Friday, July 15.

SECOND DIVISION.

[Lord Lee, Ordinary.

RONALDSON AND OTHERS (GRAY'S TRUSTEES) *v.* DRUMMOND & REID.

Expenses—Agent and Client—Discount upon Disbursements.

An agent who receives commission or discount upon the payment of charges incurred on account of a client is not entitled to charge the full amount of such payment against his client or against the opposite party in a litigation who has been found liable in expenses, but can only take credit for the sum actually disbursed.

The Auditor's report in the case of *Gray's Trustees* v. *Drummond & Reid*, June 7, 1881, *supra*, p. 551, having been enrolled for approval, the defenders, who had been found liable in expenses, objected to the said report on the following grounds—(1) That in course of the inquiry under the remit it had been ascertained that the pursuers' agents, Messrs James L. Hill & Company, received from Mr Dowell, who had been appointed to sell the furniture of Harthill Villa, a part of the commission charged by him for selling the furniture, and the full amount of that commission, without crediting the repayment, had been charged and allowed against the defenders. (2) That the account as audited included charges for the full professional remuneration of the pursuers' said agents connected with the sale of the furniture, and that the discount received out of the auctioneer's commission had not been credited. (3) That the pursuers' agents being bound to credit the said discount to the pursuers, the latter were bound to credit it in a question with the defenders. (4) The pursuers' agents had refused to state the amount of the said commission, and said that it had not been passed through their business books. The defenders believed that the amount of this commission was not less than £35, and they claimed that this sum be deducted from the amounts of the accounts as reported by the Auditor.

The pursuers' agent wrote to the Auditor in the following terms in explanation of his account —"Dear Sir,—With reference to the taxation of the non-judicial account in this action, I beg to mention that Mr Dowell allowed and paid me a portion of the commission charged by him for the realization and sale of the furniture poinded and sold in connection with the action. This allowance was treated by Mr Dowell as a personal commission, and he made it when settling other transactions with me, and it thus does not appear in my business books, and so was not known to my clerk who charged the account and attended the taxation."

He also produced the following letter to himself from Mr Dowell, the auctioneer—"Gentlemen, —I beg to state that agents are not entitled to commission from us, or to any share of our commission for conducting sales of property or effects; but there are cases where, from a variety of transactions, and from personal consideration, we occasionally give a donation, which of course is directly out of our pockets."

At advising—

Lord Justice-Clerk—I am rather glad to have an opportunity of expressing an opinion on the matter in hand. The notion of a so-called system of commission, by which the agent gets more than he is entitled to without the knowledge of the opposite party, is not creditable, nor is it to be allowed, and I shall always oppose it. The system goes too far in high transactions and in low transactions, and in this case the attempt to charge against the unsuccessful party more than was actually paid to Mr Dowell for his work is not to be listened to.

Lord Young—I am of the same opinion, and concur in every word that your Lordship has said. I assume that Mr Dowell was properly paid with the money which he received, and not that he gave back as charity to Mr Hill or anyone else a portion of his own proper right. He gives discount on receiving payment of his account, and I assume he has been rightly paid with what he actually received. If Mr Hill charges against his client, and consequently the client against his adversary in the litigation, more than he paid, he charges so much in excess of what he is entitled to. He is remunerated according to a well-established scale of remuneration, and the law will not allow him to get more in a question with his client, or allow his adversary in litigation to pay more. It is nothing to the purpose to say it is a matter between the agent and his client. So it is—that is to say, if the client is not seeking to make a charge against anyone else. But it so happens here that he has made a charge against Mr Drummond, who objects to being charged with Mr Hill's account, which is in excess of a just charge. He is entitled to what was paid to Mr Dowell and no more. I agree in condemning the system when it prevails, and it is notorious that it does prevail universally. Tradesmen, grocers, saddlers, coachmen receive tips, which are all paid by the master in the end. It is no doubt hard to detect the practice, but when we do detect it we must discountenance it.

Lord Craighill concurred.

The Lords sustained the objection.

Counsel for Pursuers—Dickson. Agents—J. L. Hill & Co., W.S.

Counsel for Defenders — Pearson. Agent — Thomas White, S.S.C.

Friday, July 15.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MURRAY'S TRUSTEES *v.* MURRAY AND OTHERS.

Succession — Marriage - Contract — Conquest — Legitim.

In an antenuptial contract of marriage, the husband, besides undertaking certain

other provisions, undertook to make over at his death to the children of the marriage, if any, one-half of the whole estate, heritable and moveable (after deducting a proportional part of his debts), which he should thereafter conquest and acquire in any manner of way, reserving power to divide and proportion the provisions made by him among the children, if more than one, as he should see fit. The contract did not exclude legitim. Certain of the children having at their father's death claimed legitim—*held* that the half of conquest being an onerous provision due to the whole children by contract, fell to be deducted from the estate before computing legitim, and that those children who took legitim were therefore entitled both to a share of the half of conquest and to legitim.

Power of Apportionment of Funds among the Children of a Marriage.

Opinions (per Lords Young and Craighill) that a father who by his antenuptial marriage-contract was entitled to apportion a sum among his children, which sum was to be truly all divided among them, "did not validly exercise this power by a will directing that certain of the children should have the interest of their portions, and that the capital should belong to their children."

By antenuptial contract of marriage, dated 16th December 1831, between George Murray, merchant in Tain, and Miss Elizabeth Aird, with advice and consent of her father Gustavus Aird, Mr Murray bound and obliged himself, his heirs, executors, and successors, to pay over and assign before Whitsunday 1832, to certain persons named as the marriage-contract trustees, £1000, to be laid out and secured by them on heritable security, British funds, or otherwise, and to be held in trust for behoof of the spouses and their children, "to be paid and divided in manner after mentioned." The contract then provided that the interest of the sum should be paid to Mr Murray during all the days of his life, and that if the wife should be the survivor it should be paid to her while she remained a widow, for her own maintenance and the upbringing of any child or children who might be born of the marriage. Mr Murray then bound himself, "over and above the said sum of £1000 sterling, to provide and secure and convey and make over at his death the just and equal half of the whole heritable and moveable property of every denomination which he shall conquest and acquire by purchase, succession, or otherwise, to the heirs and bairns of the said intended marriage, after deducting a proportional part of his debts corresponding to the said conquest." The manner in which the funds were to be divided among the children of the marriage, if more than one, was thus provided for—"And it is hereby specially provided and declared, that it shall be lawful to and in the power of the said George Murray senior, at any time of his life, and even on deathbed, to divide and proportion the foresaid provision of £1000 sterling, including the above conquest, at such time and in such way and manner among his said children, if more than one child, under reservation always of the liferent right of the said Elizabeth Aird, as he may see fit, provided the said provision and conquest be truly all divided amongst them; but failing of any such division, the said provisions shall belong to and be divided among the said children equally, share and share alike," the lawful issue of a child dying before the provision should be paid or payable to have their parent's share divided among them. In consideration of these provisions, the wife, on her part, besides discharging her legal rights, made a general conveyance to the trustees of all the property then belonging to her or which should belong to her during the subsistence of the marriage, "excepting only the provisions conceived in her favour in manner before and after specified," and her father Mr Aird bound and obliged himself to make payment to the trustees on the death of his wife, who was declared liferenter of these funds if she should happen to survive him, of the sum of £500, and of the third share of the free residue of the executry of his estate after crediting the sum of £500, as also of all right of succession which might accrue to Mrs Murray in the event of any of her father's executors predeceasing her. These provisions, when the time of payment arrived, were to be laid out on security by the trustees, and the interest was to be paid to the spouses in liferent, the principal to be divided by Mr Murray among the children of the marriage in any way he might deem fit, and failing such division equally among them, the lawful issue of a child dying before such division to receive their parent's share.

There were born of the marriage one son, Gustavus Aird Murray, and four daughters, Mrs Sarah Robertson Murray or Campbell, who predeceased her father leaving children, Mrs Georgina Murray or Vass, Mrs Williamina Murray, and Miss Elizabeth Murray. Mrs Campbell was married in 1857, and her father was a party to her marriage-contract. In it he bound himself to settle on Mrs Campbell, and in the event of her decease on her child or children, if any, "a share of his means and estate, heritable and moveable, to be payable at his death, such share being at least equal in amount or value to the share of his means and estate to which any of his other children shall be entitled. He reserved power by any will or settlement to restrict Mrs Campbell's right to a liferent, and to secure the capital to her children. This provision was declared to be in full satisfaction to Mrs Campbell of legitim, executry, and every other claim competent to her from his estate at his death, or from the goods in communion between him and her deceased mother.

Mr Murray's other married daughter, Mrs Vass, was married in 1868, and in her contract, to which also he was a party, Mr Murray bound himself to settle on the spouses in conjunct liferent, and on the surviving child or children, if any, in fee, a share of his means and estate, heritable and moveable, payable at his death, "not less in amount or value than the share to which any of his other children or their issue shall be entitled." In this contract also, as in that of Mrs Campbell, the provision made by Mr Murray was declared to be in full to Mrs Vass "of legitim, executry, and every other claim competent to her from his estate at his death, or from the goods in communion between him and her deceased mother."

Mr Murray never made payment to his marriage-contract trustees of the sum of £1000 which he bound himself to pay in his marriage-contract. In 1861, on the death of Mrs Aird, he received

the provisions made for him by his wife's father in that contract, amounting in all to £1445. A portion of this only was distinguishable from his other funds at the time of his death. He died in 1879, being predeceased, as already mentioned, by Mrs Campbell, and survived by his other children. The value of his estate at the time of his death, heritable and moveable, slightly exceeded £29,000. The heritage was of the value of about £1734. He left a trust-disposition written by himself and several codicils relative thereto. By the trust-disposition he declared it to be in the power of the trustees named in the deed to realise his property, heritable and moveable, and to invest it in the funds, in Colonial guaranteed stocks, or on landed security, at their discretion. The deed then proceeded—"As I propose that the different members of my family, viz., Sarah, now Mrs Alexander Campbell, Sydney, N. S. Wales; Gustavus (presently a squatter in N. S. Wales); Williamina, Elizabeth, and Georgina (the three latter living with myself unmarried—say in all four daughters and one son), do participate equally of my estate, but subject to the following restrictions—say to Gustavus, my son, how soon it is practicable and convenient to my executors, that his portion or share of my estate, so far as realised, be paid over to him, as it is possible that his future prospects in life may be advantaged by his being put in possession of his share; but it is to be understood that any advances which may have been made to him by me during my lifetime, which are recorded in my investment record book, are to be deducted from his portion or share of succession, less his share of the value of the heritable property, until the trustees see fit to convert it into money, but until then he is to be paid his portion of the annual return therefrom. As to the portions effeiring to my daughters surviving at my death, they individually are only to be paid the interest arising, or rents of houses if not disposed of, from the residue of my estate after Gustavus's share is paid to him, annually, *i.e.*, paid to each in two equal instalments once in the six months, say the income accruing from their respective portions of capital as separate members of my family, it being understood that such payments are only paid to themselves individually, and that no husband, if any, or his creditors, are to have any control over such payment, directly or indirectly. It is further to be understood, should any of my daughters unmarried predecease her sisters or brother, her proportion falls to be divided equally amongst the surviving members of my family or progeny, to which they are to succeed on the same terms as they succeeded to their portions as members of my family, in which case the principal or stock from which they derive their income during their lifetime from my estate is not to be touched or interfered with till after their death, and only then when their children, if any, attain twenty-one years of age, when, should the executors see advisable, the amount effeiring to each child of the mother's share of the capital is to be paid; but as to this, its to be entirely at the discretion of the executors." The only other clause of importance in this deed was the following—"I further desire that the provisions herein made for my children are to be in place of what they might be entitled to from my means under my marriage-contract with my late spouse, and of all legal claims which might be competent to them." In 1868 he added a codicil relative to the contingency of one of his daughters predeceasing him being married, and in 1876 another codicil relative to charitable bequests, neither of which was of importance. In 1878 he executed another codicil, which, so far as material to this case, was as follows:—"I, George Murray senior, above designed, considering that by the trust-disposition and settlement of my late brother, Colonel Hugh Murray of Househill, Nairn, he bequeathed to me a considerable sum of money, the greater part of which was the proceeds of the sale by him of the property of Househill, which he inherited from his ancestors: Considering that had not the said Hugh Murray so sold the said property I would have succeeded to it as his heir, and that my son Gustavus Aird Murray would on my decease succeed thereto as my heir-at-law; considering further, that it is only right and proper that my son should derive the benefit of a sum of money equal to the value of the said property at the time of my said brother's succession thereto, which value has been estimated by me at about ten thousand pounds sterling; and being desirous that the said sum should be invested in land for the benefit of my said son and his heirs, I do hereby give, convey, and make over the sum of ten thousand pounds stg. to my trustees, being those mentioned in the foregoing codicil, in trust for the following purposes, viz.—To be by them invested in landed property for behoof of the said Gustavus Aird Murray and his lineal heirs, the free annual proceeds or income therefrom to be payable to him during his life, and thereafter to his lineal heirs, and this in addition to the provisions already made in his favour as one of my children by the foregoing settlement; declaring that the said annual proceeds shall not be liable for the debts or attachable by the creditors of the said Gustavus Aird Murray or his heirs; declaring further, that in the event of the said Gustavus Aird Murray dying without leaving lawful issue, then it is my wish and desire that the heritable property in which the said sum of ten thousand pounds sterling may have been invested shall be sold, and the proceeds divided equally among my other children and their heirs according to the principle of my foregoing settlement."

In 1880 the testamentary trustees raised this action of multiplepoinding to have the estate of Mr Murray judicially divided.

Claims were lodged for (1) Misses Williamina and Elizabeth Murray, the unmarried daughters. They declined to accept the provisions of the settlement, and elected to take their legal rights. Their mother being dead, and their brother Gustavus Aird Murray not being entitled to claim legitim without collation, while Mrs Campbell and Mrs Vass had both accepted the provisions in their marriage-contracts in lieu of legitim, they claimed one-half each of half the free moveable estate of their father, as also one-fifth share each of the £1000 which their father bound himself in his marriage-contract to secure to his children in fee, and one-fifth of the share of the executry of their grandfather Gus-

tavus Aird, the capital of which by their father's marriage-contract was provided to his children in fee. (2) Gustavus Aird Murray and his minor children claimed for their respective interests of liferent and fee the sum of £10,000, being the sum to be invested for them by the testamentary trustees under the codicil of 1878. They also claimed one share of the £1000 provided in their father's marriage-contract, one share of the sum provided by Gustavus Aird under that contract, and a share of the fund *in medio*, after deducting the £10,000 left by the codicil and the two sums just mentioned, not less in amount than that to which any of the children of Mr Murray might be found entitled. Alternatively, in the event of its being held that the provisions to the truster's children in the trust-disposition and codicils must come n place of the provisions under Mr Murray's contract, or that children could not claim under the contract without forfeiting the benefit of the trust-disposition and codicils, they claimed the sum bequeathed by the codicil of 1878; and Gustavus Aird Murray, for himself, accepted the provisions of the settlement as in place of his rights under the marriage-contract or at common law. He claimed to be ranked on the fund, other than the sum of £10,000, to the extent of an equal share with the other children of the truster. This share he claimed to have instantly paid over to him in terms of the directions of his father's disposition and settlement. (3) Mrs Vass, besides a claim similar to that of her sisters and brother in the sum of £1000 and the fund derived from Gustavus Aird, claimed a share in one-half of her father's conquest in terms of his marriage-contract, and under her own marriage-contract she claimed to be entitled to a share of the remainder of her father's estate to the extent of a share equal in amount to that of any child of Mr Murray. (4) The children of Mrs Campbell made a claim similar to that for Mrs Vass. (5) The pursuers and real raisers (testamentary trustees) claimed to retain the sum of £10,000 conveyed to them for behoof of Gustavus Aird Murray and his children, or such portion of it as should remain after giving effect to any abatement inferred by other provisions made by the truster, for the purpose of investing it in landed property as declared by the testator. They also claimed to retain and administer the sum which might be found to belong to the children of Mrs Campbell, and to retain and administer the sum which might be found due to Mrs Vass and her children, and to retain a share of the fund *in medio* equal to that of any child of Mr Murray for behoof of the child or children of Miss Williamina should she marry and have children, but under deduction of the value of the provision forfeited by her in consequence of her claiming her legal rights. They made an exactly similar claim with regard to the interest of Miss Elizabeth Murray. Both these ladies were at the time when the multiplepoinding was raised about 40 years of age.

The Lord Ordinary pronounced this interlocutor:—"Finds that the sum received by the truster from the executry estate of the deceased Gustavus Aird is a debt due by the trust-estate, and that the amount thereof is divisible in equal shares among the children of the truster, the children of Sarah Campbell being entitled to their mother's share: Finds that the claimants Williamina and Elizabeth Murray are entitled to legitim, and that they are each entitled to one-third of the legitim fund, augmented by one-third to each of them of the value of such share of the truster's heritage as the claimant Gustavus Aird Murray is or may be entitled to under the truster's settlement: Finds that over and above their share of legitim they are each of them entitled to one-fifth of the sum of £1000 settled on the children of the marriage under the marriage-contract of their father and mother: Finds that in computing the legitim fund there shall be deducted the said sum of £1000; but finds that the other provisions made by the said marriage-contract, and the provisions made by the truster in the marriage-contracts of his daughters Sarah and Georgina, are not to be deducted: Finds that the claimant Georgina Vass and the claimant Gustavus Aird Murray, are each entitled to one-fifth of the said sum of £1000, and the children of the late Sarah Campbell to another fifth thereof, equally among them: Finds that the residue of the estate is divisible into five equal shares, of which one is to be applied in satisfaction of the provisions made by the truster in the marriage-contract of his daughter Sarah, and in his trust-settlement, in so far as consistent therewith; another in satisfaction of the provisions made by the truster in the marriage-contract of his daughter Georgina, and in his trust-settlement, in so far as consistent therewith; that another is to be applied *pro tanto* in implement of the legacy of £10,000 bequeathed by the truster in the codicil of 17th May 1878, the balance, if any, being payable to the claimant Gustavus Aird Murray; that another is to be held and administered by the trustees, the annual proceeds thereof during the lifetime of the said Williamina Murray to be paid to the parties entitled to the foregoing three-fifths, and the capital at her death to any child or children she may have, whom failing to the said parties entitled to the foresaid three-fifths; and that the remaining fifth is to be held and administered by the trustees, the annual proceeds thereof during the lifetime of the said Elizabeth Murray to be paid to the parties entitled to the foresaid three-fifths, and the capital at her death to any child or children she may have, whom failing to the said parties entitled to the foresaid three-fifths: Finds that the trustees are bound to pay over to such children of the late Sarah Campbell as have attained majority the shares to which such children are respectively entitled, and that the trustees are entitled to exercise their discretion by paying over to the claimant Alexander Campbell, as administrator-in-law of his pupil and minor children, the shares to which such children are entitled: Finds that the trustees are bound to retain during the lifetime of Mrs Georgina Vass the share of residue falling under the marriage-contract between her and her husband Dr Vass, to be held and administered by said trustees for the respective behoofs of Dr Vass, Mrs Vass, and her child or children: And with these findings appoints the case to be put to the roll for further procedure: Finds all the parties entitled to expenses, so far as hitherto incurred, out of the fund *in medio*,"&c.

He added this note:—"It is not disputed that the claimants Williamina and Elizabeth Murray are entitled to legitim. The findings in the interlocutor applicable to this matter appear to be the necessary result.

"But a question arose as to the amount of the legitim fund. The sum of £1000 settled by the truster on his children under his marriage-contract is a debt against his estate, and therefore must be deducted. The other provisions are of the nature of succession—protected succession, no doubt, but not less succession. If so, they do not, it is thought, form deductions.

"The case of *Nisbet*, 1 Rob. App. 5, G. 4, was pleaded as an authority, to the effect that the claimants for legitim must impute the legitim *pro tanto* in satisfaction of their claims under the marriage-contract; but it appears to the Lord Ordinary that this case is not regarded as an authority, and that he is not entitled to follow it. See *Breadalbane*, 2 Sh. & M'L. 377, and *Keith's Trs.*, 19 D. 1040.

"In the opinion of the Lord Ordinary, the married daughters of the truster have under their marriage-contracts a right to benefit equally with their brother Gustavus Aird Murray in the trust-estate, and in obtaining this equality the benefit conferred on the children of the latter must, it is thought, be taken into account. For it seems to the Lord Ordinary that the meaning of the daughters' marriage-contracts is, that they and their children are to receive an equal share of their father's estate with any other child of his family.

"It was argued that the equality must be fixed by reference to the sum which any child took as legitim. The Lord Ordinary is disposed to think that the better opinion is that the father only undertook for equality in so far as he had a power of disposal over his estate, or, in other words, over the dead's part.

"Further, it seems to the Lord Ordinary that Mrs Vass and the children of Mrs Campbell are entitled to their share of the specific sum which the truster in his own marriage-contract bound himself to set apart. By these marriage-contracts the daughters discharge all claims competent to them from their father's estate—a discharge which it is thought excludes from any claim to the share of his estate provided to them under his own marriage-contract, but does not exclude them from the share of the sum which he was bound to place under a separate trust.

"The Lord Ordinary understood that if the view which he has taken is correct, the residue would be exhausted at the lowest value which could be attached to the legacy of £10,000. The consequence seems that an equal division of the residue must be made. The claim of Williamina and Elizabeth Murray cannot affect any right competent to their children, and it seems to the Lord Ordinary that according to the true construction of the testator's settlement the shares which were given to them in liferent were given to their children in fee.

"The rights of the claimant Gustavus Aird Murray as residuary legatee are postponed to the special legacy above mentioned. So far as he is concerned, the result must be that the legacy must be satisfied before he can take anything."

Gustavus Aird Murray reclaimed.

In the Inner House the claimants other than the testamentary trustees concurred in stating that they desired an equal division of the estate among the children of Mr Murray, Mrs Campbell's children to take her share. The pursuers, the real raisers (testamentary trustees), however desired the judgment of the Court upon their claim.

At advising—

Lord Young—By the testator's antenuptial contract of marriage there is provided and secured to the children of the marriage surviving the spouses — 1st, a sum of £1000 certain; 2d, one-half of their father's conquest, heritable and moveable; and 3d, a certain sum from the executry estate of Gustavus Aird (who was a party to the contract), the whole being subject to division and apportionment by the father among the children, provided it "be all truly divided amongst them." It was not suggested that the testator had any property at the date of his marriage beyond the £1000 which he undertook to pay to the marriage trustees but never did, and the case was argued to us on the footing that the fund *in medio* (amounting to about £27,000) consists entirely of conquest, with the exception (immaterial to the competition) of this £1000 and a sum which he received from Aird's executry under Aird's obligation in the contract.

The testator was the survivor of the spouses, and was himself survived by five children of the marriage—a son and four daughters, two of them married. These children have by the contract an indefeasible (by the father) right to the £1000, to the provision by Aird which was paid to their father, and to one-half of their father's conquest, *i.e.*, one-half of the fund *in medio* computed after deducting the £1000 and Aird's provision. Further, legitim not being excluded expressly or impliedly by the contract, the children have also right to legitim if not otherwise excluded, which it admittedly is not except in the case of the two married daughters who have renounced, and whose renunciation, being in consideration of an obligation by their father to them, may be taken to operate in his favour by increasing the dead's part and consequently his testing power. To ascertain the legitim fund the fund *in medio* must of course be cleared of the £1000 and Aird's money, both of which it includes, and, differing from the Lord Ordinary, I think it must also be cleared of the half of the conquest which is, as I have stated, indefeasibly secured to the children by the contract. This half of the conquest is not dead's part, for being affected by an onerous contract obligation it cannot pass by will or *ab intestato*. Deducting it as a debt, which with respect to the parties before us it is, the remainder is divisible into legitim and dead's part. Further, legitim not being excluded by the contract, the children who have not renounced do not forfeit any of their contract rights as a condition of taking it, and it is impossible that the same funds can be both computed as legitim and given under the contract to children taking legitim.

The result is that the dead's part, subject to the testator's power of disposal by will, is limited to one-fourth of the fund *in medio*, computed after making the preliminary deduction to which I have already referred—increased, however, by the shares of legitim effeiring to the married daughters who have renounced, as I assume, in his favour. It is unnecessary to make an exact calculation, but it would probably be in excess if

£7000 were taken to be the limit of the fund at the testator's disposal by will, having regard to his own marriage-contract obligations and his inability to touch on the legitim fund.

The testator has not otherwise than by his testamentary instruments exercised his power "to divide and proportion" among his children the provisions in their favour by his marriage-contract, and it is, in my opinion, more than doubtful whether these instruments can be sustained as an execution of that power. In none of them does he profess to execute the power or make any allusion to it. Further, the power not being general and absolute, but special and limited, there is no room for the doctrine that the intention to execute it may be implied in the execution of a general will—for that is limited to the case of powers as extensive as those which a man has over his own estate. Again, beyond the general provision for equality, which by itself is superfluous, as no more than that would be effected without it, the testamentary instruments are not in accordance with the power, but distinctly at variance with it, inasmuch as it does not authorise the disappointment of the children of the marriage of the capital of their provisions, but, on the contrary, expressly declares that it shall "be truly all divided amongst them." In so far, therefore, as the unmarried daughters are by the wills limited to a liferent of the capital which is put in trust for their possible issue, I am of opinion that they are not according to the power. The limitation in the marriage-contracts of the married daughters is in a different position, for that is by lawful contract with themselves and their husbands.

The result is that the right of the children under their parents' marriage-contract is not affected by the testamentary instruments of their father, and must have effect in their favour irrespective of them. The rights of the married daughters are of course governed by their own marriage-contracts. By these (for they are in substance alike so far as material to this case) they discharge all claims against their father and his estate in return for an obligation by him to settle on each of them a share of his means and estate not less in amount or value than the share to which any of his other children shall be entitled. This obligation must be fulfilled out of the fund *in medio* as a proper debt due by the testator at his death, not the less so that their amount is to be ascertained by reference to the "amount or value" of the shares of the other children. The fund *in medio* is thus heavily loaded with onerous contract obligations which can in no way be thrown off. Two of these are, besides, of such a character that they grow in magnitude with any and every bounty bestowed by the testator on any of his other children. The result is that at whatever amount you may provisionally, and to begin with, take the sum at the testator's disposal by will to be, he cannot use his disponing or testing power in favour of a child without an exactly equivalent increase of his debt to his married daughters, to be satisfied out of that sum. This consideration obviously makes inoperative the legacy of £10,000 to buy land to be settled on his son and his heirs, for the effect of it, if operative, would be to make his debt to each of his married daughters £10,000. But the whole fund *in medio* is only £27,000, and it has to meet, in the first instance, the testator's marriage-contract obligations, and afford a legitim fund of some amount. Nor is it practicable merely to reduce this £10,000 legacy, for there is no guide thereto or data on which it can be made—except perhaps this, that the son's provision shall not thereby be so increased that each of the married daughters being made equal to him there will be a deficiency of funds. We put it to the parties to consider whether in this view there was room for any increase to the son by legacy — meaning increase over what his unmarried sisters are entitled to irrespective of the wills. On consideration they came to the conclusion that after giving the son and unmarried daughters their marriage-contract provisions and shares of legitim there will be no more left of the fund *in medio* than will suffice to satisfy the obligation of the testator in the marriage-contracts of the married daughters to make them equal to the others. The result is the equitable one of an equal division of the whole fund *in medio* among the five children under the marriage-contract of their parents, the rights of legitim not renounced, and the contracts of the married daughters, without regard to the testamentary instruments of the father which have no funds to operate on. The children, including the married daughters, are all agreed in this result, which I think the right one, and am prepared to give effect to accordingly. The trustees as guarding the interests of non-existing but possible children did not think proper to concur. Being of opinion that the marriage-contract of the testator gave the capital of the provisions thereby made to the children of the marriage, I have no hesitation in repelling the claim for their possible children—or in the case of the son, existing children—so far as these are concerned, and as I have observed there are no funds to be carried by the testamentary instruments of the testator, the whole funds being exhausted by contract provisions and legitim.

Lord Craighill—I concur entirely and have nothing to add.

Lord Justice-Clerk—I concur entirely in the result at which your Lordships have arrived. I am not, however, prepared absolutely to give my adhesion to all that is contained in the opinion of Lord Young. He has dealt in that opinion with several very important questions. After giving the case my best attention, I think that no other result is possible than that at which your Lordships have arrived.

Gustavus Aird Murray having then moved for leave to amend his claim so as to claim legitim, this interlocutor was pronounced:—

> "Recal the said interlocutor [Jan. 11, 1881]: Appoint the fund *in medio*, after deducting all just charges and expenses, to be divided and distributed equally, share and share alike, among the claimants Gustavus Aird Murray, Williamina Murray, Elizabeth Murray, Mrs Georgina Hughina Aird Murray or Vass, and the children of the late Mrs Sarah Robertson or Campbell, the said children having one share among them:

Appoint the shares of Mrs Vass and of the children of Mrs Campbell to be paid according to the terms of the obligation by the deceased Mr George Murray senior in the respective marriage-contracts of Mrs Campbell and Mrs Vass referred to on the record: Sustain the claims of the before-mentioned parties to this extent and effect accordingly: Refuse all other claims: Find all expenses hitherto incurred by the parties due out of the fund *in medio*, and remit to the Auditor to tax the same and to report, and decern: *Quoad ultra* remit to the Lord Ordinary to proceed with the cause, with power to decern for the expenses now found due."

Counsel for Pursuers and Real Raisers—Begg. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Misses Murray—Macdonald, Q.C. —G. Watson. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Gustavus Aird Murray—Kennedy. Agents—Duncan & Black, W.S.

Counsel for other Claimants—Guthrie Smith—Pearson — H. J. Moncreiff — Taylor Innes. Agent—Alexander Matheson, W.S.

Friday, July 15.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

BALLANTINE AND OTHERS *v.* STEVENSON.

Lease — Removing — Possession — Tacit Relocation.

D. S. was sub-tenant of a farm leased by his brother W. S. On the expiry of the lease he received from the landlord's agent a lease for a further term of years, which he signed with his brother as cautioner and returned to the agent for the landlord's signature. The latter retained it unquestioned, and a year after the landlord repudiated it and brought an action of removing against D. S. *Held* that inasmuch as the lease had been duly signed by D. S., who was (*diss.* Lord Young) tenant of the farm by tacit relocation, and had been acted on by both parties, the landlord was not entitled to challenge it at this distance of time.

This action was raised by Andrew Rollo Bowman Ballantine, Esquire, of Ashgrove and Castlehill, in the county of Ayr, with the consent and concurrence of Edward Atkins, Southampton, against David Stevenson, farmer, for the purpose of having the latter ordained to remove from the farm of Outer and Innerwood, and further, in the event of his continuing in possession, to pay damages. The pursuer was heir of entail in possession of the estate of Ashgrove. Although he succeeded to that estate in 1859, on the death of his predecessor Miss Bowman, he did not come into the actual possession of the estate till 1879, in respect that in anticipation of his succession he sold his life interest to Mr Edward Atkins, of Southampton, who remained in possession until a year or two ago, when he re-sold the interest to the pursuer. During his possession Mr Atkins granted leases of the farms and exercised all the rights of owner. The said farm of Outer and Innerwood was let for a term of nineteen years to William Stevenson, the defender's brother, but from about 1867 the latter was subtenant of the farm under his brother by an arrangement to that effect. In 1876 this lease expired, and negotiations took place for a renewal of it. Mr Atkins at no time took any personal part in the management of the estate but left the whole administration in the hands of Mr Bradby, a London solicitor, and the firm of Bradby & Robins, of which he was for some time a partner. These gentlemen employed Mr Hugh James Rollo, W.S., of Edinburgh, as their local agent and factor, and entrusted him to a large extent with the details of the management. It appeared that in 1875, while William Stevenson had a year and a-half of his lease still to run, the roof of the farmhouse had fallen in from natural decay. Mr Rollo obtained a report on the subject from Mr Stewart, factor to the Earl of Eglinton, suggesting that the landlord should renew the roof and raise the walls of the farmhouse and charge the tenant interest on the outlay. This report was sent by Mr Rollo to Messrs Bradby & Robins on 19th June 1875, but no answer having been returned, Mr Rollo, on 4th January 1876, wrote to them as follows:—"I must again refer to the repair of the roof of the barn on the farm-steading occupied by Stevenson. I am rather at a loss what to advise. Mr Atkins' tenure of the estate depends upon the life of Mr Bowman Ballantine. Then there is only one year of the lease to run, so that it is not worth Stevenson's while himself to be at much outlay, even although by not doing so he puts himself to inconvenience. The farm will certainly not let without the houses being repaired, and when a new lease is entered into there is every reason to suppose that there will be a rise of rent. The Stevensons are most respectable men, and I think a good deal of the younger brother who occupies this farm. How would it do to enter into an agreement with the Stevensons that Mr Atkins will repair the barn, the Stevensons paying six or seven per cent. till the present lease runs out, and then, if Mr Atkins is still in possession, that they will retake the farm on a new lease, and let us have the farm revalued to see what the increase of rent would be? It is quite evident that when the lease does run out the steading must be repaired." On 5th February Messrs Bradby & Robins replied—"Please do what is right according to the respective obligations of the landlord and tenant, and not expending more than is absolutely necessary." On 5th June Mr Rollo wrote—"As I sometime since wrote to you, Stevenson's farm of Outerwood runs out this Martinmas, and I now enclose report by Mr Stewart as to what he proposed should be done in the event of a new lease being entered into. The rise of rent is considerable, but then there is the required outlay. Whitehirst also runs out this November, and, as you will observe, Mr Stewart proposes the two farms should be joined. The change of steading, however, will be a very serious matter as to expense. Considering the tenure upon which the estate is held, depending upon Mr Ballantine's life, the repairing of steadings is a matter