of that provision being held to have been the stipulated consideration for the liferent of the husband's moveable estate given to the wife. Lord Glenlee states the principle thus:—"This provision is an ingredient in the counter stipulations to what is given to the wife:" And he adds that legacies may be given in a contract to strangers: "And where it is clear that they are not in lieu of the other stipulations, they will be revocable, as if in a separate deed; but the provision here was a counter stipulation in favour of the husband's family, and irrevocable."

The destination contained in the deed now under consideration is of an essentially different character. It forms no part of the mutual stipulations of the spouses. The second husband of Mrs Gillespie or Marshall was noways interested in the daughter of his wife's first marriage, and no question arises with which any relation of his, as his heirs and representatives, are concerned. On his predecease he gave over all the estate he might possess to his wife and her heirs and assignees. This conveyance took effect. The counter stipulation in the contract by which, had he been the survivor, he would have got the liferent of his wife's whole estate, heritable and moveable, became abortive by his predecease. No counter stipulation remained to be fulfilled by his wife under the provisions of the deed, in so far as it constituted a mutual contract. And from the moment of her husband's death Mrs Marshall, as owner of her own estate and effects, possessed them disburdened of the liferent right for which her husband had stipulated as absolutely as if the mutual deed had not been executed. The destination to her daughter, Jane Gillespie, contemplated the survivance of her mother's second husband, which did not occur. That might suffice to render it thenceforth of no avail; but the bequest was, moreover, revocable from its very nature as testamentary.

The true view of the deed is, that, in so far as the interest of the contracting spouses respectively were concerned, it was irrevocable unless by mutual consent; but that in providing, on a certain event which did not occur, for the succession to Mrs Marshall's estate when she should die, it was testamentary and revocable. Deeds intended for this very purpose are frequently met with in practice, and have been the subject of decision. The case of *Sommerville's Trs.*, decided in this Division of the Court 3d March 1865 (recently affirmed in H. of L.), may be referred to in illustration, where, in a postnuptial-contract, even in a question with the child of the marriage, a destination of his whole estate, as at his death, was held to be revocable. No doubt every deed of the kind requires to be construed in reference to its own terms and provisions. But where onerosity cannot be pleaded by parties for whose behoof the predeceasing spouse has made special stipulation, the gratuitous regulation of the surviving spouse's own succession, as it should exist at death, is inherently revocable. Nor is its character in that respect in the least affected by the destination being made in favour *nominatim* of the party at the time intended to be benefited by his succession. This is the case in every testamentary deed.

On these grounds I consider that the special conveyance of the heritable subjects by the deed under reduction of 1852 was not *ultra vires* of Mrs Marshall, nor *in fraudem* of any right of succession to the *universitas* of her estate conferred on the pursuer by the mutual deed of 1842. What became of Mrs Marshall's general estate and effects—whether the pursuer, as her only daughter, succeeded thereto under the destination in her favour by the mutual deed, or by any other deed, or as her heir and representative, does not appear from any facts in the record. Nor is it of any consequence. The sole question is, Whether the granter had deprived herself of the power to execute the deed of 1852? I think she clearly had not, and am therefore of opinion that the interlocutor of the Lord Ordinary ought to be altered, and the defenders assoilzied from the reduction.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly recalled, and the defenders were assoilzied.

Agents for Pursuers—Morton, Whitehead, & Greig, W.S.

Agents for Defenders—Duncan & Dewar, W.S.

Friday, May 24.

MURRAY'S EXECUTORS *v.* CARPHIN AND OTHERS.

(*Ante*, vol. ii. p. 198.)

Fraud—Common Law—Bankrupt—Act 1621, *c.* 18 *—Antenuptial Contract—*Jus crediti—*Reduction.* 1. Held that an antenuptial-contract of marriage is an onerous deed in the sense of the Act 1621, c. 18, and is not liable to be set aside under the statute at the instance of prior creditors of one of the parties to it. 2. Circumstances in which held that an antenuptial-contract of marriage creating a *jus crediti* in favour of children was reasonable and not liable to be cut down as excessive. Question, How far an antenuptial-contract of marriage is liable to be cut down *quoad excessum*, either under the Act 1621, c. 18, or at common law?

This is a question between Mr Clapperton and Messrs Kennington & Jenner, merchants, Edinburgh, and Mr James Rhind Carphin, judicial factor on the estate of Mr and Mrs Johnstone. Mrs Johnstone's father died leaving three children (two daughters and a son) and a will, by which he provided that his estate should be divided into three equal shares, one to be taken by each of his children, the shares to vest in the daughters upon their attaining majority or their being married, and the share in the son at majority. Mr Murray's will declared these shares to be alimentary and exclusive of the *jus mariti* of the daughters' husbands. Before majority Mrs Johnstone became engaged to her present husband, and as he had no means wherewith to set up a house, it was arranged with Mrs Johnstone and her father's executors that a sum of £400 should be uplifted from her share in her father's estate, and set apart for the purchase of furnishings for the house. She then entered into a contract of marriage with her husband, by which she conveyed to trustees the balance of her funds, amounting to about £1200, that they might, in the first place, pay to herself the annual proceeds of it, and on her death to her husband, and on the failure of both, keep it for the benefit of children to be born of the marriage. Mr Johnstone, on his part, undertook reciprocal obligations in favour of his wife. The parties were married on the 14th April 1863, and soon after the husband's estates were sequestrated.

Mrs Johnstone had made the necessary purchases in view of the marriage; but instead of confining herself to the sum of £400, she expended about £900 in that way. Her father's executors, when they became aware of the amount of the debts she had contracted, and after having paid away about £150 of the appropriated sum, refused to make further payments, and they afterwards brought a multiplepoinding to have the rights of parties determined. The various tradesmen to whom Mrs Johnstone had incurred debts prior to her marriage and the judicial factor, who came in place of the marriage-contract trustees, who had failed, were the parties to the process. The factor claimed the whole sum, as representing the marriage-contract trustees, to whom it was conveyed; and the other claimants rested their right to be preferred on the ground that Mrs Johnstone had not by the marriage contract effectually divested herself of the fee of the estate which she still held. Last year Lord Barcaple repelled this plea, and sustained the claim of the judicial factor to the capital of the fund conveyed by the marriage-contract; and on advising a reclaiming-note for the other claimants, the Judges of the Second Division unanimously adhered. It was then represented to the Court that a plea, stated on behalf of Mr Clapperton and Messrs Kennington & Jenner, had not been argued in the Outer-House, and they asked a remit to the Lord Ordinary to hear parties upon it. The Court acquiesced, and made the remit. The plea was to the effect that the conveyance in the marriage-contract had the effect of rendering Mrs Johnstone insolvent, and that it was a gratuitous alienation under the Act 1621, c. 18, in favour of conjunct and confident persons without a true cause, and to the prejudice of prior creditors, and was also reducible as a fraud at common law. Lord Barcaple repelled this plea, and of new preferred the judicial factor. His Lordship added the following note:—

"The only ground urged for the preference claimed in the plea was that the conveyance by Mrs Johnstone to her marriage trustees is reducible under the Act 1621, or at common law, as a fraud upon her prior creditors; and the Lord Ordinary understands this to be the whole import of the plea. It does not appear to him that there is room in the present case for the questions—some of them new, and of great importance—which would have arisen if the creditors of Mrs Johnstone could have maintained that the conveyance by Mrs Johnstone in the marriage-contract was truly granted to their prejudice—they might have done so if her estate had consisted of heritage which would not have passed to her husband by force of the marriage; but her whole means being moveable, the result of setting aside the marriage-contract, or the trust conveyance which it contains, would be to allow her entire estate to be carried to her husband by force of the legal assignation implied in the marriage, and ultimately to the trustee on his sequestrated estate. The conclusions of the summons of reduction, which has now been brought in aid of the plea, and held as repeated, are, in the most general terms, to set aside the marriage-contract *in integrum*. The effect of reducing the contract either wholly or to the extent of Mrs Johnstone's prior debts, would be just to that extent to place the funds in the position of being unprotected from the legal operation of the marriage, and of now consisting part of the husband's sequestrated estate.

"It may be that in the present case it would have been better for Mrs Johnstone's creditors that her estate should have passed altogether unprotected to her husband—though he was in bankrupt circumstances—as in his hands it would have been liable for their debts, in which he is now their debtor. That must depend upon the amount of his own debts, upon the survivance of one or other of the spouses, and upon the existence of a family. In possible circumstances it may be greatly for the benefit of Mrs Johnstone's creditors that her property has been tied up in terms of the trust. But in any view the true objection, if any exists, to the deed, is not that the property has been conveyed from Mrs Johnstone to the prejudice of her creditors as such, but that it has been conveyed past the husband to the prejudice of parties who could only have reached it as his creditors. It is not that the contract rendered Mrs Johnstone insolvent, for the marriage without a contract would have effectually done that; but that it did not leave her property to pass to Mr Johnstone and his creditors. Even if this would have been a relevant ground for reducing the deed, it is not the ground stated on record. The ground for setting aside the deed is set forth in the 11th article of the condescendence for Mr Clapperton, which is adopted by Messrs Kennington & Jenner, in these terms:—'If the said contract was intended to take away, and did take away, from Mrs Johnstone the property of her own funds to the prejudice of the claimants' prior debts, it was a gratuitous alienation to conjunct and confident persons in prejudice of said debts, and was null under the Act 1621, c. 18. Further, it was a fraudulent alienation by Mrs Johnstone, who thereby rendered herself insolvent, and was intended to defraud, and had the effect of defrauding her lawful creditors, and is null at common law.' It is unnecessary with reference to the case as it is thus stated, to inquire whether a consequential injury of a different kind has resulted to these parties in their character of creditors of Mr Johnstone since the marriage.

"Mrs Johnstone might, by marrying without a contract, have transmitted her whole property to a bankrupt husband, and her prior creditors would have had no legal ground of complaint. On the other hand, her husband's creditors could not complain of any amount of restriction which she might have placed upon his interest in her fortune, for the benefit either of herself or of the children of the marriage. As little, as it appears to the Lord Ordinary, can that complaint be made by the wife's prior creditors, who in that capacity have no interest whether the rights of the husband are restricted or not.

"If the creditor could have any case for reducing the marriage-trust, it would appear to be of a complex and peculiar kind, resting not merely upon the alleged gratuitous conveyance of Mr Johnstone's property to the prejudice of prior creditors, but likewise upon the legal effect of the marriage in making her husband liable for her debts, combined with the fact that her property was not also made over to him. No such ground for setting aside the deed is set forth on the record, and the Lord Ordinary is not disposed to think that it could have been relevantly stated. While Mrs Johnstone's property was not attached by her creditors she was entitled to dispose of it in any way she thought most advantageous, subject only to the restraints of the Act 1621, which, for the reasons already stated, cannot, in the opinion of the Lord Ordinary, avail in the present case; or to the equit-

able interposition of the Court to set aside an act of manifest fraud. The Lord Ordinary thinks that it would be carrying this interposition further than either authority or principle would warrant if the Court were to seek for the elements of the alleged fraud, not in the nature of the conveyance which is challenged, and its direct effect upon Mrs Johnstone's prior creditors as such, but in the consequence to them as being now creditors of the husband, of the property not having been transmitted to him either by deed or by the legal effect of the marriage."

The creditor reclaimed.

SCOTT and WATSON, for them, argued—It is not denied that the creditors of Mrs Johnstone, who are challenging her contract of marriage, are prior creditors in the sense of the Act 1621; and therefore, even assuming the theory of the Lord Ordinary's judgment to be well founded, it cannot be sustained, because, even if the effect of the reduction was to open up the fund to the creditors of the husband, the claimants, as creditors of the husband as well as of the wife, would participate in the dividend to be paid out of the estate. All the requisites of the statute to ground a reduction are present; but there is at least one or more of them. The conveyance to trustees for the benefit of children *nascituri* of the marriage was a conveyance to conjunct and confident persons, but there was no true just and necessary cause to enter into the marriage-contract, and the only effect it had was to render Mrs Johnstone insolvent; at any rate, in the circumstances that Mrs Johnstone had incurred a sum of upwards of £600 to the claimants, besides other debts, prior to entering into the contract, the *jus crediti* which it conferred on children of the marriage was excessive; and *quoad excessum* the contract should be reduced. And it is impossible to create an alimentary fee—Act 1621, c. 18; Bell's Com., vol. ii, p. 187, *et seq.*, 5th edition; and the case of *Duncan* v. *Sloss* there cited; Bell, i, 130; *Urquhart*, M. 10,403.

GIFFORD and W. A. BROWN, in answer—It is admitted that the claimants are prior creditors of Mrs Johnstone, and that may give them a title to challenge her marriage-contract; but the effect of a reduction, if successful, would not be to carry the fund to them, but to open it up to the creditors of the husband by reason of the assignation implied in marriage; and therefore the Lord Ordinary's interlocutor is well founded. Another view of the case—it may be inconsistent with the last argument, but it is a valid answer to that of the claimants—is, that Mr Murray impressed an alimentary character on Mrs Johnstone's share of his estate, and that prevents it from being attachable by her creditors. It may be incompetent to create an alimentary fee, but it is quite competent to create an alimentary liferent; and if Mr Murray exceeded his power in making the whole capital sum alimentary, Mrs Johnstone cured the defect by restricting that to the liferent. Except the title of the creditors to challenge, none of the requisites of the Act has been established. The conveyance was made to trustees, but only as representing the children *nascituri* of the marriage; in themselves they were not conjunct and confident, nor were they so in their representative character, because it was impossible to regard children that had a mere capacity of existence as conjunct with any one. But it has never been doubted that marriage is an onerous cause, and the onerosity of the contract is sufficient to sustain it. In itself, its terms are in every respect reasonable, and the creditors who have suffered from the advances which they made have themselves to blame, both for their recklessness and not contemplating the chance of a marriage contract by which Mrs Johnstone's funds would be carried away from them; Bell, *ut supra* —Ersk., iv, 1, 33—*Rollo* v. *Ramsay*, 28th Nov. 1832, 11 S. 132.

At advising—

LORD JUSTICE-CLERK—I think his judgment is correct, but I cannot go along with the Lord Ordinary in the *medium concludendi* which he has adopted, that the parties have no title, because they have no interest, the effect of the reduction, in his view, if successful, being to open up the fund for the benefit of the creditors of the husband. There are three things necessary under the Act to confer a title to challenge—(1) that the challenger shall be a prior creditor; (2) that the conveyance shall be to conjunct and confident persons; (3) that there shall be no true just or necessary cause for the conveyance. The presence of the first requirement of the Act is conceded. It is unnecessary to decide the case as based on the argument, whether the conveyance in the marriage-contract was to conjunct and confident persons—and that is in many aspects a difficult and delicate question—because, according to the view that I take, there is a true just and necessary cause. It is impossible to consider the position of parties and the nature of the contract without coming to the conclusion that the settlement made by them was a fair, rational, onerous contract. (His Lordship recited the provisions of the contract.) If the settlement was rational, and thereby onerous, one of the indispensable requisites of the statute is absent; and I do not know what contract could stand if we were to reduce this one.

LORD COWAN—It is a novel question that rises out of the attempt to reduce a marriage-contract under the Act of 1621, and at common law. I concur with your Lordship, that the ground of the Lord Ordinary's judgment is not satisfactory. I cannot see that the result would be that the husband's creditors would get the money, for at the time the debts were contracted Mrs Johnstone had no right to her share of her father's money, because his will declares that it was to vest only at majority or on her being married. The only question then is, Can it be shown that the deed was executed for an onerous cause? Was it so? The deed was an antenuptial contract of marriage, which in its character is an onerous contract. I reserve my opinion as to whether or not a marriage-contract may be set aside on the ground that its provisions are excessive. But I never saw a more rational deed than the present. Accordingly, we must hold that when her money vested in Mrs Johnstone, it did so under the conditions of the marriage-contract.

LORD BENHOLME—This is a very novel and interesting case. It is an attempt to reduce a marriage-contract under the Act of 1621 and at common law, and the only case cited in support of it is that of *Duncan* v. *Sloss*, referred to by Professor Bell. I cannot take this case as an exposition of the law, to the effect that postnuptial are equivalent in their effect to antenuptial contracts. An examination of the case will not bear out this proposition. It was a very special case, and I cannot take it as an authority on the general question. A marriage-contract would require to be very extravagant indeed to be set aside under the Act 1621, and in my opinion this is not an extra-

vagant marriage-contract, but a very reasonable one.

Lord Neaves—I cannot concur in the ground upon which the Lord Ordinary has noted his judgment. Nor can I lay down any general proposition that there can be no reduction or setting aside of a marriage-contract, so far as its provisions are excessive, under the Act of 1621; on the contrary, I am disposed to think that either the application of the statute or of common law may be a good ground of reduction. His Lordship, after examining the case of *Duncan* v. *Sloss*, concurred with the other Judges that it was no authority to set aside a contract which was in every respect reasonable.

The Court accordingly adhered to the interlocutor of the Lord Ordinary.

Agent for Pursuer—A. K. Morrison, S.S.C.

Agent for Judicial Factor—John Henderson, S.S.C.

HOUSE OF LORDS.

Thursday, May 16.

DICKSON *v.* PAGAN AND OTHERS (SOMERVILLE'S TRUSTEES).

Husband and Wife—Postnuptial Contract—Conditional Settlement. Terms of settlement by a husband in postnuptial contract which held intended to take effect only in case of the wife surviving; and the wife having predeceased, the husband held to have full power to dispose of his estate.

This was an appeal against a judgment of the Second Division of the Court of Session as to the construction of a postnuptial settlement of the late Colonel Somerville. Dr Pagan and the other trustees and executors of the late Colonel Somerville raised an action of multiplepoinding against Mrs Dickson, wife of Mr William Dickson, and only daughter of the late Colonel Somerville, and her husband and others.

The following were the facts of the case:—Colonel Somerville, a captain in the service of the East India Company, was married in June 1816 to Miss Eleanor Dixon. There was no antenuptial contract of marriage; but on the 17th August 1818 Colonel Somerville and his wife executed a mutual postnuptial contract, in order to regulate the interests which the spouses were to have in the property then belonging to them, or that they might afterwards come to have right to.

Captain Somerville conveyed to his wife, "in case she survives him, the full liferent right of every property, money, means, and effects of every denomination that may pertain and belong to him at his death, for the said Eleanor Dickson, her liferent use allenarly; but reserving to the said Henry Erskine Somerville full power to burden his said effects or estate with an annual payment or payments, not exceeding in all £25 sterling, to such person or persons as he shall bequeath the same to by any deed or writing under his hand; and it is hereby declared that the said liferent, under the above reservation, shall be subject always to the maintenance, clothing and education of the child or children that may be procreated of the marriage; and upon the decease of the said Eleanor Dickson, the whole subjects, money, means, and effects liferented by her as aforesaid, are hereby conveyed to the child or children of the marriage and if more than one, to be divided in such proportions as the said Henry Erskine Somerville, and failing him the said Eleanor Dixon, shall see proper, by a writing under his or her hand; and in case of no children existing of the present marriage, it is hereby understood and agreed that the whole property, &c., to be liferented as aforesaid, shall belong and accresce to the heirs and executors of the said Henry E. Somerville, or his assignees, upon which he reserves the power of bequeathing and disposing of as he may think proper."

On the other part Mrs Somerville conveyed to her husband and the children of the marriage in fee, whom failing to her husband and his heirs, executors, and assignees, all goods, money, &c., then belonging to her, or which she might succeed to, and particularly a sum of £1000 to which she was entitled under her father's settlement; with power to her, however, in case she should survive her husband, and there should be no children, to will and dispose of that sum. In 1825 the first and the only surviving child of the marriage Eleanor, now Mrs Dickson, the appellant, was born. In January 1826 the trustees under Mrs Somerville's father's settlement paid over to Colonel Somerville the sum of £1000 above mentioned. In August of the same year Colonel Somerville executed a will, in which he stated it to be his desire that the postnuptial contract should be valid in every respect, and, to the full extent therein expressed, he exercised the power therein assigned to him, and bequeathed an annuity of £25 to his sister Harriet. On the 10th November 1840 Mrs Somerville died, survived by her husband, and by the appellant Mrs Dickson. In February 1841 Colonel Somerville executed a holograph will, in which he bequeathed all his property to his daughter, after deducting, however, a considerable number of legacies and annuities. In February 1852 he executed the will, which with the codicils attached constitutes the final disposition of his property. He thereby directed that various legacies should be paid to his relations, and that his trustees should hold the residue for behoof of his daughter and her children, but that, should she die without children, she should have power of disposing only of £500. The rest of the residue was to be divided among the testator's sisters, nephews, and nieces, whom he named. In December 1854 a contract of marriage was entered into between William Dickson and Eleanor, daughter of Colonel Somerville, by which the last named bound himself *inter alia*, to make over, within three months after the marriage, the sum of £8000 to trustees for his daughter's and her husband's behoof in liferent, and to their children in fee. Colonel Somerville died in 1863. He left estates amounting to about £28,000, besides the £8000 transferred to the trustees under the marriage-contract of his daughter. Mrs Dickson (who had no children) and her husband now claimed the whole trust-fund, on the ground that as the only surviving child of the marriage she was entitled to the whole under the postnuptial contract of 1818. The legatees to whom the fee of the estate, failing Mrs Dickson's children, was to be paid, claimed under the deed, and contended that the residue should be held by the trustees during Mr and Mrs Dickson's life.

The Lord Ordinary (Barcaple) held that the postnuptial settlement of 1818 was bindiug, and had not been competently revoked, and therefore