any right of theirs. I can quite understand that any scheme or device on Mrs Hagart's part to defeat the children's right to an equal share of her estate after her death, while preserving her right to it intact during her life, would be such a fraud, just as in the somewhat similar case of legitim.

But such a question would only arise after Mrs Hagart's death, and we have no such question to deal with here, because the complaint against Mrs Hagart is that she is making present gifts to one particular child. I therefore concur with the Lord Ordinary as regards this conclusion of the action.

I also concur with the Lord Ordinary as regards the alleged agreement of 1871, which forms the second declaratory conclusion of the summons, as I understand, the averments of which the pursuers desire a proof are to be found in the 10th article of the condescendence.

It is there averred that the three next heirs of entail agreed to accept sums of money very greatly less than the actuarial value of their interests as the consideration for their consenting to the disentail; that it was a condition of their doing so, and of the transaction and agreement between them and the defender that the equal division of their father's and the defender's estates among the whole members of the family provided for by their father and mother's marriage-contract of 1833, relative minute of 1840, and mutual trust-disposition and settlement of 1861, was and should be fixed and irrevocable. But I agree with the Lord Ordinary that, even if this were proved, it would not forward the pursuer's case. It would in no way enlarge the fund, which is to be equally divided among the children, that is, the estate which should belong to their mother at the date of her death, and it would confer no right in the children to interfere with her in the disposal of it during her life.

I therefore think that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—I had an opportunity of reading the opinion which has just been delivered by Lord Adam, and, on the first branch of the case, the question of the rights of the children under the marriage-contract as determined by the construction of that deed, I agree with all that his Lordship has said and have nothing new to add. I may perhaps refer to some observations of my own upon the principles of law applicable to this branch of the case which I made in the former action between the same parties. I think the law on this subject is very tersely stated by Lord Watson in *Macdonald* v. *Hall*, where, referring to provisions of this kind in marriage-contracts, he says that the equality contemplated is only an equality in regard to testamentary provisions, and that the parent is free to squander his whole estate if he pleases in his lifetime.

Now, there is another branch of the case which was not much elaborated at the previous hearing under the petition. That is the contention on the part of the children that, because they consented to a disentail and accepted something less than the actuarial value of their interests in the entailed estate, they must be taken to have done so, or they did in fact do so, under the condition that at the death of their mother they were to receive an equal share in the converted value of the entailed estate. Now, if the argument means only that the children accepted less than the actuarial value of their interests because they had prospects of succession under the contract of marriage of their parents, then I agree with Lord Adam and the Lord Ordinary that such an expectation just resolves into a right to receive whatever the marriage-contract would give them, and that this view of the case leads to identical results with the argument upon the first branch. But if the meaning of the averments be

that the children consented to disentail upon favourable terms to their mother, upon an express agreement that the mother was not to diminish the capital of the disentailed estate, then such an agreement, in my opinion, could only be constituted by deed. It is no doubt familiar in experience that children often do consent to a disentail of their parent's estate upon terms more favourable to the heir in possession than a stranger heir would be likely to agree to; and they do so from motives which are very intelligible, but which are never expressed in the deed of consent. That is always given in the statutory form, and is an unqualified consent, but it is not the province of courts of law to inquire into the motives or expectations of the parties who enter into the agreement. We can only look at the agreement itself, and the idea of extending the scope of the agreement, or altering its terms by parole evidence of intention, appears to me to be contrary to our settled principles of law, and altogether inadmissible. In this view of the argument I am also of opinion that the averments are irrelevant, because there is no averment of an agreement constituted in such a way as the law would recognise.

On the whole view of the case I agree that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR—I am of the same opinion, and I only desire to add that there is one branch of the case which the Lord Ordinary has dealt with in his opinion, but which I think we are not called upon to consider, although it necessarily falls within the scope of the judgment which we are affirming. I refer to the Lord Ordinary's judgment, where he is of opinion that the averments of facility and circumvention are irrelevant to support the conclusions of the summons. He says that the law gives a remedy for circumvention when it occurs, but that he has never heard of its interfering to prevent circumvention; and he indicates an opinion that the present pursuers would have no title to pursue the action for that purpose. Now, I think we are not called upon to express any opinion upon that part of the case, and, for my own part, I desire to reserve my opinion upon the question which the Lord Ordinary has decided; because, assuming that there are such averments as would support a reduction of a will, counsel declined to maintain that their averments could or ought to be so construed as importing any such facility on the part of this lady as the Lord Ordinary assumes to have been intended in that part of his judgment to which I refer. We were told that they had declined to maintain that this lady was not capable of managing her own affairs, and they did so for reasons which were stated, and which appear to be quite natural and reasonable. Therefore, for my part, I desire to say that I give no opinion at all upon that part of the Lord Ordinary's opinion.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers—H. Johnston—Clyde. Agents—Hagart & Burn-Murdoch, W.S.

Counsel for the Defender—Jameson—Salvesen. Agents—Bruce & Kerr, W.S.

Saturday, June 8.

SECOND DIVISION.

CLARK'S TRUSTEES, PETITIONERS.

Trust—Trust (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 7—*Advances for Maintenance of Beneficiaries out of Accumulations of Unappropriated Income.*

A testator directed his trustees, *inter alia*, to pay annuities to his widow and sister, and on the death of the last annuitant to hold the whole residue of his estate for behoof of his children in liferent and their issue in fee equally among them, *per stirpes*, declaring that the shares should not be payable to the beneficiaries entitled to the same until majority in the case of males, and until majority or marriage in the case of females, and further declaring that the provisions should vest in the beneficiaries on the arrival of the respective periods of payment. The testator died in 1882 leaving estate to the value of about £98,000. He was survived by his widow and sister and by five daughters. The widow accepted her alimentary provision, but the daughters claimed and were paid legitim. The annual income of the trust-estate remaining after withdrawal of the legitim fund was much larger than was necessary to pay the annuities, and considerable sums of interest accumulated in the hands of the trustees. In 1895 the trustees petitioned the Court, under section 7 of the Trusts Act of 1867, for authority to pay £500 per annum, out of the funds undisposed of by the testator, to each of the two daughters of the testator who were married, for the maintenance and education of their respective families. The Court (*dub.* Lord Rutherfurd Clark) *authorised* the trustees to make the proposed payments for the period of two years.

Peter Clark died upon September 14th 1882 leaving a trust-disposition and settlement dated August 29th 1878, by which he provided, *inter alia*, an annuity of £600 per annum to his widow so long as she remained unmarried (restrictable in the event of her marrying again to £100), and further, desired his trustees to pay her an allowance of £100 for each of his daughters living with her, for their maintenance, clothing, and education. He also left an annuity of £100 to his sister. By the last purpose of his settlement the testator directed his trustees, upon the