Friday, February 21.

FIRST DIVISION.

M'LEOD *v.* LESLIE.

Marriage-Contract—Provision to Younger Children—Heir-male of the Marriage—Creditor under Marriage-Contract—Liability of Heir for Debts of Ancestor. A bound himself, in antenuptial articles of marriage, to convey a certain estate to himself and the heir-male of the marriage, and also to secure a sum of money to the younger children. A postnuptial contract of marriage was executed giving effect to these stipulations. A died, and his son took the estate. A's executry being insufficient to satisfy the provision to the younger children, *held* (Lord Deas diss.) that the son, as heir of his father, and so liable for his father's debts, was bound to implement his father's obligation to the younger children, *intra valorem* of the estate to which he succeeded.

Agreement—Bond—Conditional Right—Obligation to Relieve. An heir taking the heritable estate of his father executed a bond for £5000 in favour of his sister, she granting in return a discharge of all claims against her father's estate. It was subsequently discovered that the sister was entitled, under her father's marriage-contract, to a provision of £16,000. *Held* that the sister was not entitled to decree for the £16,000 until she should relieve the heir and his estate of the obligation for the £5000.

Hans George Leslie of Dunlugas died on 4th May 1856 survived by two children, Hans George Leslie the present defender, and Mary Leslie or M'Leod, who was married to the pursuer Gordon M'Leod of Lochbay in 1854, and died in 1861. The deceased Mr Leslie left a trust-disposition and settlement, dated 24th April 1856, whereby he conveyed to trustees his whole heritable and moveable estate, including his estate of Dunlugas. The trust-purposes were, *inter alia*, first, for payment of his debts, deathbed and funeral expenses, and the expenses of executing the trust; and, secondly, for securing a provision of £5000 sterling to and for behoof of the said Mrs Mary Leslie or M'Leod, the truster's only surviving daughter, in liferent, for her liferent use only, and her children born of her said marriage, or any future marriage, in fee; whom failing, to the said Hans George Leslie, the truster's son; and for that purpose the truster directed his trustees to hold and accumulate the rents and profits of the lands thereby conveyed until the same, together with what should remain and be available of the truster's other estate, after satisfying the first purpose of the trust, should amount in all to a capital sum or provision of £5000 sterling; and then to set apart and hold, or invest, or manage the said capital sum or provision in such manner as that the interest or income thereafter to accrue or arise therefrom, after deducting the necessary charges of management connected therewith, might be payable by his trustees to the said Mrs Mary Leslie or M'Leod during her lifetime, at such terms or periods as they might think suitable; and the capital sum to be on her death, payable to the fiars as therein and after mentioned. Until a capital sum or provision of the amount foresaid should be formed and set apart, the truster directed his trustees, out of the rents of his lands or other income of his estate, to make payment of a free annuity of £200 sterling to his said daughter. By the third purpose of the trust, the truster, in so far as regarded his lands and other residue of his estate which might remain after his trustees should have formed and set apart the capital sum or provision of £5000 sterling, as directed under the said second trust-purpose, directed his trustees to convey and make over such lands and residue to the said Hans George Leslie, his son, and his heirs and assignees, whom failing, the truster's own nearest heirs, and that with all convenient speed after the said capital sum or provision should have been formed and set apart as aforesaid. The truster also declared that the foresaid provisions in favour of his said son and his said daughter respectively should be taken and accepted by him and her respectively in full of all claim of legitim, or bairn's part of gear, or portion-natural, or other share of his estate which might be competent through his decease. The estate actually left by Mr Leslie consisted of his estate of Dunlugas, estimated as of the free value of £28,000, and of about £1500 of free executry.

In October 1857 the defender Hans George Leslie raised an action of reduction of this trust-disposition and settlement, as having been granted on deathbed to his prejudice, as the truster's only son and heir, and on 15th January 1858, decree of reduction was pronounced in the action. Thereafter, in March 1858, the defender made up a title by special and general service as heir of his father, and as such was infeft in the estate of Dunlugas. Some communications passed about this time between the pursuer on the one hand, and the defender and his agent on the other, which finally resulted in the defender granting a bond for £5000 over Dunlugas, in favour of trustees for the pursuer and his wife and children. The bond, which was dated 31st May 1858, narrated the provision of £5000 to Mrs M'Leod's family, as contained in the late Mr Leslie's trust-settlement; the reduction of the deed at the instance of the defender; the defender's purpose, while availing himself of his right to challenge that deed as far as it conveyed heritage, of carrying into effect the wishes of his father with reference to the provision of £5000; and the agreement with reference thereto with the pursuer and his wife; and then the defender bound himself, his heirs, executors, and representatives whomsoever, to pay to trustees named the sum of £5000 for the purposes specified, disponing the lands of Dunlugas in security. In consideration of this bond and disposition in security, the pursuer and his wife executed a discharge, dated 1st June 1858, whereby they discharged the defender and the trustees of the deceased Hans George Leslie, "and all others, the representatives of the said deceased Hans George Leslie, or the intromitters with his effects, of all sums of money or other effects which belonged or were due to the granters, or either of them, or which they, or either of them, could have asked or claimed out of the estates and affects of the said deceased Hans George Leslie; but also of all legitim, portion-natural, bairns' part of gear, executry, and every other thing which the said Mrs Mary Leslie or M'Leod, or the said Gordon M'Leod, *qua* husband and administrator-in-law of his said children, or otherwise, might ask, claim, or demand from the estate and effects of the said deceased Hans George Leslie, or in and through his decease, or the decease of Mrs Mary Ramsay or Leslie, his spouse, mother of the said Mrs Mary Leslie or M'Leod; and of every other claim or de-

mand in any way or manner whatever, or in whatever capacity or character, from and against the said deceased Hans George Leslie or his estate, or trustees or representatives; but reserving always the granter's respective rights and interests under and in virtue of the said bond and disposition in security for the said provision of £5000, in respect of which the said discharge was granted, and which should not be hurt or prejudiced thereby."

In March 1863, the pursuer raised the present action for the purpose of enforcing his right under the marriage-contract of the late Mr Leslie and his wife, of the existence of which he had only recently, he alleged, become aware. The action was directed against Hans George Leslie, only son of the deceased Mr Leslie; the trustees of the deceased Mr Leslie; the trustees nominated in the bond and disposition in security dated 31st May 1858; the pursuer's children; and his marriage-contract trustees. The summons called for production of (1) an antenuptial agreement or articles of marriage, dated on or about 4th March 1820, entered into between the said deceased Hans George Leslie, on the one part, and Mrs Mary Ramsay otherwise Brebner, widow of the deceased William Brebner of Learney, afterwards spouse of the said deceased Hans George Leslie, on the other part; and (2) a postnuptial contract of marriage, dated on or about 25th March 1820, entered into between the said deceased Hans George Leslie, on the one part, and his wife, the said Mrs Mary Ramsay or Leslie on the other part.

The leading conclusions were for declarator that the pursuer's wife, now deceased, had sole and absolute right to a provision of £16,000 provided to the younger children of the marriage between the late Mr Leslie and his wife, and that that right was now vested in the pursuer; that the defender, as heir-male of the marriage between the late Mr Leslie and Mrs Mary Ramsay or Leslie, or as heir in special or heir in general of his father, was bound to pay to the pursuer the said sum of £16,000, with interest from Martinmas 1856, being the first term happening six months after the decease of the late Mr Leslie; and for reduction of the bond and disposition in security and the discharge dated in May and June 1858, "but that only in so far as the same can be held to exclude or prevent the pursuer from obtaining decree of declarator and payment in terms of the other conclusions above written, saving and reserving the said several writs, and all rights and interests under the same, in as far as it may not be necessary or expedient to have the said writs set aside and reduced as aforesaid."

The defender's agent having, in reply to a demand by the pursuers' agent for production of the marriage settlements, stated that he was not in possession of any such documents, and that none such were found among the late Mr Leslie's papers, and the defender pleading that the pursuer was not entitled to decree in the action until the tenor of the deeds founded on by him had been proved in a competent action, an action of proving the tenor was brought by the pursuer in December 1863, and after various procedure in this action (*vide* 3 Macph. 840), decree was pronounced on 2d June 1865. The antenuptial articles of marriage, of which the tenor was thus found proven, were executed by the late Mr Leslie and Mrs Mary Ramsay or Brebner, afterwards Leslie, on 4th March 1820, the latter party agreeing that her whole property should be be conveyed to her intended husband, and the latter agreeing to infeft his intended wife in a free annuity of £500, and to settle other provisions upon her. The articles of marriage contained also this provision—"and the said Hans George Leslie shall be farther bound to convey the lands and estate of Over and Nether Dunlugas and others to himself and the heir-male of the marriage in fee, and also to secure to the younger children of the marriage £16,000, and in the event of no heir-male being procreated of the said marriage, to increase the said sum to £20,000 sterling, payable at and against the first term of Whitsunday or Martinmas six months after the decease of the said Hans George Leslie." On 25th March a postnuptial contract was executed by the parties, giving effect to the provisions in the articles of marriage. This deed, after narrating these articles, proceeded thus:—"Therefore the said Hans George Leslie hereby dispones and conveys to and in favour of himself and the heirs-male of this marriage, whom failing, to his own heirs and assignees whomsoever, heritably and irredeemably, all and whole the lands of Over and Nether Dunlugas," &c. After sundry provisions in implement of Mr Leslie's obligations in the way of annuity and other payments to his wife, the deed continued—"Moreover, the said Hans George Leslie, in farther implement of the said marriage articles entered into betwixt him and his said spouse, hereby binds and obliges himself and his heirs and successors whomsoever, to make payment of the sum of £16,000 to the younger child or children that may happen to be procreated of this marriage, besides the heir succeeding to the said lands and estate of Dunlugas and others." The pursuer now averred that while he and his wife were ignorant of the existence and tenor of these articles of marriage and postnuptial contract, the defender and his agent, or at least the latter, knew of their existence and import; or at least they knew that no such rights as those to which the pursuer and his wife were entitled under the said deeds were in the contemplation of the pursuer and his wife when they granted the discharge above-mentioned.

The pursuer pleaded (5)—The defender, Hans George Leslie, having, as his father's heir, succeeded to and been infeft in and taken possession of the lands and estate of Dunlugas and others, is bound by the terms of his father's marriage-settlements to satisfy and pay the said provision of £16,000 to the younger child or children of the marriage, or their representatives. (7) The acceptance by the pursuer Mr M'Leod and his wife of the bond and disposition in security for £5000, and the discharge granted by them in consideration thereof, as well as the arrangement under which the said deeds were accepted and granted, having been impetrated and obtained from them by fraudulent concealment and misrepresentation as condescended on, the pursuers are entitled to have the deeds under reduction set aside in as far as they import or operate as a discharge of the right and interest of the pursuer Mr M'Leod and his said wife and children in the provision of £16,000. (8) The said bond and disposition in security having been accepted, and the said discharge granted by the pursuer Mr M'Leod and his wife, and the arrangement under which the same were accepted and granted having been entered into while they were in ignorance of Mr and Mrs Leslie's marriage settlements, and of the said provision of £16,000, the said deeds, in as far as they can be held to import a discharge in exclusion of the present claim to the said provision, are reducible in respect of essential error on the part of

the said pursuer and his said wife. At least the said deeds are reducible in respect of essential error on the part of the said Mr and Mrs M'Leod, induced by the fradulent misrepresentation or fraudulent or undue concealment on the part of the defender Hans George Leslie, and his said agent, at least on the part of the latter.

The defender pleaded—(1) The averments of the pursuers are irrelevant and insufficient in law to support the conclusions of the action. (2) On a sound construction of the marriage-contracts founded on by the pursuer, the defender is not liable for the sum claimed by the pursuers in this action, and was entitled to the lands of Dunlugas and others without incurring such liability. The defender does not represent his father, and is not liable for the sums sued for. (5) The pursuers are not entitled to make or enforce the claim made in the present action so long as the said bond for £5000 is in force; and, before enforcing said claim, they are bound to discharge the said bond, or to get it discharged, and to repay the sums paid under the said bond. (6) In any view, the said sum of £5000 must be imputed in part payment of any sum found due by the defender in this action.

On 29th June 1866, the parties put in this minute of admission:—

"The defender, Hans George Leslie, admits that the pursuer, Gordon M'Leod, and his late wife, accepted the bond and disposition in security, No. 11 of process, and executed and delivered the discharge, No. 12 of process, in ignorance of the antenuptial articles of marriage, and postnuptial contract of marriage as respectively found and declared by the extract decree of proving the tenor, No. 35 of process, and of their rights under the same; the said defender undertakes not to found upon or plead the said bond and discharge as being any bar to the said pursuer maintaining the rights of himself and his said wife under the said antenuptial articles of marriage and postnuptial contract of marriage. The defender further admits the averments in article 8th of the condescendence (relating to Mr Leslie having received payment of certain property belonging to his wife); and also, that the estate of Dunlugas, settled by the said articles of marriage, and conveyed by the said postnuptial contract of marriage, was, at the date of the late Mr Leslie's death, and still is, of the free value of £28,000.

"The pursuers admit the averments in statement 3 for the defender (to the effect that the late Mr Leslie left only about £1500 of personal property, and no heritable property except Dunlugas) to be true:

"And both parties renounce probation, except upon the question, Whether the defender is entitled to be restored against the obligations contained in the bond and disposition in security, dated 31st May 1858, set forth in articles 18 and 19 of the revised condescendence; or to have the sum of £5000 therein contained imputed in payment of any sum which the pursuers may be entitled to recover in this action."

On 20th July 1866 the Lord Ordinary (Jervis-woode) pronounced this interlocutor:—"The Lord Ordinary having heard counsel, and made avizandum, and considered the debate, with the closed record, joint minute of admissions, No. 56, and whole process, Finds that under a sound construction of the terms of the antenuptial agreement or articles of marriage between the deceased Hans George Leslie, Esq., of Dunlugas, and Mrs Mary Ramsay, otherwise Brebner, the decree of proving the tenor of which forms No. 35 of process, the defender, Hans George Leslie, as heir-male of the marriage, holds a right as of credit, under the said agreement or articles, to the lands and estate of Over and Nether Dunlugas, and that the provision of £16,000, provided under the terms of the said postnuptial agreement or articles to the younger child or children that might happen to be procreated of the then contemplated marriage, does not constitute a claim or debt preferable in the question between the defender claiming the estate of Dunlugas as heir-male of the marriage, on the one hand, and the pursuer, as in right of the provision of £16,000 foresaid, on the other; and, with reference to the preceding findings, repels the fifth plea in law stated on record for the pursuers, and sustains the second plea in law for the defender, and appoints the case to be put to the roll with a view to further procedure.

"*Note.*—The question on which the Lord Ordinary understands the parties are agreed that a judgment may here, with advantage to their interest, be at present pronounced, is, briefly, whether or not, as in a question between the pursuers, as in right of the money provision of the deceased Mrs M'Leod, amounting to £16,000, on the one hand, and the defender, having right to and taking the estate of Dunlugas, under the provisions contained in the antenuptial contract or articles of marriage between his deceased father and mother, on the other, the former are entitled to claim as against the whole estate of the defender's father, including the heritable estate destined to the heir of the marriage, preferably to the claim competent to the latter as heir foresaid.

"The Lord Ordinary has considered this question, which is doubtless of great moment and importance here, in relation to and after examination of the various authorities to which he was referred, or which have appeared to him to bear upon the question.

"The result to which he has come is favourable so far to the contention on behalf of the defender. It appears to him that, as heir of the marriage, the latter is entitled to claim the heritable estate destined to him on a footing of right not less complete than that under which the younger children claim the provision of £16,000 which was to be secured to them, and that no preference is created in favour of the latter which would entitle the pursuers to succeed in their argument under the fifth plea, as set forth in their behalf."

The pursuer reclaimed.

The Court, after hearing counsel, appointed the case to be heard before themselves and three Judges of the Second Division.

Young and Nevay for reclaimer.

Dean of Faculty (Moncreiff) and Lancaster for respondent.

At Advising—

Lord Justice-Clerk.—The case before us raises the question as to the liability of the proprietor of Dunlugas—having right to that estate as heir of the marriage between his late father, Hans George Leslie, and his mother, Mary Ramsay or Leslie—to make good to the pursuer, as in right of the younger children of the marriage, the provision of £16,000, stipulated in the marriage articles, on the faith of which the marriage-contract was entered into. The pursuer demands payment of the entire sum, in so far as the executry estate left by the deceased is insufficient to meet the obligation. The defender pleads on the record non-

liability for payment of any portion of it. The Lord Ordinary has pronounced an interlocutor, in which he points to an apportionment or adjustment of claims founded on the footing of the defender and pursuer having only the same description of right under the marriage-contract. He has negatived the pursuer's plea as to the liability of the defender as heir of the marriage to implement the obligation in its entirety.

The marriage articles were entered into shortly before the marriage, and almost immediately after it the substance of these articles was embodied in the form of a regular formal contract. It was executed with a view to carry the marriage articles into effect. Under the marriage articles, the intended husband agrees to pay an annuity to his intended spouse, and to make certain payments which were to be secured by infeftment in his estate of Dunlugas, and then, in reference to the heir and the children of the marriage, he comes under an obligation conceived in the following terms:—"And the said Hans George Leslie shall be further bound to convey the lands and estate of Over and Nether Dunlugas, and others, to himself and the heir-male of the marriage in fee; and also to secure to the younger children of the marriage £16,000; and in the event of no heir-male being procreated of the said marriage, to increase the said sum to £20,000, payable at and against the first term of Whitsunday or Martinmas six months after the decease of the said Hans George Leslie." In the formal contract in implement of these articles, besides securing the wife in her provisions by giving security over the estate, the deceased Mr Leslie proceeds to dispone and convey the lands of Dunlugas in favour of himself, and the heirs-male of the marriage, whom failing his heirs whatsoever; and at a subsequent portion of the deed, and in further implement of the obligation contained in these marriage articles, he binds and obliges himself, and his heirs and successors whatsoever, to make payment of the sum of £16,000 to the younger child or children that may happen to be procreated of the marriage, besides the heir succeeding to the lands and estate of Dunlugas. The wife, in consideration of the provisions for herself and her children, renounced all claim to the rights which would accrue to her at law; and similarly there is a declaration with respect to the rights of the children, which declares that the "provisions before written, conceived in favour of the children of the marriage, are and shall be in full satisfaction of all bairns' part of gear, legitim, portion-natural, executry, and every thing else that they could ask or claim by and through the decease of their father." The wife, on the other hand, conveys right to an annuity of £700 a-year, to which she had right as the widow of a former husband; certain property in Aberdeen, and the right to a share of a succession in Demerara, together with all she might acquire during her marriage. It is said that, at the date of the marriage, the husband had property, independent of Dunlugas, amounting to £30,000. The estate of Dunlugas is admitted to be of the value of £28,000, and the executry estate (and there is no other heritage or property of the defunct) is stated to be of the value of £1500 or thereabouts. The effect of sustaining the claim of the pursuer, as representing the younger children, would be that payment of the £16,000, except to the extent to which he may be relieved out of the executry, must be made by the defender. The demand for payment of the provisions is represented by the defender as involving a preference inconsistent, as it is said, with the true legal position of the parties under the contract, and causing unfair inequality, apart from the question of legal right. The point which we have first to determine is as to the relative position of the parties as affected by the arrangement entered into under the marriage articles and contract; when that is clearly ascertained and fixed, it will be found that the question at issue has been solved.

The position of Mr Leslie, the defender, is that under the contract, he is heir of provision of his father in the estate of Dunlugas. As the heir of the marriage, he is entitled to complete a title to the property in that character; he is to be taken in the present discussion as heir-male of the marriage. His father bound himself to convey the lands to himself and the heirs of the marriage, and under the marriage-contract his father did dispone the estate to himself and the heir-male of the marriage; and as heir-male of the marriage, the defender is therefore his father's heir of provision in that estate. His right, under the marriage articles, was to obtain precisely such a disposition as was executed. His father by executing it implemented his obligation. The heir could ask no other or better implement than he obtained by the disposition so executed. His right was not one which his father could disappoint by any gratuitous deed, and which, in the event of a sale of the subject, would have given the heir, on his father's death, an interest in the amount of the price as a surrogate for the estate. But in the actual condition of the fact he had got implement of the obligation conceived in his favour, and by that implement he is constituted his father's heir of provision in the estate of Dunlugas. As incident to that position, it follows that he represents the deceased; and, as representative of the deceased, he must fulfil the obligations of the party whom he represents. In a question of payment of a moveable debt, he is entitled to relief against the executor; as an heir of provision in a special subject, he would be entitled to relief against an heir general or heir of conquest, if there were such heirs; but his position is this, that as heir of provision, he represents the deceased, and as heir and representative in that character, he must implement the onerous obligations under which that ancestor has come. It seems to me to be utterly unnecessary to cite authority in support of a proposition so clear. That heirs of provision are liable *in suo ordine* for fulfilment of their ancestors' obligations is not a question on which doubt can be entertained. That the defender did become such heir of provision by reason of an onerous obligation in the marriage-contract, is in this question of no moment. If an heir of provision be liable, it is of no consequence whether the right was acquired as the result of contract or by a voluntary deed. The liability attaches to the character held by him as such. If attaching in law to the character held by him, it is not material how he came to assume the character. It is a burden to be borne by heirs of provision, and one who takes upon him that character cannot evade the legal burden which such heirs must bear. In stipulating for such a conveyance in his favour, the effect of the conveyance was necessarily to be attended by the obligations incident to the position in which the party taking the conveyance should be placed. It seems to me impossible, therefore, to dispute that Mr Leslie, the defender, is bound as one of his father's heirs and representatives

to fulfil his father's onerous obligations. Such being the true legal position of the defender, we have now to enquire what the true character of the pursuer as in right of the provision to the younger children, is. The Dean of Faculty maintained that the children were representatives, not creditors, of the deceased—heirs *in mobilibus*, not parties having the rights of creditors. I am very clearly of opinion that that is not a true representation of the legal character held by the pursuer. In a question with the father's representatives, I hold that parties having bonds of provision or provisions secured to them by antenuptial arrangements, are proper creditors entitled as against the representatives of the ancestor to all the rights and remedies against the estate of the deceased, competent to creditors. The position of the holders of such provisions as in a question with ordinary creditors of the father is such that they cannot compete with them, unless, indeed, these provisions are so framed as to come into operation during the life of the father, in which case they are allowed to compete. Their debts are payable only on their father's decease, and the nature of the arrangement leaves the father in the free administration of the estate while he is alive. That they should be postponed in such a competition is not singular. Whether it is to be traced to the difficulties attaching to the nature of the right, as one contingent and uncertain during the parent's lifetime, or to expediency, is of no moment to inquire; but certainly the mere postponement in a competition with stranger creditors cannot disprove that they are creditors in a question *intra familiam*. The younger children are made creditors by the form of the obligation adopted in this case, and invariably adopted in all such cases. Where the father seeks to provide for his younger children in an antenuptial contract, or by a separate bond of provision, he binds himself, his heirs, and successors whomsoever, in payment, just as the representatives, and heirs, and successors of the party are bound by the marriage-contract here. The provision in the marriage articles is to secure the provision to younger children—a phrase which may admit of an interpretation going further than a mere obligation by the granter on himself and his heirs, but which I hold to have been fairly implemented by the obligation as introduced in the marriage-contract. If the defender is an heir of provision, Is not the obligation prestable by him as one in which his father bound himself, and his heirs and representatives whomsoever? But that the children, having bonds of provision, are creditors of the deceased, and not his representatives, seems to be made out very clearly on authority and by decision. Mr Erskine (3, 9, 22), in speaking upon that subject, says—"Donations to the wife, and obligations of provision to children, delivered to them by the granter in *liege poustie*, whether by marriage-contract or in separate bonds, must, *like other debts due by the deceased*, come out of the whole head of the executry." These parties are not executors; they are not claiming as executors; they could not confirm as executors in right of these bonds, except as executors creditors, but are claimants upon the estate of the defunct; and to the extent of the debts due to them, there is no executry—the executry, or dead's part, arises only after deduction of these debts. In the case of *Dundas* v. *Dundas* (1 D. 731,) it appears to me that this question—I mean the question as to the true character of parties in the right of such obligation—is almost expressly decided. In that case, Mr Dundas of Arniston, in a marriage-contract between him and Miss Lilias Durham, made certain stipulations in the ordinary form for the payment to the younger children of the marriage of certain sums therein fixed. Certain policies of insurance were assigned, and there was an obligation that they should be kept up; they were kept up, and the policies were imputed towards extinction of the obligation, but there remained a sum of £4300 due upon the provisions, which these policies were insufficient to discharge. Mr Dundas was succeeded by his son, who took the estate in question—an estate called Haltrees—in virtue of a deed which had been executed by a party of the name of Davidson. By the deed, a direction was given that the entail should be executed precisely in the terms of the entail of the estate of Arniston. And, acccordingly, the entail was so executed, and under it Mr Dundas the elder, who was the contracting party, had a right as institute to the estate, which was not affected by fetters in so far as regarded the institute, but which was affected only in the person of his son (against whom the proceedings were taken) by all the fetters of a regular entail. Under these circumstances, after Mr Robert Dundas senior's death and the succession of the son, an action was brought at the instance of the younger children, as to the amount of deficient fund under the provision, and the question which was raised involved the determination of the character in which these parties stood under the bonds of provision. If they were representatives of Mr Dundas, their position assumed one form; if they were creditors of Mr Dundas, then they were entitled to adjudge the estate as being held by their debtor in the position of a party holding an estate unfettered, and in that way the question came to be necessary to be determined as to the character of the parties. The Lord Ordinary (Cunninghame) found "That the deceased Robert Dundas, Esq., held the estate of Haltrees libelled on under a disposition and deed of tailzie, executed by the trustees of the deceased John Davidson, Esq., in which the said Robert Dundas was the disponee or institute in the tailzie, and on which he possessed the estate from the date of his infeftment in June 1829 down to the period of his death in June 1838; that the fetters of the tailzie did not apply to Mr Dundas as institute, or prevent third parties with whom he contracted, from affecting the same for his onerous debts and deeds; that the provisions libelled on, which Mr Dundas, by his contract of marriage, bound himself to pay and secure, in manner therein specified, to his younger children, were debts or onerous contractions which, in a question with the heirs of tailzie substituted to the institute, the said younger children are entitled to make effectual against the estate in so far as they are unpaid or unsecured." Then the Lord Ordinary proceeds—"This is not a question between ordinary stranger creditors on the estate of a party insolvent. Had it been so, it is manifest from the form of Mr Dundas' title that the defenders themselves could have set up no claim in competition with such creditors, who had onerously contracted with the proprietor during his life. But this is a claim by children whose claims now emerge, and are now liquid and prestable, and which are urged only against the substitute heirs of entail, who plead their *jus crediti* under the title. As in a question with these heirs only, the Lord Ordinary thinks that the younger children are preferable; or, rather, that they are entitled to attach the estate libelled on for their provisions, in so far

as these are still unpaid and unsecured." And his Lordship refers to the case of *Borthwick*, where the House of Lords, reversing the judgment of this Court, had sustained the rights of children in a similar position. The case was pleaded before Lord Murray, as Lord Probationer, who gave a clear opinion, and one part of it is in these terms:— "The third and only remaining point is whether the obligations founded on by the pursuers were onerous obligations of the deceased, and can be made the ground of attaching whatever property he held in fee-simple. In a marriage-contract, obligations of two several classes may be inserted; one consisting of such obligations as are or may become prestable during the life of the party, the other consisting of those obligations which can only take effect after his death. The obligations in this case belong to the latter class. Generally speaking, the obligations to children undertaken in a marriage-contract are as onerous as the obligations in any other contract. But if they are only prestable after the death of the contracting party the children are only *quodammodo* creditors. It is true they are postponed in a competition with proper creditors, holding obligations prestable during the life of the contracting party. But here there is no question with the ordinary and proper creditors of the deceased. The obligation founded on by the pursuers was just as onerous as any other obligation; and as it became prestable by his death, and none but the heirs of Haltrees are in the field, I am of opinion that the pursuers are entitled to attach the estate of Haltrees and others, which was held in fee-simple by the deceased." And in that opinion, so expressed, the whole Court concurred. The authority of that case might be, I think, confirmed by reference to several other cases. In the case of the *Advocate-General* v. *Trotters*, 12th November 1847, the question was whether the provision under a marriage-contract subject to the right of apportionment by the father, was a legacy given by testamentary instrument, or, according to the language of the statute, a gift by will or testamentary instrument, and so liable to duty or not. Lord Fullerton and Lord Robertson negatived the claim, and Lord Fullerton says that provisions to children by marriage-contract are rights of credit enacted by deeds *inter vivos* of a peculiar and modified kind, and neither in form nor in substance gifts by testamentary instruments. And lastly, I may refer to the case of *Maxwell*, decided on 20th July 1866 in the Second Division, where it was held, in a question arising under the Stamp Laws, that such provisions in the marriage-contract of Sir Wm. Stirling Maxwell were to be stamped as obligations, and were therefore not to be used otherwise than as obligations undertaken in a personal bond. Further, I think the case of *Russell* quoted to us is an authoritative case, and there the question was raised in a great measure on the note of the Lord Ordinary, on which it is now attempted to found as against the nature of this obligation. The result is, that the pursuer is in the right of an onerous creditor, and is enforcing his claim of debt against a party who, to the extent of the estate of Dunlugas, represents the deceased. It is difficult to see how such a claim can be met. Then the only question comes to be, whether, if that view be correct, it can be disputed that this was a provision onerous to its full amount. It has sufficient onerosity, as it appears to me, in the consideration of the marriage itself. It is onerous because, in consideration of it the legal rights of the younger children are in respect of that provision discharged. It is onerous by reason of the very considerable estate contributed by the wife upon the faith of the contract to the husband. I hold that the question of alleged excess is inadmissible, because the precise amount was fixed in an antenuptial contract by parties in the full right to make such a provision with reference to their future issue. It leaves them to make a provision in that form. Another well-known form is where children are found to be entitled to certain sums according to their number. The contract might have fixed the sum which each child should receive, but here the parties chose to fix otherwise a sum payable to the child or to the children of the marriage, however numerous they may have been. Now, it is not in the mouth of the defender to say that they had not a perfect right to make such an arrangement, and it seems to me to be impossible that he can be allowed to quarrel with that particular provision, in respect that under the very same deed by which his own rights are created, that fund is made payable, necessarily under the condition of the law, if I have rightly stated it, as to the position which he was to assume, fixing the liability on him, in the event of there being no other estate out of which it may be recovered. I may further add that any such adjustment as is pointed out by the Lord Ordinary seems to me to be inadmissible on the ground so strongly and ably pressed on us by Mr Young. We should be reforming according to loose views of what we think fair and equitable a deliberately settled agreement of parties competent to contract in the very matter of this contract. We may in certain cases be called upon to say whether, there is excess in a provision over what is reasonable where a father, who has obliged himself to convey a property to the heir of the marriage, has subsequently granted deeds said to be *in fraudem* of his rights. Here it is impossible to say where in the very arrangement itself by which the heir's right is created, a sum is fixed, which his heirs and representatives are to pay, there can be a fraud on the heir's right. If we deny the demand of the pursuer, it would be, I think, a usurpation of power in us, new in our law and practice, and going to set aside the arrangements which I think we are bound sacredly to maintain. The result of the view to which I come is, that the interlocutor of the Lord Ordinary should be recalled, and decree given conformable to the conclusions of the action.

Lord Cowan—I cannot regard the question raised by this record as any other than whether the defender be liable for the sum concluded for in the summons, or be exempt from all liability whatever. The fifth plea in law stated for the pursuer asserts the liability of the defender to satisfy and pay the provision of £16,000; it has been repelled by the interlocutor of the Lord Ordinary. The second plea in law, again, stated for the defender, has been sustained by the interlocutor. It is, that "the defender is not liable for the sum claimed by the pursuers in this action, and was entitled to the lands of Dunlugas and others without incurring such liability." And this assertion of non-liability is justified by the third plea, that "the defender does not represent his father, and is not liable for the sums sued for." In conformity with this view of the issue raised between the parties, the oral pleading was conducted, and upon that argument the Court has now to pronounce judgment.

The primary question thus is, whether the defender be exempt from all liability for the provision sued for. He takes the estate of Dunlugas in respect of the right to succeed to it on his father's death secured to him by the contract between his parents—a contract entered into after the marriage, but, being in terms of an antenuptial arrangement, to be regarded as no less onerous than if it had been subscribed before the marriage of the parties. But the provision for the younger children is contained in the same deed with the *spes successionis* conferred on the heir-male of the marriage. The respective rights thus provided to the issue of the marriage are essential parts of the contract between the spouses; and neither the one nor the other could be gratuitously defeated by the parents or either of them. They might be disappointed by the onerous deeds and debts of the father, and the exhaustion in this manner during his lifetime of his means and estate. But, on the one hand, of the succession to the estate of Dunlugas on his father's death, the defender, as heir-male of the marriage, could not be disappointed; and on the other hand, the obligation undertaken by the father, supposing means and estate to have been left by him unexhausted by onerous debts, became exigible by the younger child or children from the father "and his heirs and successors whomsoever." The situation of the two parties under the contract of marriage was, that the heir-male had secured to him the succession to the heritable estate of Dunlugas, and that the younger children were entitled to claim their provisions out of the estate of the father and from his whole heirs and successors. The pursuer has got the estate thus secured to him, and is vested therein as heir-male of the marriage, his rights under the contract having been in this manner fully satisfied. And the pursuer, as in right of the surviving younger child, now claims payment of the provision from the defender as the father's heir taken bound to implement the same, either to the full extent,—leaving the defender his relief against the father's general estate; or to the extent of the sum remaining unpaid, after applying towards its extinction the other funds left by the deceased father. Those other funds are stated to have amounted at his death to about £1500. The burden falling upon the defender will thus be about £14,500, while the estate of Dunlugas, which he takes as heir-male of the marriage, is admitted to be about £28,000.

Viewing the question in this light, I cannot see any legal ground on which the defender can be freed from all liability for the provisions of the younger children, constituted as their respective rights are by the same contract. And that liability, I apprehend, attaches to the defender as heir of his father under the special destination in his favour. It was certainly within the power of the spouses to arrange before their union the respective rights and interests of the children expected to be born of the marriage. They did so by conferring on the heir-male the succession to the estate, which he could take only as heir of the marriage, and by service as such; and by an obligation on the father's part to be binding on his heirs and successors whomsoever to pay such an amount to the other children as the intended spouses mutually agreed on. It is vain for the defender to say that the succession of Dunlugas has not opened to him as heir subject as such to his father's debts and obligations. The father did not divest himself of the fee of the estate. What he did was to secure and provide it to himself and the heir-male of the marriage. It was as his father's heir, therefore, the defender could alone take Dunlugas, and in that character it is that he is liable for the whole debts and obligations of his father of whatever kind or nature these may be; and, among other obligations, it is as heir of the marriage, taking the family estate, he is liable to pay the provisions claimed by pursuer. That this is the case will be apparent from many considerations.

Supposing there had been no provisions made by the contract for younger children, and that no other provision as regards the offspring had been made than that the estate of Dunlugas should descend to the heir-male of the marriage. And suppose that after the subsistence of the marriage, and the birth of younger children, the father had executed in their favour bonds of provision binding himself, his heirs and successors for certain sums of money. Even in that case the heir-male of the marriage could not carry off the estate exempt from liability for the provisions thus constituted. The father, as fiar, was entitled to impose such obligations on him as his heir and successor in the estate. It may be that, to the extent of any general estate other than that provided to the heir of the marriage, the amount of the provisions might fall to be primarily satisfied; but the father's obligation being equally onerous with the destination of the estate, must be implemented by the heir, when the moveable succession or general estate proves insufficient. One limitation there is in the case which I have supposed—viz., that of the heir's succession being secured by antenuptial deed, and the younger children's provisions being settled by postnuptial deed. It is that, if excessive and unreasonable, having regard to the value of the estate taken by the heir, his liability may be restricted; and the amount of the burden to which he is liable be reduced on equitable principles to such sum as in the whole circumstances the Court may deem reasonable and just. But in so far as reasonable, it it indisputable that such provisions would be an onerous obligation of the father from which the heir of the marriage, as such could not shake himself free.

Another case will illustrate the fallaciousness of the defence of total exemption from liability for these provisions. It is an undoubted principle that as heir of the marriage, taking the family estate, which has been secured to him by the antenuptial contract of his parents, the eldest son of the first marriage will be liable for provisions settled by the father, in the event of his second marriage, upon his second wife and the children of that marriage—this liability, like that incurred in the previous case, being subject to equitable modification by the Court upon consideration of the whole circumstances affecting the father's succession.

The decisions fixing the principles now adverted to, and the import of the authorities, are well stated in Mr Duff's Work on Conveyancing, (*vide* section 312;) and after carefully considering the decisions and authorities on which he founds, I am content, in so far as the present question is concerned, to adopt his statement of the law, which is expressly to the effect I have stated.

The defence of total exemption from liability for younger children's provision does therefore appear to me quite untenable. And the defender has not stated any other defence. He has not pleaded that, supposing he is liable to be burdened with provisions to younger children as the heir of the

marriage taking the family estate, the amount of the provision here claimed under the father's obligation is excessive, and on that ground that the extent of his liability should be restricted. If the defender considered that he could maintain a plea to that effect in the face of the fact that the younger children's provisions were fixed in amount as a debt on the father's estate, and his heirs whomsoever, by the very deed which conferred on him the right to succeed to Dunlugas, it was incumbent on him to have pleaded that defence. The claim of the younger children could not be otherwise made than it is in this action. The full amount in every such case is claimed from the party indebted in that amount, unless he can show that, in the state of the father's succession it ought to be reduced to a greater or less extent. When no such plea is stated, the younger children, whether of the same marriage or of a subsequent marriage, will be entitled to have decree against the heir taking the estate as the representative of the father, in virtue of whose obligation the claim is made, The question of modification may, no doubt, be raised by the heir himself in an action of declarator and reduction. But if he does not do so, no course is left for the younger children but that which has been here followed. I apprehend, therefore, that the Court in the state of the record, is excluded from considering the defence in that light, even were it maintainable. But I concur in the Lord Justice-Clerk's opinion that, in such a case as the present, it would be inconsistent with the principles acted on by the Court in this class of cases, to entertain the question of modification, the spouses having themselves fixed the amount of the provision by their antenuptial arrangement.

The view acted on by the Lord Ordinary in pronouncing the interlocutor appears to me to be inconsistent at once with the state of the record, and with the rights of parties. For while he disposes of the leading pleas to which the argument has been directed favourably for the defender, he has not dismissed the action, but has ordered the cause to the roll with a view to farther procedure. From the findings in the interlocutor, and the observations in the note, his Lordship seems to consider that the claim of the defender to the heritable estate, and the claim of the pursuer for the provision of £16,000, are not preferable the one to the other, but stand on a footing of equality as claims upon the father's estate; and that to this equality effect may be given in this process. Had the whole property, heritable and moveable, left by the father been made the subject of division in a multiplepoinding, on which the parties claimed to be ranked respectively, the claim by the pursuer being for the £16,000, and that by defender for £28,000, as the worth of Dunlugas, there would have been room for a finding,—had the legal rights of the parties been consistent with it,—that the claims should be ranked *pari passu* on the fund. On no other footing, however, does it appear that there could exist any case for collation and ranking of the kind contemplated. But the defender has not attempted anything of this kind. He has never intimated his liability for the £16,000 to any extent whatever, and far less has he expressed—supposing liability to exist—any desire that the value of Dunlugas, as it may be realised or be estimated, should be a fund of proportional division between the parties. The case stated in the record, and argued, is quite the reverse. His legal right to take Dunlugas free of liability altogether has been and is the contention of the defender.

On these grounds I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and decree pronounced in favour of the pursuer.

Lord Curriehill — The marriage-contract of March 1820, between Mr and Mrs Leslie, although dated a few days after their marriage, was executed by them strictly in implement of articles signed by them before that event, and has therefore the legal effects of an antenuptial contract. They were then entitled to exercise their own discretion as to the amount, and likewise as to the nature and conditions, of such provisions as they might think proper to make for the children of their marriage. They were under no restrictions which could control them in the exercise of such discretion.

In these circumstances, they, in the exercise of that discretion, contracted that, in the event of their leaving children, the one who should eventually be the heir of the marriage should be in a position different from the others. As to the former, they provided—not that any property or funds should be conveyed to him, or that any money should be paid to him—but only that Mr Macleod's lands of Dunlugas should be vested in himself, with such a destination thereof as would make the heir of the marriage to be heir of investiture to him. The contract provision in favour of that party, therefore, imported merely that he was to be placed in the position of heir to Mr Macleod in the estate of Dunlugas. But he was to hold that character with both the privileges, and the burdens, which the law itself would attach to it; and one of these burdens would, of course, be liability for his ancestor's debts. There can be no question that the parties had power to make such an arrangement.

The position of the other children who might be born of the marriage was to be different. It was to be that—not of heirs, but of creditors of their father for a specific sum of money, amounting to £16,000, to be paid at the first Whitsunday or Martinmas which would happen six months after his death. That obligation was imposed on himself, and on his heirs and successors indiscriminately. That obligation being in a marriage-contract, in which the mother of these children was one of the contracting parties, and by which she made provisions to Mr Leslie, was onerous in any question with Mr Leslie himself and his heirs; and the position in which it placed such children was that of creditors of him and them.

The time has now arrived when these provisions have become prestable to the issue of their marriage or those in their right. The defender is the party who is now in the position of being the heir of the marriage of Mr Macleod in the estate of Dunlugas, under the destination in the marriage-contract. The pursuers are the parties who are now in the position of being the creditors in the obligation undertaken by Mr Macleod by that contract for payment of £16,000 to the younger children. If the late Mr Macleod had died insolvent, neither of these parties could have ranked upon his funds in competition with his other creditors. But that is not the case. He has left the estate of Dunlugas, and its value is estimated at £28,000; and it is said that he has left also about £1500 of executry. There is therefore no competition between any of his descendants and stranger creditors. The defender having succeeded to Mr Macleod in the estate of Dunlugas, as heir of provision, he now en-

joys the privileges, and is subject to the burdens, which by law attach to that position. And the pursuers being now the creditors in the provision of £16,000, which was made in favour of the younger children of the marriage, the question is, Whether or not they, as such creditors, are entitled to enforce payment of that debt from the defender, as being the heir of their debtor, and liable *passive* for payment of his debts? I am clearly of opinion that this question must be answered in the affirmative. The defender having succeeded to the debtor's estate, and being in the actual enjoyment of it, is consequently liable *passive* for the debt in question, as well as for any other debts which were owing by that ancestor at the time of his death.

The defender pleads that the heir of the marriage was placed, by the marriage-contract, in the same predicament as to the estate of Denlugas, as the younger children were as to the provision of £16,000. This might have been the case if, by the marriage-contract, Mr Macleod had divested himself of the fee of that estate during his lifetime, and had vested it in trust, or as a fiduciary fee for behoof of the heir of the marriage. But he did not do so. He settled it so that he himself remained the fiar thereof, and that the heir of the marriage had nothing but a *spes successionis* thereto, and could acquire right thereto only after his death, and by being then served heir to him, and by so incurring liability for his onerous debts, and above all for a debt contracted by the very deed which contained that destination under which he has succeeded.

The defender says that, although he is heir of Mr Macleod, yet he would be in the position of a creditor of his ancestor in a question with his heirs. That would be true. But in this action the position of the parties who are suing him is that of creditors, not heirs, of his ancestor; and his own position in reference to them is that of heir of his ancestor.

In order to support his claim to the character of a *creditor* of the late Mr Macleod, he founds upon certain cases, in one class of which a party who was merely apparent heir of provision under a marriage-contract, was found to be entitled, without serving heir to the contracting party in the marriage-contract, to sue him to perform an obligation contained in such contract to make a settlement upon the heir of the marriage; and in another class, of which such a party was found to be entitled to challenge deeds done by the contracting party *in fraudem* of the provision in the contract in favour of the heir of the marriage. But the cases of the former class were those where the father had not performed an obligation in the marriage-contract to make a settlement in favour of the heir of the marriage. And if the late Mr Macleod had not performed the obligation in the ante-nuptial articles, to make such a settlement, the heir of the marriage might have sued him, without having been served heir to him, to have performed that obligation. But, as already stated, Mr Macleod did perform that obligation, and, having done so, the heir of the marriage could not have taken any right under that settlement otherways than *qua* heir of the marriage after his ancestor's death, and by being served heir to him. This is expressly stated in the reports of all the cases upon which the defender founded. And that doctrine is explicitly stated in Erskine 3, 8, 73.

And the other class of cases consists of those where the father had granted deeds *in fraudem* of the destination in the marriage-contract. But, in the first place, the heir in these cases was found to be entitled to do so, not as a creditor of the father for performance of any obligation, but as being entitled to rescind an act done by his father in excess of his powers. And if Mr Macleod had granted such deeds, the defender as heir of the marriage, even while in apparency, might have been entitled to challenge such an abuse of power; although even had that happened, he as heir would still have remained liable for all his father's debts, including the debt in question. And, in the second place, the provision of £16,000 in question (besides being *sua natura* onerous) having been made in this very contract of marriage itself, can never be brought under the category of being a contravention of the very deed in which the provision was granted. The different parts of such a settlement cannot be frauds upon each other. I am therefore of opinion that the claim of the pursuers is well founded, and that the interlocutor complained of ought to be altered.

Lord Deas—I am of opinion that the interlocutor of the Lord Ordinary is right. It may be a question whether the principles of the interlocutor can be carried out in this action or in another action. The Lord Ordinary has not decided that, and that remains behind. The pursuers of the action make a claim for £16,000, and for nothing less or more. Having an impression that they were entitled to something, I endeavoured to draw from the counsel for the defender a statement or admission to the effect that that would not necessarily require another action, but might be vindicated in this action. I got no encouragement in that matter. Mr Young took the very safe position of refusing to answer my question whether it was within this action or no. The position thus taken by the pursuer accounts for the position taken by the defender, who naturally says—"I am called upon in this action to pay £16,000; but there are no conclusions to try my liability for any smaller sum, and, therefore, in the meantime, I defend myself entirely against the claim for the whole sum of £16,000." I think it is perhaps unfortunate that the case was pleaded so high upon both sides—but that is the state of the pleadings, and, in that condition of matters, I don't see much room for the remark of Lord Cowan with a view to founding an opinion upon the state of the record. It may be that the question may require another action, but the Lord Ordinary has not decided that, and we have at present nothing to do with it. The question now is, are these pursuers entitled to decree for that whole sum of £16,000? The summons is laid upon a variety of statements, but I need not say to your Lordships that that arose out of very peculiar circumstances connected with the contract of marriage, which had disappeared altogether, and one consequence of which was, that the heir in the meantime had expede a general service, believing there was no contract; and all that must now substantially be left entirely out of view. The only question now raised and insisted in under this summons is, whether, in respect of the character which the defender has under that antenuptial contract of marriage, he is liable for that £16,000. The single ground, as far as I have observed, upon which the opinions delivered by your Lordships in favour of that liability rest, is that, as heir of provision, he represents his father in his debts and obligations, and, as the Lord Justice-Clerk expressed it, it does not matter how he became heir of provision. That was his Lordship's assumption, and upon that assumption the whole of his opinion,

as I understood it, rests. But I should have liked to have had that not assumed but proved, because there, I think, lies the great question in this case. Does it, or does it not, matter how he became heir of provision? Does it, or does it not, matter whether he became heir of provision by an onerous obligation undertaken by his father, or without any such onerous obligation at all? As respects the whole of the rest of the Lord Justice-Clerk's opinion, except a single point in the outset, I have no ground of difference to state. I think it is all trite law. I think it is trite law that those younger children are creditors of their father, under an onerous obligation in an antenuptial marriage contract. I think it is trite law that the provisions in that marriage contract are onerous obligations and not gratuitous, that the stamp duty is exigible as on a bond, and that the legacy duty is not payable in respect of an onerous obligation. I also think that the question of excess is inadmissible, and does not arise in this cause at all. I agree, moreover, in the decision in the case of *Dundas*, which really was just to this effect, that in respect the father had an heritable estate at his disposal, in respect of which he had come under no obligation whatever to the elder son, that estate, which was entirely at his disposal, and which he had not bound himself to give to anybody, was liable for his onerous obligations to the younger children. It is as clear as the sun that that does not touch this case in the slightest degree, the whole question here being respecting an estate as to which the father did come under an onerous obligation to the son in the marriage contract. In the same way, I agree with almost all that was said by Lord Cowan. There is no dispute here as to the position in which the younger children under an antenuptial marriage contract stand towards their father. The case of *Wilson's Trustees* in 1856 settles that they are not entitled to compete with onerous creditors; but there is no doubt whatever that, in a question *inter familiam*, they are to be considered as creditors, and entitled to that position. On the other hand, there is just as little doubt that a father under an antenuptial marriage contract of that kind has power, even if it is not reserved to him,—even if he had destined the estate to the eldest son or to any other of the family,—he has power to burden the estate with reasonable provisions in favour of the younger children. He has power, if he enters into a second marriage, to make a reasonable provision for the children of that second marriage. These powers extend equally to his moveable estate and to his heritable estate. He would have had the power in this very case, if he had entered into a second marriage, to have made a contract of marriage which would, to the extent of a reasonable provision to the children or widow of that marriage, have affected both the younger children and the eldest son. The power which he had in respect of the heritable estate extended equally to the power which he had over his moveable estate. He remained the fiar of the whole, with powers of administration. Of all that there is no question. But the question here is, whether the obligation which the father undertook to the eldest son was not equally onerous with the obligation which he undertook to the younger children, and whether he was not bound to implement the one as much as the other. Now, as respects the terms of this antenuptial contract of marriage, there is no ambiguity. The whole obligation on which this action is or can be founded is expressed in these few words:—"And the said Hans George Leslie shall be further bound to convey the lands and estate of Over and Nether Dunlugas and others to himself and the heir-male of the marriage in fee, and also to secure to the younger children of the marriage £16,000." It is upon that clause that the whole question turns. I don't see that it makes any material difference although we were to look to the postnuptial contract; but we cannot go upon the postnuptial contract, except in so far as it is precisely in terms of the antenuptial contract. To the extent of carrying that out, of course it will receive effect, but there is no reservation in the marriage articles to make any contract different from that stipulated in these articles, and more particularly there is no reservation to make any contract different in respect either of the heritable estate of Dunlugas, or of the provision to the younger children of £16,000. All that they could do under the postnuptial contract was to carry out these two things so far as they were concerned. And therefore we don't need to look to the postnuptial marriage-contract in order to see what are the onerous obligations of both parties. Now, the first thing to consider upon that antenuptial marriage-contract is, what are we to hold to have been the intention of these parties? I have no doubt they intended the eldest son to get this estate, and the whole of this estate, and that they intended the younger children to get £16,000, and the whole of the £16,000. Believing, as no doubt they believed at that time, that the father was quite able to provide for both in full, the meaning and intention of the parties was that both should have these provisions in full. Suppose that they had provided £28,000 in money to the eldest son, and £16,000 in money to the younger children, could anybody have said that the eldest son was to be liable to pay the £16,000, any more than that the younger children were to be liable to pay the £28,000? If that be so, does not the whole question resolve into this, that, in respect the onerous provision to the eldest son is a provision of an heritable subject, and the onerous provision to the younger children is a provision of money, therefore the eldest son, who was intended to be favoured by the deed, who was made the creditor of the deed to the extent of getting this estate, is not made a creditor, but is made a debtor; that he is saddled with a liability to pay the provision of the £16,000, because the thing given him happens to be an heritable estate, in place of a sum of money? The same thing would have happened suppose it had been a diamond provided to him, and a sum of money to the younger children. Was that to make him liable to pay the provision to the younger children, any more than they were bound to make good to him his provision? Again, suppose that the eldest son had been the heir of provision under a deed of entail, and that the father had no power; or under a deed executed by some relation, in respect of which the parents were quite aware that he was to get a large estate, and in consequence of that, although without expressing it upon the face of the deed, it had been provided that the estate of Dunlugas was to go to the second son of the marriage, and that the £16,000 was to be paid to the younger children,—would that have made the second son of the marriage the debtor for the £16,000 whether the father left anything to pay it or not except the estate? I look upon the words here "heir-male of the marriage,"—which seemed to me to carry your Lordships away a good deal—I look upon them as meaning nothing more or less than the eldest son to be

procreated of the marriage. It is descriptive merely of the person who was to take; it is not descriptive of liability. It does not mean the heir as if he had served heir-at-law, taking up the general estate, and liable for the debts and obligations. It is descriptive of the person who is to get something, and in whose favour the father becomes bound to give something; it is not descriptive of a party who is to be liable for the deeds and obligations of the father. Therefore we must deal with this case, in my opinion, precisely in the same way as if he had bound himself to make this conveyance in favour of the eldest son of the marriage; and then the question would have arisen, whether the mere circumstance that the title might happen to require to be made up in the shape of heir of provision, was to make that into an obligation which was a gift by the father?—whether there would have been any difference in the position of the eldest son from the position of the second son, who would have made up his title in the very same way? Or it might have been to any one of the daughters in the same way, and the question would have arisen, whether there was any difference there as regarded the obligation. Certainly that was not in the contemplation of the parents; that was not their meaning or intention. They intended and believed that the eldest son would get the whole of this estate, and that the younger children would get the whole of the £16,000. Accordingly, in the very able opinion delivered by Lord Curriehill, he goes entirely upon this, as I understood him, that this was an obligation in favour of the heir of the marriage which was implemented by the disposition contained in the postnuptial contract. The eldest son was the creditor in the obligation until that deed was granted, according to his Lordship's view; but he ceased to be creditor in the obligation upon that deed being granted, and was then heir-at-law in place of an heir taking under the benefit of this deed. Whatever the result of this case may be, I cannot regard it as in the least degree different from what it would have been if the conveyance had been in the antenuptial contract of marriage—if, in place of binding himself to convey to the eldest son, he had directly conveyed to the heir of the marriage. Well, did the eldest son cease to be creditor of the father under this obligation when that disposition was granted? Would he not have been a creditor of the father under the obligation if the conveyance had been in the antenuptial contract itself? Would he not have been in the very position which Lord Curriehill puts, of an heir of provision who was entitled to bring an action against a father without any service, in order to have this obligation implemented, to prevent the father from altering it gratuitously or doing anything *in fraudem* of the obligation under that conveyance? The whole of the class of cases to which his Lordship refers, where the heir was held entitled to sue for implement without a service wherever anything was proposed or attempted to be done *in fraudem* of the obligation, would be directly applicable in a case of that kind. My humble opinion is, that the eldest son was creditor of the father, not merely for the granting of a deed—not merely for putting the thing on paper,—but he was creditor of the father for implement of that obligation. I am perfectly aware that the obligation was a qualified one. He might have given a reasonable provision to the younger children though it had not been there before. He might have provided for the children of another marriage, and so on, but all that was consistent with the obligation. But for the implement of the obligation itself, the eldest son remained his father's creditor down to the day of his father's death, and the obligation was not merely to grant a deed, but to implement the obligation by giving him the estate which he bound himself to give to him. Well, if that is the obligation in which the eldest son is creditor,—an obligation to give that estate free from any debt, except the exercise of the powers I have already referred to,—if that is his position, how does it differ from the position of the younger children? That was the only kind of obligation they had. It was only in that sense that they were creditors. They were creditors to this extent, and in this sense only that the father was not entitled by gratuitous deed to disappoint them; he was not entitled to do anything *in fraudem* of his obligation. The eldest son was creditor of this estate in the very same sense, and to the very same effect, that the father could not by gratuitous deeds or by anything *in fraudem* defeat the obligation which he had undertaken to allow that estate to come down to him. Lord Curriehill observed that, if the father had been fiduciary fiar, then the eldest son would not have been liable in the way he is held to be liable. But is his position anything different from that of fiduciary fiar, except in so far as he had these reserved powers which I have taken notice of. To the extent of exercising these reserved powers, making provisions for the younger children, &c., there was a difference, but in all other respects, was his obligation to allow this estate to go down to the eldest son not just as strong and as obligatory as if the form of the title had been to make him fiduciary fiar? He was fiar under the obligation to allow his estate to go down to the eldest son as in a question between him and his family. The onerosity, therefore, is the same, and unless it were to be held that under an antenuptial contract conveying the estate in this particular form, the eldest son would not have been a creditor, it cannot be held that he is not a creditor here. Now, that being the state of the matter, while the younger children claim full payment of their provision, the eldest son claims to have the estate free of all liability as heir; and, as Lord Cowan said, the first question that arises is, whether that is the position that he is entitled to take? There may be some plausibility in that position. It would rest upon this, that he is a creditor for a special subject. The other is the mere general obligation to give £16,000. But the heir says—I am in the same position as other two parties, each of whom gets a legacy, the one a general and the other a special legacy, where the special legatee takes the thing specially bequeathed, whether the general legatee gets anything or no. That is the sort of position; and I don't say that there is not something to be said for it, and some plausibility in that view. What is it that the younger children have to say against that? The only thing they can say against it is, to refer to this antenuptial contract, and to say—It is very true that you, by that antenuptial contract, are to get the special estate, and we have only a general obligation for a sum of money; but that was not the intention of parties; this is not a gratuitous obligation to the one or the other; the obligation undertaken in our favour is equally onerous with the obligation undertaken in favour of the eldest son. Both the one and the other, in a question between

us, are debts of the father, which his whole estate was liable for, and therefore you are not entitled to take the estate, though it is a special subject, and to leave us without any means of realising the £16,000. I am humbly of opinion that that is a good answer to the claim of exemption on the part of the heir. But it is a good answer just because these two parties are *in pari casu* in respect of their position as creditors of the father. Now, if it could be said that there had been a series of decisions finding the eldest son liable in a case of this kind, I could have understood it, however unreasonable it is, for it does seem to me to be very unreasonable. If there had been any sound principle, and a series of decisions, for holding that to be the position of these parties, I could have understood it; but there has not been a single decision quoted to that effect. It is perfectly true that this is not an uncommon form of contract of marriage; it is one of the numerous styles of contract of marriage, and I dare say it has been common enough for a long time. But that does not touch the question as to the effect of it where there is a shortcoming in the estate, and it does appear to me somewhat remarkable that, while this must have been a common form of marriage-contract, no action of this kind, so far as we see, has ever been brought before. No doubt, it may be said it has not been decided either the one way or the other, but cases must have occurred where the estate was short, and where it was the strong interest of the party having the heritable estate to plead that the whole of that heritable estate was not to be carried away from him. One would doubt whether eldest sons have been so acquiescent as never to dispute their liability under these circumstances, and if they had disputed their liability, there must have been cases of that kind. The single case at all resembling this is the case of *Russell*, 25th Feb. 1835, which was not quoted to us at the bar, for Mr Young quoted no case at all upon that matter, but which appears to me, so far as anything turns upon it, to go all the other way. It was a case in which the antenuptial contract conveyed the estate to the eldest son or to the heir of the marriage under various burdens and reservations which entitled the father to make the deed which he subsequently did; and the Note of Lord Jeffrey in deciding that case shows distinctly that the eldest son there was in the position of being actually bound to pay the provisions to the younger children, and that the import of the deed was, that he was in the position simply of a residuary legatee. In Lord Jeffrey's Note, he mentions that the estate had been settled on the heir under the special burden of a sum to the younger children, and that if the means fell short, the heir must bear the loss, the estate left to him being not an heritable estate, but a free and disposable estate, and which was made stronger, he says, by the trust-deed, which was within the reserved power in the contract appointing the trustees to pay to the younger children, and then to convey the residue generally to the heir. The rule of law as to special and general legacies leads also to the same conclusion, that is to say, that there was a special legacy to the younger children, and a general legacy of residue to the heir. In the report in *Shaw and Dunlop*, there is no account given of the opinions in regard to it; but in 7 *Jurist*, 289, it is stated that the Court concurred in the views expressed in the note of Lord Jeffrey, and it is quite clear from the note of Lord Jeffrey that his Lordship went entirely upon these grounds, that the heir was taken bound to pay the provision, that he was merely a legatee, and even in that case his Lordship with great difficulty came to the conclusion that the heir was liable. If it had been the general law that, without laying the burden upon the heir at all, and when he upon the face of the deed was *in pari casu* with the younger children, he was still liable to pay in case of deficiency, there would have been no room for all that fine reasoning on which his Lordship came unwillingly to the conclusion that in that particular case the heir was liable. In this case, if we are to go beyond the antenuptial marriage-contract, and look at the postnuptial contract, or even if we confine ourselves to the antenuptial contract itself, so far as we see anything bearing on the question, the indications are in favour of an intention of a very different kind, because, as respects the widow, the obligation in the antenuptial contract is to infeft her in an annuity of £500 a year, which may be fairly held to mean to infeft her in that estate as regards an annuity of £500 a year; and when we come to the postnuptial contract, that is expressly and in terms made a burden on the heir. Then there is £4000 provided to the widow; and, according to the postnuptial contract, the meaning appears to have been that that was to have been paid by the heir likewise; but, while providing all that in regard to the widow's annuity and the £4000, and laying these burdens on the heritable estate, there is not a word of any such condition as regards the £16,000 payable to the younger children. Now, the only other remark I have to make is this, and it is probably implied in what I have already said, that there is no question about excess here at all. I agree with your Lordships that the father and mother here had the power to do as they pleased; they had the power to fix the provision of the younger children at £16,000, and they did it. In the case of *Russell*, in the same way, the provision was fixed by the antenuptial marriage-contract at a certain amount, and where the provision is of a fixed amount, there is no room for question at all. They were entitled to give as much as they chose to the younger children and to the eldest son. But what did they do? They gave to the eldest son this estate, admittedly worth £28,000, and they gave the younger children £16,000, leaving no room for a question whether the one was reasonable as compared with the other at all; and it is not there that I understand it to have been in the contemplation of of the Lord Ordinary, that any equitable principle can come in. It is upon this footing that the eldest son and the younger children were precisely in the same position in respect of the onerosity of their rights. But the estate falls short to meet them, just as in the case of two legacies the estate falls short of meeting the legacies, and the result of that is not an equitable adjustment as to what would be reasonable or unreasonable; but on inquiry into the proportion between the two provisions, the £28,000 on the one hand, and the £16,000 on the other, to make the estate answerable so far as it will go for the one and the other in the proportion which they bear to each other, carrying out the views and intentions of the parties so far as that can be done. I think that results from the onerosity of both of these obligations. In both cases the obligation was undertaken by the father, who never intended that they should be laid on the eldest son more than on the younger children, and when the estate falls short, I think both of them should be implemented proportionally, so far as the heritable and moveable estate taken together will

yield. Whether that can be done in this action or no, or in another action, is not *hujus loci*, but the opinion I have formed, with great deference to the views of your Lordships is, that both of these obligations are precisely of the same description, and that they are not laid upon the one party more than upon the other; and, therefore, that the ground upon which the Lord Ordinary proceeded is well founded, and that the interlocutor ought to be adhered to.

Lord Neaves—I concur in the opinion that has been delivered by the majority of the Court. I can see that there may be some matter of nicety here, whether the state of the pleadings gives rise to all the questions that have been considered, but I am inclined to think that the state of the pleadings would have done so. Whatever question any party chose to raise that was competent to be considered in reference to these contracts could, I think, have been considered in this process, and I am quite ready and disposed to give my views upon the total rights of parties in the case. There is an antenuptial deed and a postnuptial deed, but these are undistinguishable. They are substantially the same thing, except that the postnuptial deed, so far as regarded the landed estate, did carry out the obligation that the father had undertaken; but I agree with Lord Deas in holding that the same thing would have happened if that settlement of the estate had been made in the antenuptial deed itself, the one thing being just in implement of the other. The rights would, in my opinion, have been the same, but that is a matter of no moment in this case. Now, the antenuptial deed gave rights to each of the parties here competing. To the heir-male of the marriage it gave a certain right, and to the younger children now represented by the only younger child surviving of this family, it gave rights, and onerous rights undoubtedly. But the rights that were thus given to the heir-male of the marriage on the one hand, and to the younger children as a class no the other hand, were not identical rights nor similar rights, nor, in my opinion, commensurable rights. They were rights essentially different, and, in point of fact, contrasted with each other. Now, I think this is the great point of the case to be considered, for in reference to all the views that may be taken of it, the question seems to be whether these parties are *in pari casu*, with the same claims and the same characters, in this supposed competition, or whether their characters are essentially different, and whether the result of that difference is to lead to the conclusion that we are now going to come to. Now, the defender, the heir-male of the marriage, had a *jus crediti* under this antenuptial deed, but what was that right? He had a right to be substituted to his father in the succession to that landed estate. He had not a right as disponee; he had not a right to an *inter vivos* conveyance of it, to enter into possession, but he had this right, that his father should take the titles to that estate to himself in the first instance, and to the heir-male of the marriage as his heir substituted to him. That was the right of the eldest son. He had a right to be his father's heir, and a right to be liable for his father's debts. That was the nature of his right; for every man that has a right to be another's heir has a right to be liable for his debts. He must take the passive elements and characteristics of that character just as he takes the active ones. The right of the other party was not certainly a right of that kind. It was a *jus crediti* in so far like the eldest son's; I don't say they had equally a *jus crediti;* they had both a *jus crediti*, each of its own character; but their *jus crediti* was that of pecuniary creditors—pecuniary creditors for a sum of money to be paid to them at a postponed date, viz., the death of the father. They were pecuniary creditors, and nothing else than creditors. Now, these two obligations were essentially different in this way, that the obligation or *jus crediti* of the eldest son was an obligation *ad factum præstandum*. It was an obligation so affecting the titles of this estate that the succession should go down to him as heir, that the estate should be so left that he would take it up by service, by that solemnity in law which we know as the *aditio hæreditatis*, and by so doing became liable in all his father's onerous obligations *ad valorem* of the estate. The right of the children was not *ad factum præstandum*. It was a pecuniary right of payment as creditors, and creditors alone. They had no estate marked out for them that they were to succed to or take up by any process. It was suggested that they were heirs *in mobilibus*. They were not heirs *in mobilibus;* there might have been no *mobilia* to be heirs to. It was not contended that that was a necessary part of their stipulation. The stipulation was the same, except with a postponed period, as that which is created by any man who signs a bill of exchange and passes it over to his creditors. That was the nature of their position as pure pecuniary creditors, not constituted the successors of the deceased in any fund or estate—not with any title that enabled them to confirm, unless they chose to confirm as executor-creditors, which they might do like any other creditor of their father. Now that is their position, and it appears to me that these two things are incommensurable. It comes then to this, when the father dies, by which time, on the one hand, the succession to the landed estate will open to the heir, and by which, on the other hand, the term of payment of the pecuniary debt has come, what is the relation of these two parties towards each other? In this case the father did, by the postnuptial deed, implement the obligation *ad factum præstandum* which had been imposed upon him. He might have done that in the same breath with the antenuptial deed—that would make no difference. Even if he had not done it at all, his heir might have got at it his own way, but his position would then have been only the same as if it had been done in the regular and normal way. But it was here so done. No doubt this party, not knowing the marriage-contract, did not follow that course, but he must be held to be in the same situation as if he had done so, and then his course would have been to have served heir to his father in that estate as the heir-male of the marriage, or heir of the provision of the destination which attached to it. Now, the father being dead, and the son served heir of provision to that estate, and the term of payment of the £16,000 or of the money provision having come, what was the relation between the younger children and the eldest son? Was it anything else than that of debtor and creditor? The father was debtor to the younger children while he lived by the obligation which he had put his hand to, and though not prestable in his lifetime, it was an obligation of the nature of a pecuniary debt. When he died, leaving a representative who served to him as heir of provision, the heir of provision became debtor to his father's creditors; so that, from the moment when the rights of parties were to be practically enforced, that was the necessary and inevi-

table relation in which these parties stood. The younger children were creditors for £16,000 of money provision, and the heir-male of the marriage, taking up his father's estate, was the debtor to the children in that obligation. I think it is impossible to dispute that. They were creditors, and if so, who was their debtor? Who else but this defender? There was nobody else, as it actually turned out; but supposing there had been ever so many other debtors, this defender took up the better part of the estate, and he was one of the debtors, at all events, of the younger children *ad valorem* of the estate. He had certain rights which still attached to him, of the nature of a *jus crediti* to some extent, though he had got fulfilment of this, but fulfilment having been so given, he was only protected against gratuitous deeds of his father, or donations of any kind, but he had no answer to an onerous creditor; and it is unnecessary to say that the children under the marriage-contract are onerous creditors of the father, and consequently are onerous creditors of the heir of the father. In that state of matters they claim their provision, and to that claim there seem to me to be two answers that might have been made; one admitting it *in toto* and *simpliciter*, which, I think, is the correct view of the case; another denying the relation of debtor and creditor, and denying the liability of the heir of provision for one sixpence of this claim. These are the two extreme views. There are other views that might have been raised here if there were grounds for doing so—one that, although liable for the debt, the defender was not *simpliciter* and totally liable for it, but that either there was to be a ranking as upon a short fund, or that, if the provisions were unreasonable, they were to be cut down to a reasonable amount, and I think this process afforded perfect opportunity and *termini habiles* for raising that question if the defender had chosen to do so. I don't think we required any answer from the counsel for the pursuer as to what was the import of the conclusions. I think we understood them as well as he does, and, at any rate, his statement of what they contain would not have been a satisfactory answer to us, because we must judge for ourselves upon that point in the state of the pleadings. But I have no doubt that a party asking £16,000 may be met by the defence, either that there is none of it due, or that it is an unreasonable demand, and that part of it only is due. I have no doubt that can be stated competently as a defence, and, if it be a well-founded defence, it will be sustained. Now, with reference to the question which Lord Cowan thinks is the only one raised here, and perhaps the only one well raised by the pleadings, Is it the fact that, by the law of Scotland, in an ante-nuptial contract, the landed estate of the father being settled upon the son, so that the father is liar of it during his lifetime, and the son is to succeed by service as heir of provision, and the same deed containing moderate provisions for daughters and younger children—I shall take that case—is it the law that these younger children have no claim against the eldest son for one shilling of their provision, and that they run the risk of there not being sufficient executry to pay those provisions? Now, these matters have been prevailing in this country for certainly a couple of centuries, and within a century, or not much more, the amount of money in the country was exceedingly small indeed, and almost every family that had land had no money. That was the general rule, and debt upon the land besides. Now is it the law that, looking back at marriage-contracts, when we see the landed estate given to the son, and to the daughters £500 or 500 merks, he is to take the land wholly free, and that the daughters are to have no claim against him? That must be the state of it, for if he is indebted to them at all as their debtor, then you have the relation of debtor and creditor. The quantum I shall speak to afterwards, but I think all the *dicta* in the books, and all the authorities show that these provisions were not an exclusive or preferable burden on the landed estate in the sense that they were to come on it rather than on the executry, but that, failing the executry, the landed estate is liable in the hands of the heir of provision, just as in the hands of any other heir of provision, for those reasonable provisions. And the power to leave provisions by a subsequent marriage-contract, or even without a marriage-contract, in obedience to the law of nature which makes it the duty of every father to give a reasonable provision to his younger children, makes his heir of provision, though deriving his right of succession from an onerous deed—a contract of marriage—liable to implement these reasonable provisions as much as any other heir of provision. I really do not think it is possible to maintain that the relation of debtor and creditor did not subsist between these parties, and that, failing other funds, the provisions of the younger children were payable—to a reasonable amount I shall say only at present. But it is suggested, and that is what the Lord Ordinary seems to point at, that there may be a sort of ranking. Now that is a very anomalous thing, and if it had been the law of Scotlond, I think we should have seen some traces of it. Observe what it is—the children are creditors for their marriage-contract provisions to some extent; the son, as heir of provision, is debtor to some extent; and the proposal is that the debtor and creditor shall rank upon the debtor's estate, the one for his debt, and the other for the value of that estate, upon the value of which they are both to rank. That is the proposition. The estate is to become a fund of division, and there is to be a ranking; the eldest son ranks upon the value of the estate, for the value of the estate, and the creditor ranks for the amount of his pecuniary claim. Surely, if that is the law of Scotland, we should have seen something of it before, and I don't think it can be alleged that any trace of such an anomalous thing can be found. Well, if that is not to be the mode adopted, the next matter is as to the amount of the provisions being reasonable or unreasonable. I doubt very much whether that can be raised on the pleadings here, because, although I think it was perfectly competent for the defender to have said, "at any rate you cannot get the whole amount, because it is unreasonable," he has not done so. Lord Deas does not think that is here. I think he rather says that the marriage-contract puts an end to that. I certainly think so too. This is a large provision as it turns out. I am not sure that it was so large in one point of view. In general, no doubt, a larger sum is given to the younger children when they are of small number than when they are of large number, and it comes to be a large sum because it is a small family. But that does not make it heavier upon the heir than if there had been a large family. Suppose £1000 had been left to each daughter, and suppose we had seen in this family what we have seen in other Scotch families, viz., a "chalder of dochters," we would have had sixteen daughters, each claiming £1000—and one

is claiming that £16,000 here. That is no hardship to the eldest son. It is perhaps an undue degree of liberality towards the younger part of the family, but it is no greater hardship on the elder son than if there had been a greater number of younger children. But, after all, it is the parents who have so settled this matter. They could leave their children just what they pleased, and it is not to be supposed that they do otherwise than act fairly. Their views of primogeniture may have been more or less favourable to their eldest son, but that is all in their breasts. The idea seems to be (as Lord Curriehill observed), that one part of this deed is a fraud on the other parts of it; but that the parents, in dealing with the eldest son, cheated themselves when bargaining for the younger children, is scarcely to be conceived. If the natural construction is that the son was made the heir, I think it is to be held that they have diminished to that extent the right which they meant to give the son, in order to confer on the younger children the right which they wished to confer on them. I do not see how, either on authority or on the logical view of the matter, any other conclusion can be arrived at than that at which the majority of the Court have arrived.

Lord Ardmillan.—This case has been to me the subject of repeated and anxious consideration. I have had some difficulty and hesitation in forming an opinion, and have been very much impressed by the considerations explained by Lord Deas, while I do not quite concur in some of the observations of Lord Neaves, which, though very forcible, are not quite applicable to the case maintained for the defender; but I have ultimately arrived at the same conclusion as the majority of your Lordships.

The case is one of no little hardship to the defender, now proprietor of the estate of Dunlugas; and there are equitable considerations which would have rendered it very satisfactory if I could have found legal grounds for disposing of the case in a somewhat different manner. But I have not been able to find any grounds in law on which I can safely sustain this defence to any extent.

The case has been argued on both sides as involving the entire recognition, or the entire rejection, of the pursuer's claim for £16,000. The fifth plea in law for the pursuer has been repelled by the Lord Ordinary, and the second plea in law for the defender has been sustained by the Lord Ordinary; and therefore, although his Lordship, by the use of the word "preferable" might be thought to have disposed only of a claim of preference, yet he has, by his disposal of these pleas, substantially decided the cause against the pursuer. I need not, however, dwell on the terms of the interlocutor, as I understand that your Lordships propose to recall the interlocutor.

I concur very much in the observations made by Lord Cowan on the position of the defender, as the heir of Dunlugas under this marriage-contract. I think he must take as heir of the marriage, and as heir of provision; but at the same time he had a certain qualified *jus crediti* under the antenuptial marriage-contract; and I do not think he lost that *jus crediti* under the later and postnuptial contract. On this point I agree with Lord Deas, and I think, as regards the qualified *jus crediti* of the heir, the postnuptial contract does not impair his rights under the previous articles. Of that *jus crediti* the father's obligation in the antenuptial contract was at once the foundation and the measure. It was a right to obtain from the father a conveyance of the estate to himself (the father) and the heir-male of the marriage in fee, subject, as I think, to the qualification created and disclosed by the same deed, that the father undertook an onerous obligation to secure to the younger children of the marriage the sum of £16,000. Shortly after the marriage Mr Leslie, the father, by postnuptial-contract fulfilled the obligation in the antenuptial-contract, by conveying to himself and the heirs-male of the marriage his estate of Dunlugas, with obligation to infeft, and other necessary clauses. By the same postnuptial deed, and in implement of the antenuptial engagement, Mr Leslie bound himself and his heirs and successors to make payment of the sum of £16,000 to the younger child or children of the marriage, at the first term six months after his death. Of course Mr Leslie's power to provide effectually for younger children was limited by the marriage articles, a provision in excess of the £16,000 would have been, to that extent gratuitous. The rights of the two parties, the heir and the younger child stood thus. The conveyance of the landed estate left the fee of the estate in the father. I do not think he was fiduciary fiar. He could have sold or burdened the estate. The obligation to pay £16,000 to the younger children was not indeed made a real burden upon the heritable estate, but it was in implement of an onerous antenuptial engagement, and was, therefore, onerous and effectual against all the free estate of the father, heritable or moveable. As against the onerous creditors of the father, neither the heir to the estate, nor the younger child claiming the money provision, had a right amounting to a proper *jus crediti* capable of competing with onerous creditors. The claims of both parties rest on the same deeds, and are in this respect equally liable to the observation, that they must be postponed to the onerous creditors of the father.

It has been strongly contended at the Bar that, on the one hand, the defender is not an heir, but a proper creditor, not indeed a creditor who can rank with extraneous creditors, but still a creditor entitled to succeed and maintain his right without service, and not bound to any extent by the obligation in favour of the younger children undertaken by his father, and, on the other hand, that the pursuer is just an heir *in mobilibus*. I have not been satisfied by the argument in support of these propositions. I think that the defender must take as heir of provision. The only *jus crediti* which he had was within the measure of the original antenuptial obligation; and that was a right to obtain a conveyance which left his father in the fee of the estate, with power to dispose of it, or to contract debts preferable to the heir's right. It appears to me that this defender could not be secured in a proper *jus crediti* by a deed which left his father in the fee of the estate. It is well observed by Lord Glenlee, in the case of *Brown* v. *Govan*, 1st February 1820 (F. C.), that "children can only be secured in their provisions by divesting the father; and if that is done, the father is securing his children against his creditors and against himself, but, otherwise, it would put it in his power to secure his children against all the world but not against himself; it would be to give a right to the children against creditors which they have not against himself." The same opinion is expressed by Lord Deas in the case of *Wilson's Trustees* v. *Pagan*, 2d July 1856, 18 D. p. 1136. The observation certainly applies also to the provision for the younger

children. They too are in a sense creditors, but not creditors who can compete with onerous extraneous creditors of the father. To use the expression of Lord Corehouse in the case of *Browning* v. *Hamilton*, May 25, 1837, 15 Shaw, 1004, it may be said of both the pursuer and the defender, that they are "creditors among heirs, but only heirs among creditors, of the father."

The next step in the course of reasoning which has led me to support the pursuer's claim is, that the defender, thus taking as heir of provision, but being a creditor *quodamodo*—a creditor among heirs, or an heir with a right of credit protected against gratuitous acts—is bound to fulfil those obligations of his father, which the law must hold onerous. For the father's proper debts he is confessedly liable. If this provision to younger children had been by the antenuptial deed made a real burden, charged upon the landed estate, he would have been clearly liable. Supposing such a provision to have been made, not in implement of an antenuptial-contract, but by a deed only postnuptial, it would, in my opinion, have been effectual against the defender so far as it was not gratuitous. The heir, while protected against gratuitous acts to his prejudice, is not protected against an onerous deed by the father; and a postnuptial provision for younger children would be viewed by the law as onerous, so far as reasonable, and gratuitous *quoad excessum*.

If, therefore, this had been a claim by a younger child founding on a postnuptial obligation, I should have thought that the question of reasonableness or excess in the provision would have been presented for disposal. But it is not so. Both obligations are in the same deed; both bear to have been undertaken in implement of antenuptial contract; and I know of no instance in which the Court, dealing with obligations within a deed so highly onerous as a marriage-contract, have ever attempted to weigh or measure the provisions, and adjust them with a view to their supposed reasonableness.

On this point the case of *Russell* v. *Russell*, 25th February 1835, 13 S. & D. 551, and especially the note of Lord Jeffrey, is instructive. The circumstances of that case are different, and some of the points of difference have been mentioned by Lord Deas, but I am disposed to think that Lord Jeffrey, who was much pressed by the equitable considerations to which I have adverted, would have felt himself compelled to decide this case as your Lordships propose to do. It is not disputed by the defender that if, in this contract, the provision of £16,000 had been charged upon the landed estate, he must have liable in full payment. But, in a question with the heir only, and without reference to extraneous creditors, I am not able to see any legal ground for refusing to sustain the provision as it stands, if we would have sustained it had it been charged upon the estate. The making it a real burden would make it more secure against others, but not more obligatory on the heir; and there is no question here of the relief of the heir out of moveable estate. The late Mr Leslie held the absolute fee of the estate. His obligation to convey and his subsequent conveyance, did not divest him of the fee, nor deprive his eldest son of the character of heir of provision protected only against gratuitous acts. Within the same deed, and by an act which law cannot regard as gratuitous, he has undertaken to pay £16,000 to his younger children. The sum might have been £1000, or there might have been eight or ten younger children, but the legal question must be the same. It has indeed been so urged to us. The defender has maintained that, not because of any excess in the sum, but because of the nature of the two obligations, he is not liable. I observe that Mr Duff, in his work on Feudal Conveyancing, (p. 417, par. 312), says "Provisions to younger children of a marriage, or the children of a second marriage, secured over feudal subjects, or imposed on the heir of the marriage, may be granted in various modes. The most usual is by providing a sum of money, which it is unnecessary to declare an express burden on the estate destined to the heir of the marriage, unless the father be divested of the fee. The obligation is equally onerous as the destination, and must be implemented by the heir, if the moveable succession prove insufficient." This view seems to me to be substantially correct, and to be in conformity with the authority of Mr Erskine, Book III. title 8 § 38 and 39, and Mr Bell, (Commentaries, vol. i, page 639). I do not quote at length these authorities, but I am satisfied, on examination, that they do not conflict with the opinion of Mr Duff, or with the judgment which your Lordships propose in this case. The case of *Dundas* referred to by the Lord Justice-Clerk, though in some respects like the present, is in other respects distinguishable, but it does seem to me to confirm to some extent the views expressed by his Lordship.

If there had been sufficient grounds in law to support some equitable adjustment of this claim, such as would have been applied if it had stood on a subsequent deed, it would have been satisfactory to my mind, for I think it a hard case for the heir. But I am unable to find such grounds in law; and both parties seem to have arrived at the conclusion that the case must be decided either by recognising or by rejecting the pursuer's claim *in toto*.

So viewing the case, I am of opinion, not without difficulty, and I may say not without some reluctance, that we must reject the equitable considerations which might have been urged for modification of the claim, and that we must find the defender liable to the full extent claimed.

Lord President—I concur with the majority, and the grounds of my opinion have been so precisely and completely stated by Lord Curriehill that I have nothing to add. The judgment of the Court will be, I presume, in terms of the first declaratory conclusion of the summons. How much further we are to go at present I don't exactly know.

Young—Your Lordships will repel the second plea in law for the defender, which the Lord Ordinary has sustained.

Lord President—We can repel the first three pleas in law, in terms of the opinions of the judges. With reference to the others, perhaps it will require some consideration. We need not go any further at present, I think. Then we shall make the interlocutor in terms of the opinions of the majority of the judges, repel the first three pleas stated in defence, and decern in terms of the first alternative declaratory conclusion.

Young—Your Lordships will in the Division, I suppose, consider to what further extent the case can be exhausted here.

Lord President—We pronounce judgment in the First Division.

Young—And that is the place to move for expenses, I suppose.

Lord President—Yes.

Young—I shall ask for the expenses since the date of the interlocutor.

LORD PRESIDENT—I suppose you have nothing to say against that, Dean of Faculty.

DEAN OF FACULTY—No, but there may be something as to the £5000.

LORD PRESIDENT—Then we shall appoint the case to be put to the roll for the purpose of disposing of the matter of expenses.

YOUNG—Would your Lordships put it to the roll in the view of hearing out the matter, because the remaining pleas are such that I don't doubt your Lordships will take up and dispose of them there? It would be inconvenient to send the case back to the Lord Ordinary.

LORD PRESIDENT—We shall put it to the roll next week for that purpose.

The case was accordingly sent to the roll.

After argument—

LORD PRESIDENT.—On the fifth of this month we pronounced an interlocutor after a hearing of the cause before seven judges, by which, in conformity with the opinions of a majority of the seven judges, we recalled the interlocutor of the Lord Ordinary, repelled the first three pleas stated in defence, and decerned in terms of the first alternative declaratory conclusion of the summons. By that judgment we in effect affirmed this proposition, maintained to us by the pursuer of the action, that his wife, the deceased Mrs M'Leod, "as the only younger child of Hans Leslie of Dunlugas," was creditor under his marriage contract for a sum of £16,000; and was entitled to recover that sum by action against the defender as heir of provision under that same marriage-contract. The remaining pleas of the defender are two in number and form now the only obstacle against the pursuer obtaining a decree for payment of this sum of £16,000. The first of these two pleas contends that the pursuers are not entitled to enforce this claim so long as the bond for £5000 is in force, "and before enforcing the said claim they are bound to discharge the said bond, or to get it discharged, and to repay the sums paid under the said bond;" and the other plea is, "In any view, the said sum of £5000 must be imputed in part payment of any sum found due by the defender in this action." Now the question is, whether the pursuer is now entitled to a decree for payment of £16,000, or whether to any extent the defences which I have just adverted to are to be sustained. For the purpose of solving this question I think it is quite necessary to review the history of this case. The father, Mr Hans Leslie, died on the 4th May 1856, and there can be no doubt that if the parties had then been aware of the existence and operation of his marriage-contract, everything that has since followed might have been avoided, except perhaps the mere question upon the construction of that marriage-contract which we have already decided. But unfortunately the contract of marriage was lost, or destroyed, or had in some way disappeared, and Mr Leslie the elder had left behind him a trust-disposition and settlement by which he provided the estate of Dunlugas to his son the present defender, and made a provision in favour of his then only daughter, Mrs M'Leod, to the terms of which I think it is necessary to advert. He expressed one of his trust purposes to be for securing a provision of £5000 sterling to and for behoof of—(*reads.*) Now the state of Mr Leslie's affairs, as might indeed be assumed from this provision in his trust-settlement, was that he left substantially behind him nothing but his estate of Dunlugas. It turned out, as we have been informed, that the free executry amounted to some £1500 and not more. In this state of matters the defender brought a reduction of the trust-settlement on the head of death-bed, and he obtained decree of reduction, the effect of which was necessarily to set aside that trust settlement *in toto*, because there being really substantially nothing but the real estate, and the heir having right to the real estate, and to have it disburdened of any debt that was imposed upon it by the deceased *in lecto*, his decree of reduction gave him that estate and left substantially nothing to his sister. He then proceeded to make up titles as heir-at-law of his father. Now I think we are bound at the present stage of this cause, and in the state of the pleadings, to assume that at this time both parties were in ignorance of the existence of the marriage-contract. I shall have occasion to state more precisely by-and-by why I make that assumption. I may mention, in the meantime, that it was distinctly announced to us at the last debate which we had upon these remaining conclusions and pleas, that the pursuer did not propose in this action as it now stands to ask for a proof of any of his averments of fraud. I therefore assume that both parties were at this time in ignorance of the existence of the marriage-contract; and in these circumstances a certain transaction is entered into by Mr Leslie the defender, on the one hand, and by the pursuer and his wife on the other, his wife being as I understand then alive. That is contained in a bond, the contents and import of which are also set out upon the record in the 19th article of the condescendence. The object of that bond was to give effect in favour of Mrs M'Leod of the provision which her father had made in her favour by his trust-settlement which had been reduced. This was the proposal of Mr Leslie the defender, and in return for that and as the consideration of his granting that bond, he took from Mrs M'Leod and her husband a complete discharge of every other claim or demand which might be competent to her or her husband against the estate of her father or against Mr Leslie as his heir and representative. The bond settles the £5000 just in terms of the trust-settlement of the father Mr Leslie, that is to say it gives the life-rent to Mrs M'Leod, and it gives the fee to her children, but with a clause of return, as it may I think fairly be called, in favour of Mr Leslie on the failure of issue of the body of Mrs M'Leod. The discharge thus obtained by Mr Leslie was certainly a very full and ample discharge, and the provision of £5000 for Mrs M'Leod and her family was, in the circumstances in which the parties were then placed, or believed themselves to be placed, a very fair and handsome provision. But in the course of time it turned out that there was a marriage-contract between Mr Leslie the elder and his wife, which superseded all these arrangements and proceedings together, if it was to receive effect, and put Mr Leslie the elder in such a position that he really could do nothing in the disposal of his estate at all by any *mortis causa* deed, because the provisions of his marriage-contract had anticipated everything of that kind, and disposed of his estate and of more than he was possessed of. Now, it is important to consider what were the rights of parties upon the discovery of that marriage-contract—it is not quite accurate, perhaps, to say the discovery of the marriage contract, because it does not exist, but on the discovery of its having existed, and not having been in any lawful way extinguished or cancelled, but, on the contrary, its tenor being proved in a previous action between the parties. What were the rights

of the parties after the decree of proving the tenor was pronounced? I apprehend there can be no doubt, because we are bound to hold now that unless Mrs M'Leod was barred by what had taken place between her and her brother, she was entitled to payment of £16,000 in terms of the obligation contained in the marriage-contract; and the defender, on the other hand, was entitled to succeed to the estate of Dunlugas as heir of provision under the marriage-contract. But he could not take the estate of Dunlugas as heir of provision without rendering himself liable to make payment of that £16,000 as his father's representative *intra valorem* of the estate to which he succeeded; but if Mrs M'Leod was to insist for her rights as creditor under the marriage-contract, and was to insist upon setting aside the transaction that had been made between her and her brother, upon the ground that it was entered into in ignorance of her rights, it seems to me just as clear, assuming the *bona fide* ignorance of both parties in entering into that previous transaction, that before she could obtain payment of that £16,600 she must relieve her brother and his estate of the bond for £5000 which he had granted to her in consideration of the discharge of her claim. At that time, therefore, I think that was the state of parties' rights, and the question comes to be, whether anything has taken place, or whether anything has been established since, that alters this condition of the parties' rights, or prevents us from doing justice between them upon the footing of that being the state of their rights. It certainly would be altogether against justice if Mr Leslie were to be put into the position of having to pay £16,000 under the marriage-contract, and at the same time to remain under an obligation to pay £5000 under the transaction with his sister and her husband. If any condition of the proceedings before us, or any technical rule, were to drive us to the result of placing Mr Leslie in that postion, even temporarily, it would be very much to be regretted, but I am happy to say that I see no necessity which should drive us to any such unjust result. On the contrary, I don't see the least difficulty in the present case, and by a judgment pronounced now, in doing what I conceive to be full justice between the parties. Just let us see what has taken place in this action. Mr M'Leod, his wife being now dead, raised the present summons, and it contains, besides conclusions of declarator and for payment, a conclusion for reduction, and most naturally and properly it did contain such a conclusion for reduction, because if the action had been brought simply as an action of declarator and for payment without any arrangement with the defender and without any conclusions of reduction, the defender might have set up the discharge which he had obtained from the pursuer and his wife as a conclusive bar against the claim made in this action. And therefore conclusions for reduction were inserted in the summons, and it is important to observe against whom these conclusions were directed. The defenders called are, first of all, Mr Leslie, and secondly, the acting trustees under the marriage-contract of the father, Mr Hans George Leslie the elder; third, the trustees nominated in the bond and disposition in security which was granted by Mr Leslie to his sister in the terms that I have already explained; fourth, the children of the marriage between Mr M'Leod and his wife, and their tutors and curators, if they any have; and lastly, the trustees under the antenuptial contract of marriage between Mr M'Leod and his wife. Now, it seems to me that the pursuer thus had all the parties interested in the field without exception. I do not think it is possible to suggest anybody that is interested in these matters in any way, either in a beneficiary or a fiduciary character, that is not called in this summons. Then the reduction libelled is, that the bond and disposition in security and the discharge shall be reduced, and the pursuers reponed and restored thereagainst *in integrum*, but that only in so far as the same can be held to exclude or prevent the pursuers from obtaining decree of declarator and payment in terms of the other conclusions above written. Now, it appears to me that if the defender stood upon the discharge which he had obtained, it was absolutely necessary as a preliminary to the pursuer's success in his claim for the £16,000, that he should reduce the discharge and the bond, to the effect, on the one side, of opening the claim for £16,000 to himself and his wife, and, on the other hand, of relieving the defender from the obligation for £5000 which he had undertaken in consideration of obtaining that discharge, and unless there had been an arrangement between the parties which I am just going to mention, it would have been indispensable for the pursuer of this action to have taken such a decree of reduction before he could have insisted in his conclusions for declarator and payment. But then, when the case came into Court, the parties, to avoid the necessity of discussing the various reasons of reduction which had been proponed, came to an arrangement which was embodied in a joint-minute, dated June 1866, in which Mr Leslie, the defender, admits that the pursuer and his wife accepted the bond and disposition in security, and granted the discharge in ignorance of the contract of marriage and of their rights under the same, and he further undertook not to found upon or plead the said bond and discharge as being any bar to the said pursuer maintaining the rights of himself and his said wife under the said antenuptial articles of marriage and postnuptial contract; and, on the other hand, both parties renounced probation except upon the question whether the defender is entitled to be restored against the obligations contained in the bond and disposition in security, or to have the sum of £5000 therein contained imputed in payment of any sum which the pursuer shall be entitled to recover in this action. Now, by these means the necessity of pronouncing a decree of reduction was obviated. The impediment of the transaction, which consisted of the discharge upon the one side, and the bond and disposition upon the other, was removed out of the way in so far as to enable the parties to discuss the question whether Mrs M'Leod, and her husband in her right, were entitled to payment of £16,000 as creditors under the marriage-contract of her father. But it certainly never was intended, and could not be intended, by this joint-minute that the position of Mr Leslie should be so far altered as that his discharge should be taken out of the way as if reduced and set aside, and the bond and disposition which he had granted in return for that discharge should stand as a subsisting obligation. No parties could be supposed to contemplate anything so manifestly absurd as that. And therefore it seems to me to be quite open to us, notwithstanding of that joint-minute of admissions, to consider this question upon its merits. The pursuer, when he found that he was entitled as creditor under the marriage-contract to payment

of £16,000, might, if he had chosen, notwithstanding of the joint-minute which had been entered into, have proceeded to ask decree under the reductive conclusions of the summons, and he might thus have taken the bond and disposition in security out of the way, but he has not chosen to do so. He had all the parties in the field; he had ample conclusions under which to ask such a judgment, but instead of doing that, he put in a minute intimating that he did not insist in the reductive conclusions—that he declined to insist in them; and in consequence of that minute we have pronounced the interlocutor dated the 12th of February, dismissing the action as regards the reductive conclusions of the libel. Therefore, upon his own motion, the means of setting aside that bond and disposition in security in this process—a competent process, with all interested parties called—have been lost. Whether it would be competent or proper for Mr Leslie under other circumstances to bring a reduction of that bond and disposition in security,—whether the obligation to do so in any sense lies upon him, I give no opinion. But upon this I am perfectly clear, that Mr M'Leod is not entitled to a decree for £16,000 until he shall relieve Mr Leslie and his estate of the obligation for that £5000; and if he cannot do so—if he is not in a condition to relieve Mr Leslie and his estate of that £5000, then he must take his decree for payment under the marriage-contract subject to a deduction of £5000. That is the simple result of my reconsideration of this case, and it is founded upon so obvious a principle of justice, that I confess I have not been able to appreciate the reasons which were stated against it. The judgment which I should submit to your Lordships ought to be pronounced in the present case is in substance this—that decree should be given to Mr M'Leod for £11,000 absolutely, but that the decree for the remaining £5000 should be subject to the condition of his relieving the defender of that bond. The form of the judgment may perhaps require a little consideration, but that is the substance of the judgment which I think we ought to pronounce.

Lord Curriehill expressed his entire concurrence in the opinion of his Lordship.

Lord Deas—I dissented from the judgment of your Lordships pronounced in the interlocutor dated on the 5th, and signed on the 12th of February; but I agree with your Lordship that the legitimate result of that interlocutor is, that decree shall be pronounced against the defender for the £16,000, with or without deduction of the £5000. I have had some difficulty as to giving effect to that deduction in this process, and although the way in which your Lordship proposes to do it removes a great deal of that difficulty, it does not remove it altogether. We are certainly in the position, as your Lordship says, that as there is no proof of the defender's fraud offered, we must assume that there was no fraud, and that this bond was granted under innocent error upon both sides. In those circumstances, if the bond had been entirely in favour of the female pursuer, I should not have had any difficulty, I think, in concurring with your Lordship that the £5000 ought to be deducted from the £16,000. The embarrassment which I feel about it arises from this, that under that bond she has only a liferent, while the fee is vested in trustees for her children, and I think that neither these trustees, nor the children whom they represent, can be held to be in any reasonable sense parties to this action. They were called into the field for their interest in that conclusion at the pursuer's instance for reduction of the bond which has latterly been abandoned, and, so soon as it was abandoned, they ceased to have any interest in this action, even supposing they had had an interest in it before. I am not able to see that they ever had much interest in it, because, looking to the qualified way in which the conclusions for reduction are expressed, it appears to me that although the bond had been reduced in terms of those conclusions, the interests and rights of those children, and of the trustees as representing the children, would not have been affected at all. It was only sought to be reduced in so far as it formed a bar to the claim made against the defender. To that extent he has latterly agreed to dispense with it as no bar, and there is a decree of dismissal I think of the reductive conclusions. I do not think, therefore, that the trustees for those children, and the children themselves, ever were in this action in a position in which they were called upon to defend or vindicate their rights, and to try the question whether it, *quoad* them, remained a good bond or not. At all events, I think they cannot be said to be now in that position. The hardship of that upon the pursuers appears to me to be this—they must allow deduction of that £5000 out of the £16,000, which is just making them pay the £5000 in the first instance out of their own pockets. It places the defender I think in a perfectly good position, because he is getting credit for the £5000. I don't see that there is any hardship upon him, although the bond and the infeftment, or what is equivalent to infeftment, remained as a burden on this estate. I don't see much hardship to him there; but I can see some hardship to the pursuers, because the risk is laid upon them of the claim which may be made by the trustees for these children to the fee of that £5000. Now whatever may be said against the claim of the trustees for the children to that fee, the question whether they have a right which should still be enforced cannot be decided in this action, and the burden of getting that decided, and the risk of its being decided favourably for the trustees for the children, is in this way laid upon the pursuer of this action. There was an argument maintained upon the part of the pursuer, to the effect that if this bond originated in the fraud of the defender, their allegations as to which were not at the time of that argument abandoned, the result in law was that they could not get relief from this bond either as to the liferent or as to the fee. I should not have had much difficulty in dealing with it as to the liferent; but as to the fee, I don't wish to give or even to indicate any opinion, because it seems to me plain enough that these trustees for the children may try that question if they think proper, and it certainly would be a more plausible plea to state in favour of those children, who were no direct parties to this transaction about the bond at all, than it would be to state it for the life-renter, the pursuer, who is now getting the whole £16,000, which is certainly all that in any view she was entitled to. Now, if this claim for deduction of the £5000 was allowed to stand over to be disposed of in a process of reduction, which in that case would require to be brought by the defender, the whole questions relating to it would then be properly tried, which cannot be done here. The difficulty, therefore, that I have in what your Lordship proposes to do,

is just that it leaves that question untried with these children. It lays the responsibility of trying it upon the pursuers of this action, and I have a hesitation as to whether it is right to do that, or whether it would not have been more regular and more expedient to have left that question undisposed of in this cause. But while I think myself bound to express that difficulty and that doubt, I am not prepared to dissent from what your Lordship has proposed. It is not necessary that I should express any decided opinion in favour of the competency or regularity or expediency of what your Lordship proposes to do, because I understand you are all agreed about it, and I don't wish to express more than the doubt and the difficulty I have felt about it, because there may be a great deal of justice in the course which your Lordships propose to take, and it may be that if the parties have good sense there may be no more litigation about it.

Lord Ardmillan.—We are now called upon to dispose of that part of this case which relates to the bond by the defender for £5000. It has been already decided—and on that part of the case I felt great difficulty, although I concurred with the majority of your Lordships—that the pursuer is entitled to £16,000 from the defender. Now one thing I think is very clear, that, if there had been no arrangement made between the parties, the discharge granted by the pursuer in return for the bond for £5000 would have been a conclusive answer to the pursuer's claim for £16,000 in this action. It would have been necessary to get that discharge in some way disposed of before the pursuer could possibly succeed, and, standing the discharge, he could not have obtained decree for the £16,000. The defender, however, by a minute, agreed that he would not found upon or plead the bond and discharge as a bar to the pursuer maintaining the rights of himself and his late wife in this action, and so far the door was open to the pursuer stating and enforcing the claim for which he has now got decree. But that very minute contains in it this important statement—that parties renounce probation, except upon the question whether the defender is entitled to be restored against the obligations contained in the bond and disposition in security, dated 31st May 1858, or to have the sum of £5000 therein contained imputed in payment of any sum that the pursuer may be entitled to recover. Probation upon that question in this action was not renounced, and there then stood upon record some very serious looking averments upon the subject of fraud. But no proof of these averments has been offered. On the contrary, the pursuer has in this action declined to ask for proof of these averments. The minute was clearly and distinctly announced as the footing on which we were to dispose of this case, and the pursuer did not crave proof of these averments of fraud, so that I take the case entirely upon that supposition. The averments of fraud are unsupported by proof; and no proof is offered. Now, that being the case, this discharge is, in so far as regards the pursuer's claim in this action, at an end. Nothing is clearer to my mind than that the discharge which would have protected the defender cannot possibly be at an end, while the bond, which obliges the defender, and is the counterpart of the discharge, remains effectual. I think it is too clear almost to admit of doubt that where the bond and the discharge are counterparts, if the defender has not the benefit of the discharge, the pursuer cannot have the benefit of the bond; and therefore the whole matter of bond and discharge must stand or fall together. If they both stand the pursuer could not have succeeded in this action; if they both fall the pursuer cannot refuse to allow the sum in the bond to be taken as part payment of the £16,000 to which he is found entitled by the Court. I don't think that that really is a matter which can bear much argument, and as to the difficulty which Lord Deas suggests, it does not press so strongly upon my mind as it does on his Lordship's. The 17th article of the condescendence by the pursuer, set forth expressly that the pursuer agreed for himself and his wife to accept from the defender a bond and disposition for £5000 "in the terms proposed and hereinafter set forth," and in return to execute and deliver a discharge by himself and his wife, in favour of the defenders, "in the terms proposed and hereinafter set forth." Now if he took that bond to trustees for his children, and gave them rights beyond his right, that was a gift by him to his children; it was his arrangement and agreement by which that was done, and let him settle it with those to whom he has made the gift. They are his own children, and I cannot see any interest that he can have here which we can recognise as distinguished from the interest which he chose to give his children by his own act. Therefore, I think we are truly dealing with this case as a case in which the discharge must by the consent and concurrence of all parties go by the board, and if the discharge has gone, I can conceive nothing more glaringly unjust than that the pursuer of the action should plead the bond while he has got quit of the discharge.

Some discussion then ensued as to whether the pursuer was entitled to a proof of fraud on the part of the defender in the matter of the bond,

Nevay, for the pursuer, contending that the allegations of fraud had not been abandoned at the previous discussion.

Lord President—I have not the least doubt about what took place at the time, for I took a note of it. Mr Young explained that he would put in a minute asking the Court to find it unnecessary to dispose of the reductive conclusions, and further that he does not propose to ask a proof of his averments of fraud, at least at present, as an answer to the defender's pleas fifth and sixth. Now, combining that with the departure from the reductive conclusions, I think we are in a condition to dispose of the whole case, and that the pursuer is not in a condition to ask a proof of his averments of fraud, because he has not pleaded fraud for any other purpose on this record except to support the reductive conclusions.

The other judges concurred.

Lord President—Then what I propose to your Lordships is, to decern against the defender for payment to the pursuer of £11,000 with interest from Whitsunday 1856, but subject to the obligation by the pursuer under his marriage-contract to lay out and invest the same in the manner and for the purposes therein specified; further decern against the defender for payment to the pursuer of the further sum of £5000, with interest as aforesaid, and subject to the obligation of the pursuer foresaid; but under the condition that the pursuer shall, before receiving or enforcing payment of said sum of £5000, free and relieve the defender and the estate of Denlugas of the bond and disposition

in security executed by the pursuer in favour of the trustees therein named on the 31st May 1858, and recorded in the Register of Sasines on the 2d of June thereafter.

DEAN OF FACULTY—The sum was payable at the first term of Whitsunday or Martinmas which should occur six months after the death, so that Martinmas 1856 is the right date.

LORD PRESIDENT—I thought it was the first term after the decease. Then it should be Martinmas 1856. And we find it unnecessary to dispose of any of the remaining conclusions.

The pursuer was found entitled to expenses to 5th February 1868, and the defender to expenses since that date.

Agent for Pursuer—J. Knox Crawford, S.S.C.
Agents for Defenders—H. & A. Inglis, W.S.

Friday, February 21.

PATERSON *v.* MONRO.

Sheriff—Sequestration Currente termino—*Landlord and Tenant—Cause—Action—Dismissal of Action*—16 & 17 *Vict., c.* 80, *sec.* 15—*A. S.* 10 *July* 1839. *Held* (Lord Curriehill, *dis.*) that a sequestration for rent is a cause within the meaning of the 15th section of the Sheriff-Court Act 1853.

The pursuer, James Paterson, was tenant of the defender, Alexander Binning Monro, Esq. of Auchenbowie, in the farm of Mains of Auchenbowie. On 5th September 1863 the defender presented a petition to the Sheriff of Stirlingshire, in which, on the narrative, *inter alia*, that the defender's right of hypothec over the pursuer's crop and stock was in danger of being defeated by the diligence of other creditors, he prayed his Lordship to sequestrate, and to grant warrant to officers of court to inventory and secure the whole stock, growing crop, hay, cattle, farm implements, household furniture, manure, and other effects in or upon the foresaid farm and lands belonging to the pursuer, or which might have been removed *de recenti* therefrom, in security, and for payment to the defender, 1st, of £78, 15s. sterling, being the half-year's rent of the said possession payable at the term of Martinmas 1863; and 2d, of the like sum of £78, 15s., being the half-year's rent of said possession, payable at the term of Whitsunday thereafter, with interest on the said respective sums from the said terms of payment till payment, and expenses; and on the said term of Martinmas being come and bygone, and the rent then payable being still unpaid, to grant warrant to the defender to sell the whole, or as much of the said sequestrated effects as would satisfy and pay the half-year's rent payable at that term, with the interest due thereon, and the expenses of sequestration and sale; and thereafter, on the said term of Whitsunday then next being come and bygone, and the rent then payable being still unpaid, to grant warrant to the defender to sell so much of the said sequestrated effects as would satisfy and pay the half-year's rent payable at the said term, with interest due thereon till payment, and expenses; and in the event of the proceeds of the sales, or either of them, not being sufficient to pay the said rent, interest, and expenses, to decern against the pursuer, at the instance of the defender, for such part thereof as might remain due.

On the same day the Sheriff-Substitute sequestrated and granted warrant to inventory and secure, as craved by the defender in the said petition, and appointed a copy of the said petition and deliverance, and of the inventory to be taken in virtue thereof, to be served on the pursuer.

On 19th July 1864, the defender applied for and obtained warrant of sale, which was carried out in the usual way. The tenant now brought an action of reduction and damages against his landlord, pleading *inter alia*, that neither party having taken any step in the foresaid petition of sequestration, of date 5th September 1863, for a period of ten months from and after 15th September 1863, the said process stood *eo ipso* dismissed under the 15th section of 16 and 17 Vic., cap. 80, and therefore the interlocutor of 5th September 1863, sequestrating the pursuer's crop, stocking, and effects, and the warrant of sale of date 19th July 1864, with all that followed thereon, ought to be reduced.

The landlord answered that the 15th section of the recited Act did not apply to sequestrations *currente termino*, these not being *causes* within the meaning of the section.

The LORD ORDINARY (MURE) found that "no proceeding having been taken in the process of sequestration raised by the defender against the pursuer in the Sheriff-court of Stirlingshire in September 1863, between the 15th day of September 1863 and the 19th day of July 1864, the said process stood dismissed at and prior to the said 19th day of July 1864, in respect of the provisions of section 15th of the Act 16th and 17th Vict., cap. 80; and that any proceedings taken, or interlocutors pronounced, as in the said process, on and subsequent to the said 19th day of July 1864, and in particular the interlocutors bearing to have been pronounced in the said process on the 19th of July, 23d September, 12th and 21st October 1864, were and are null and void: Therefore, and to that extent and effect, decerns, reduces, and declares, in terms of the conclusions of the summons, and appoints the case to be put to the roll to arrange as to further procedure in the cause, reserving all questions of expenses."

The defender reclaimed.

SHAND and CRAWFORD for Reclaimer.
MACKENZIE and MAIR for Respondent.

LORD PRESIDENT—My Lords, on resuming consideration of the argument in this case, I have been unable to find sufficient reason for differing from the Lord Ordinary.

The question depends on the construction of the words of an Act of Parliament, which, I think, are in themselves very clear and not susceptible of such a construction as would limit them to a class of cases exclusive of the present.

The petition in the present case was presented to the Sheriff on 5th September 1863, and it is important to attend to the terms of that petition as stated on record. [*Reads petition.*] Now, this petition having been presented on 5th September, sequestration was awarded on that date, and an inventory of the sequestrated effects made up. The term of Martinmas arrived within little more than two months, and the rent being then unpaid, it was open to the landlord to apply for warrant of sale, and to have the sequestrated effects sold, and the proceeds applied towards payment of the rent, but he did not do so. Whitsunday 1864 came, and still the landlord had done nothing. It was competent to him then to apply for warrant of sale, but that he did not do until 19th July. There was then a certificate put in by the sheriff-clerk that