good, for the mere circumstance that the destination was to heirs-male did not make it fettered. The bond was thus executed under a misapprehension. So I agree with your Lordship that the bond of annualrent was of no effect at all, and so on the one hand it laid no burden upon the heir, and on the other it conferred no benefit. Now, the Act under which this action is brought requires that the money heritably secured shall be part of the succession of the party in reference to whom the inventory-duty is to be paid,—the subject must have belonged to the deceased. Thus, it is not possible that there should be inventory-duty exigible upon a subject in which the party had never any interest.

Lord Neaves—This case has been much complicated by bringing in conclusions as to debtor and creditor and extinction *confusione.* Now, it is to be observed that although the same person becomes debtor and creditor in an obligation, the debt may only be suspended, but not extinguished. But in this case no such question arises, for it is quite clear that a thing cannot be extinguished before it exists; and here no debt was ever constituted, for it is the case of a person binding herself to pay to herself after her death.

It is argued that the right to this annualrent vested in Lady Keith during her lifetime. I cannot see that it could have been so. She could not have done anything to make it *in bonis* of her, and, if it was not *in bonis* of her, it is quite plain that it cannot be made subject to inventory-duty. I therefore concur with your Lordship.

The Court therefore recalled the interlocutor of the Lord Ordinary, and found the Marchioness of Lansdowne not liable to pay inventory-duty on the sum contained in the bond of annualrent.

Counsel for Pursuer — Solicitor-General and Rutherfurd. Agent—Angus Fletcher, Solicitor of Inland Revenue.

Counsel for Defender—Shand and Marshall. Agent—Lockhart Thomson.

Saturday, October 19.

SECOND DIVISION.

SPECIAL CASE—GREIG & OTHERS.

Tutors and Curators—Nomination—Deathbed.

In an antenuptial contract of marriage certain persons were nominated to be tutors and curators to the children of the marriage, failing any other nomination by the husband. Subsequently, in a trust-disposition and settlement, the husband nominated certain other persons to be tutors and curators to his children. He died of the disease under which he was labouring at the date of the deed, and within sixty days of its execution. This deed was reduced in so far as it affected the interests of the heir at law. *Held* that the parties named in the trust-deed were entitled to be tutors both to the heir at law and to the younger children of the marriage.

Opinions as to whether the parties named in the marriage-contract would be entitled to the office of curators.

The parties to this case were, 1st—John Borthwick Greig and Others, who were nominated under the antenuptial contract of marriage between George Greig and Mrs J. Richardson Dickson or Greig, to be tutors and curators to the child or children of the marriage—of the first part; and 2d, the said John Borthwick Greig and Others, nominated in a trust-disposition and settlement executed by the said deceased George Greig, to be tutors and curators to the children of the said marriage—of the second part.

The circumstances under which the question arose were as follows:—Mr George Greig of Eccles died on 19th June 1869, and was survived by his wife Mrs J. Richardson Dickson or Greig, and by three children, viz., Mary Greig, aged five years, James L. Greig, aged four years, and George Greig, aged two and a half years, who was a posthumous son. The antenuptial contract of marriage between the said Mr and Mrs Greig contains the following nomination by Mr Greig of tutors and curators to the children of the marriage—"And failing any other nomination or appointment by him, the said George Greig hereby nominates and appoints the said trustees, and the survivors or survivor of them, and the said Isabella Dickson Richardson Dickson, to be tutors and curators to the child or children of the present intended marriage; and he hereby expressly dispenses with their lodging tutorial or curatorial inventories, and declares that they shall be entitled to the same immunities and privileges as if they were to lodge such inventories." Two of the parties named declined to accept the said offices of tutors or curators. The other parties named, being the parties hereto of the first part, were willing to accept the said offices in the event of their being found entitled to do so. On 22d May 1869 Mr Greig executed a trust-disposition and settlement, whereby he conveyed his whole estates, heritable and moveable, to the parties hereto of the second part, as trustees for the purposes therein mentioned, and *inter alia* for fulfilment of the obligations incumbent upon him in his said contract of marriage. The said trust-disposition and settlement contained the following nomination by Mr Greig of tutors and curators to his children:—"And whereas the persons who are nominated and appointed by me, under my said contract of marriage, to be tutors and curators to the children of the marriage, are not all the same persons as my trustees named herein, and it is desirable that they should be the same: Therefore I do hereby revoke and recall the nomination of tutors and curators contained in said contract of marriage; and in lieu and place of the nomination therein contained, I hereby nominate and appoint my trustees herein before named, and the said Mrs Isabella Dickson Richardson Dickson or Greig, and the survivors or survivor of them, to be tutors and curators to the said James Lewis Greig and Mary Mitchell Greig, and to any other child or children who may yet be born of my said marriage; and I expressly dispense with their lodging tutorial or curatorial inventories, and declare that they shall be entitled to the same immunities and privileges as if they were to lodge such inventories: Declaring hereby, that if from any cause the nomination of tutors and curators contained in this deed shall not take effect or be set aside, then I expressly declare that the nomination of tutors and curators as contained in my said contract of marriage shall stand and be of full force and effect." Mr Greig died on 19th June 1869, possessed of the

estate of Eccles in Berwickshire, and other heritable property of considerable value. He died of the disease under which he was labouring at the date of his trust-deed, and within sixty days of its execution. The trustees named in the said deed accepted the trust, and they and Mrs Greig also accepted office as tutors of Mr Greig's children under the nomination contained in the trust-deed. They were advised that it was their duty, in the capacity of tutors for Mr Greig's heir-at-law, the said James Lewis Greig, to reduce the said trust-deed, in so far as it affected his interests. This was done by decree of the Court of Session. After the date of the said decree, the parties of the second part, as tutors of the said James Lewis Greig, made up titles in his person to certain of the heritable properties to which he succeeded as heir of his father, and took over the management of the pupil's whole estate. After the said trust-deed was reduced as aforesaid, and the other acts above mentioned were performed by the parties of the second part in the character of tutors of the said James Lewis Greig, a question arose as to whether the said second parties had any right to the office of tutors of the said James Lewis Greig. The parties of the first part maintained that, as the nomination of tutors and curators by the said trust-deed, as regarded the latter of the offices, was reducible on the ground of deathbed, and had been set aside *quoad* the heir-at-law, the effect of this was to set up the nomination, not of curators only, but of tutors and curators, *quoad* the whole children of the marriage; or, at any rate, *quoad* the heir-at-law, contained in the marriage settlement. They also maintained that it was the manifest intention of the testator that whichever deed took effect the same parties should hold both offices of tutors and curators.

The parties of the second part maintained, on the other hand, that although the nomination of curators by the said trust-deed was reducible, and had been set aside *quoad* the heir-at-law, the nomination therein of tutors to him and the other children was valid, and subsisted, and therefore that the event had not occurred on which, in terms of the said trust-deed, the nomination of tutors contained in the marriage-contract was to take effect.

The questions of law which the parties submitted for the opinion and judgment of the Court, were:—

"(1) Are the first parties entitled to the office of tutors of the said James Lewis Greig? or,

"(2) Are the second parties entitled to that office?

"(3) Are the first parties entitled to the offices of tutors of the said younger children of the said marriage? or,

"(4) Are the second parties entitled to that office?"

At advising—

Lord Justice-Clerk—There is no difficulty in this case up to a certain point, for it is clear that the appointment of curators in Mr Greig's trust-disposition and settlement is not a good one. But although the nomination of tutors and curators in that deed might not be carried out to its full extent, I cannot doubt that the testator's intention was that it should be carried out as far as possible. So I am of opinion that we should find that the parties named in the trust-deed are entitled to the office of tutor both to James Lewis Greig and to the younger children of the marriage.

Lord Benholme—As regards the nomination in the testamentary deed, the appointment of tutors is plainly a good one, but the appointment of curators is not so. I therefore think that the parties nominated in the testament should be found entitled to the office of tutors; but when that office expires I do not think that the parties named in the antenuptial contract will be entitled to the office of curators.

Lord Cowan—It is quite clear that the nomination of tutors and the nomination of curators are separate nominations, even when the same parties are named for the two offices in the same deed, and in a case of this sort the parties named may accept the tutory but refuse the curatory. So I can't see why the nomination of tutors should fall because the nomination of the same parties to be curators happens to be a nomination to which effect cannot be given. And I think that it must be held to have been the intention of the testator that the parties named by him should act as tutors even although they could not act as curators. What will happen when the tutory comes to an end is a different question—there may be a failure of curators altogether, or those named in the antenuptial contract may take, but this is a point which we are not at present called upon to decide.

Lord Neaves—I think that this is rather a question of intention than of power. The parties who are named as tutors and curators in the first deed are the same, and the parties who are named in the second deed are the same. So if either deed takes effect to the exclusion of the other, the parties named in that deed take both as tutors and curators. But if one deed fails partially and takes effect partially, what then? Is it in accordance with the intention of the testator that the deed should be given effect to as far as possible, or that it should be set aside altogether, and the parties named in the other deed should take both the offices of tutors and curators? Now, in strict law, the nomination of tutors and curators is not a concurrent appointment, but it is a mere matter of convenience that the same parties are nominated to both offices. So I see a great deal of fairness in your Lordship's view, and I think that we should find the parties in the second deed entitled to be tutors.

As to the appointment of curators, I have great doubts if the nomination of curators in the first deed revives. A person may accept the office of tutor and refuse to be curator, but I never heard of a man who refused to be tutor and then accepted the office of curator. But this is a point which we are not called upon to decide.

The Court pronounced the following interlocutor:—

"*Edinburgh*, 19*th October* 1872.—The Lords having heard counsel on the Special Case, are of Opinion and Find that the first parties are not entitled to the office of tutors of James Lewis Greig, and that the second parties are entitled to that office: Further, that the first parties are not entitled to the office of tutors of the younger children, and that the second parties are entitled to that office; and authorise the expenses incurred in connection with this Special Case to be paid out of the heritable estate, and remit to the Auditor to tax the same, and to report and decern."

Counsel for First Parties—Miller and Watson. Agent—John Walker, W.S.

Counsel for Second Parties—Lord Advocate and Asher. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, October 22.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

SKINNER *v.* BEVERIDGE.

Assignation—Intimation—Legitim.

A father, with the intention of preventing any claim for *legitim* on the part of his children by his first marriage, assigned the lease of his farm, with cropping, stock, and household furniture, to his son by his second marriage, who, up to that time, had assisted in managing the farm. The assignation was intimated to the factors on the property, who recognised the assignee as tenant, and certain polices of insurance over the farm were transferred to his name. *Held*—in action of reduction of the assignation by a child of the first marriage—that the assignation was an effectual transfer of the father's property.

Thomas Beveridge, farmer at Craighead of Aldie, Kinross-shire, by assignation, executed on 6th March 1868, conveyed to his son, the defender, his lease of the farm, with the whole crop, stocking, household furniture, and other effects on the farm, being his whole means, estate, and effects, under burden of maintaining his father and mother and three unmarried sisters in a manner suitable to their station; also of paying certain legacies, among which were legacies of £1 each to the children of his first marriage, payable at the first term of Whitsunday or Martinmas after his death. The assignation was delivered to the defender on 23d March 1868. Thomas Beveridge, who was twice married, died on 8th June 1869, survived by four children of his first marriage, and by his second wife and nine children, the eldest of whom was defender in this action.

The assignation was verbally intimated to the factor on the property at Lammas 1868, and by letter to a new factor in April 1869, and they recognised the defender as tenant.

The present action was brought by James Skinner, who married Isabel Beveridge, a daughter of the first marriage, and concluded for reduction of the assignation, as being gratuitous, and neither absolute or irrevocable, and also executed for the purpose of disappointing the claim of *legitim* of the children of the first marriage.

The Lord Ordinary, after proof, pronounced the following interlocutor and note:—

"*Edinburgh, 2d April* 1872.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and process, assoilzies the defender from the conclusions of the summons, finds no expenses due, and decerns.

"*Note.*—The assignation sought to be reduced is an absolute and irrevocable deed. By that deed the deceased Thomas Beveridge conveyed to his son, the defender, his lease for nineteen years after Martinmas 1863 of the farm of Craighead of Aldie, which had been granted to him with right of succession to his said son, together with the whole crop, stocking, implements of husbandry, household furniture, and other effects on the farm, being his whole means, estate, and effects, under burden of the provisions therein mentioned. The deed was executed on 6th March 1868, and it is proved that it was delivered to the defender on 23d March 1868. It is also proved that the defender thereupon, and in virtue thereof, entered into possession of the farm, and of the whole subjects thereby conveyed, and thereafter held and managed the same as his own property. In particular, it is proved that the defender paid for the seeds and manures required for the farm, and the other farm expenses, sold the wool and other produce of the farm, paid the rents to the landlord falling due thereafter, and was recognised by the two successive factors of the landlord as tenant under the lease. The three policies of insurance on the farm buildings, stock, implements, and furniture, were, by docquet written on each of them, dated 19th August 1868, declared to be vested in the defender, and not in his father, and were delivered to him. The defender also engaged the farm servants; took out in his own name and paid for the licenses for the farm dogs; changed the bruist or mark of the sheep on the farm on the earliest occasion that this could be done after his entry, namely, at the clipping-time in June 1868; and, in short, carried on the farm as sole lessee thereof, and as absolute owner of the whole stock and plenishing thereon. It is proved also that although his father continued to reside in the farm-house with him, he did not interfere in the management of the farm, but recognised the defender as the sole farmer and as the head of the house, and told the neighbours that he had nothing to do with the farm, having given everything over to the defender.

"There can be no doubt that the said assignation was prepared on the instructions of Thomas Beveridge, and was executed by him, and delivered to the defender, for the express purpose of preventing any claim for *legitim* on the part of the pursuer, Mrs Skinner, and her sister and two brothers, the surviving children of Thomas Beveridge by his first marriage. But that will not vitiate the deed if it was executed *in liege poustie*, and if Thomas Beveridge was thereby divested of his property. The Lord Ordinary considers that Thomas Beveridge was completely divested by that assignation of all right of property in the lease, and farm, stock, plenishing, and furniture thereby conveyed, and that the same became the absolute and exclusive property of the defender from and after 23d March 1868. No doubt the defender was taken bound by the assignation to maintain his father and mother and three unmarried sisters in a manner suitable to their station, to receive and entertain such friends of his father and mother as might visit them, and to furnish his father and mother with a conveyance free of charge to such places as they might require. But that was merely an obligation undertaken by the son as a burden or condition imposed by the assignation, and no right in the lease or effects assigned was thereby reserved to or constituted in favour of the father. That obligation has not the force or effect of a reservation of his liferent by the father, supposing that the subjects assigned had been of such a nature as to be validly assigned under such a reservation. Now it has been decided that a reservation of a right of liferent in bank stock and bonds for borrowed money, conveyed by an *inter vivos* conveyance, will not prevent the deed from taking full effect, and excluding the claim to *legitim; Agnew*, Feb. 28, 1775, Dict. 8210. The Lord Ordinary is