and particular remaining place, diocesie, and other denomination of the writer of the body of the foresaid original writs and evidents." Now I think it clear, even taking the Act 1681 alone, still more taking it in connection with the previous Act of 1593, that the writer of the deed and the witnesses thereto are dealt with in a very different manner. In the case of the writer he must be named by name and surname as well as designed, but the witnesses, who under the statute must always be subscribing witnesses, always require to be designed. And the reason is clear, for the mere designation of the writer, whose name nowhere appears, would do little or nothing towards pointing him out, but if the designations of the subscribing witnesses are given then both their names and designations are disclosed upon the very face of the deed. The statute seems very carefully expressed, so as to make nothing a statutory requisite but what is absolutely necessary, and we are not to multiply statutory requisites, the want of which is to infer a nullity, by mere implication. On this point I entirely adopt the reasoning of Mr Robert Bell in his lectures on the Testing of Deeds, a book of the very highest authority in conveyancing, even if the writer had merely given his opinion, but I think his reasons are really unanswerable. Mr Bell's opinion seems to be confirmed by the passage in Stair, where he says, speaking of the Acts in question, that the name of the writer, and the designations of the witnesses are *de substantialibus*. Other and later conveyancing authorities were referred to, who seem to place writer and witnesses in the same category, so that the names as well as the designations of both should be inserted in the testing clause. But besides the observation that these conveyancers were pointing out the safe and proper course to be adopted, and were not considering what would be the barest compliance with the statutes, I think it quite clear that none of them had the present question in view. None of them take up the question as Mr Robert Bell does, and none of them in the slightest indicate that either his reasoning orhis opinion were unsound.

The Lord Ordinary seems to concede that the mere insertion of the names is not *inter essentialia* as a solemnity, as in the case he puts where the testing clause bore that the deed was signed "before the two subscribing witnesses, both clerks to A. B., solicitor in Edinburgh." I do not doubt that such a testing clause would be quite sufficient although the names of the witnesses could only be learned by looking at their subscriptions; and if this be true, it really is enough for the decision of the present case, for although we had a very ingenious argument to the contrary, it seems to me to be quite plain that the witness who is insert in the testing clause as "Allex esidenter in Carbane, tutor or guardian to the children of John Macdougall, tacksman, of Carbane," can be no other than the witness who subscribes Allex. Dow. The other witness is quite clear, because he is both named and designed; and I think it a most forced and violent reading,—indeed, as I said before, a malignant reading,—to hold that the "Allex" who signs as witness is a different person from the Allex who is designed in the testing clause. Indeed, in one view, he is both named and designed in the testing clause. His Christian name is given, though not his surname, and I don't think it matters that his Christian name is given in a contracted form, especially when it happens that this is the very same contracted form in which he signs.

I need hardly add that in the present question, which relates to mere formalities of authentication, we are no way bound by any analogy drawn from the strict rules of interpreting an entail. The deed happens to be an entail, but in the present question we deal with it as if it had been an ordinary disposition or an ordinary agreement. It is plain, also, that all questions as to challenging or impugning the deed as false are left entire. We only deal here with its *ex facie* regularity. I am therefore for sustaining the deed as duly tested in point of law, and this leads to absolvitor from the present action.

Lord Neaves concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Hugh M'Dougall and Others against Lord Shand's interlocutor of 28th January 1875: Alter the said interlocutor; repel the reasons of reduction; assoilzie the defenders from the action, and find them entitled to expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Reclaimer—Solicitor-General (Watson) and Trayner. Agent—P. S. Beveridge, S.S.C. Counsel for Pursuer—Dean of Faculty (Clark) and G. Smith. Agents—Mitchell & Baxter, W.S.

Saturday, June 26.

SECOND DIVISION.

A. *v.* B.

Testament—Succession—Restriction on Marriage.

A testator having left certain shares in his succession with this proviso "in the event of any of my said daughters being married her share of said profits shall lapse and fall into the residue of my estate."—*Held* that this was a valid condition and not an illegal restraint upon marriage.

Observations (*per* Lord Justice-Clerk) on the English law as to conditions antecedent and subsequent, and their non-applicability to Scotch law.

Special Case—Expenses.

Circumstances in which *held* that there was no such ambiguity in the testator's deed as to entitle the party questioning its intention to expenses out of the trust-estate.

This was a Special Case, presented for the opinion and judgment of the Court by Mrs A., daughter of Mr B., the testator, of the first part, and by Mrs B., the widow, and by the other unmarried daughters of the testator, as parties of the second part.

Mr B. died on 8th October 1873. He was twice married, and was survived by his second wife and by the following children, viz.:—By his first marriage two sons and three daughters, Mrs A. being the youngest; and by his second marriage six children, all in minority. Mrs A., the party of the first part, was married on 21st December 1871. The other two daughters of the first marriage are unmarried.

In virtue of the powers conferred upon the trustees and executors by the trust-deed, they entered into an agreement with the surviving partners of the testator in his business, by which the truster's capital remains in the business from the commencement of the new copartnery at 8th October 1873 till Whitsunday 1883, with a break at 31st January 1878, a certain portion of the profits derivable therefrom to be paid over to them and to be distributed by them in accordance with the directions contained in the trust-deed. The first balance of the business since the truster's death has now been struck, and the share of profit accruing to the trustees as at 31st January 1875 has been ascertained to be £899, 4s. The proportion of this sum which would fall to the party of the first part would therefore be one-ninth, or £99, 18s. 2d.

The first party claimed a share of these profits under the deed, on the ground that it was provided in the deed that "in the event of any of my said daughters being married, her share of said profits shall lapse and fall into the residue of my estate," and the second party resisted this claim. The first party contended that this condition being in restraint of marriage was illegal, and therefore that no lapse had taken place; and further, that supposing it were not illegal, upon this ground it was inapplicable to her, because she was married, not merely before the truster's death, but before the execution of the trust-disposition and settlement. On the other hand, the parties of the second part contended that the condition upon which the legacy was to be paid was valid and not illegal; that the object of the truster was to secure an income to unmarried daughters of the first marriage by giving them one-third of the truster's share of profits, he assuming that any married daughter would be supported by her husband, and that there was nothing illegal in her father making such a distribution of the income from his estate among his daughters.

The leading clauses in the deed were as follows:—"*Fourth*, In order that the full benefit may be obtained from my means, invested in my business . . . . . and for the better maintenance of my widow and children, it is my desire that the business be carried on for some time under the supervision of my trustees; and for that purpose I authorise and empower my trustees to allow whatever capital I may have invested in the business at the date of my decease to remain therein, and my trustees will allow suitable salaries for the management, and on the annual profits being ascertained my trustees shall dispose of the share thereof belonging to me as follows:—They shall pay over one-third thereof to my wife, one-third thereof to my daughters, equally among them, and the survivors and survivor of them, but in the event of any of my said daughters being married, her share of said profits shall lapse and fall into the residue of my estate; and they shall hand over the remaining third to my wife, to be expended by her for the use and behoof of the younger children of our family until they shall severally attain majority, and thereafter the said third of my share of profits shall fall into the residue of my estate; but my trustees shall have power to pay annually a part thereof to such of my younger children for their maintenance as such of my trustees shall think proper. *Lastly*. After the death of my wife, my trustees shall, with all convenient speed, proceed to realise my whole means and estate, heritable and movable, and convert the same into money, so far as not already done, and after payment and delivery of any legacy or legacies which I may hereafter direct, they shall divide and pay over the same among my children as follows:—They shall divide and pay over one-third thereof to and among my whole daughters by both marriages, equally among them, share and share alike, payable on their severally attaining majority or being married; and shall pay over and divide the remaining two-thirds of my said means and estate to and among my whole children, equally among them, share and share alike, payable to my sons on their severally attaining majority, and to my daughters on their severally attaining majority or being married; and in the event of any of my children declining to allow his or her share in my succession to remain unpaid until the death of my wife, my trustees are desired to pay to such child the share to which he or she would be entitled at common law, and no more."

The question for the opinion and judgment of the Court was:—"Whether the party of the first part is entitled to claim a share of the one-third of the profit from the business which has now been declared by the last balance-sheet, and a similar share of the profits as declared by the balance-sheets of future years?

Argued for first party—A condition which amounts to an absolute prohibition of marriage is illegal, and must be held *pro non scripto*. But conditions which are only restraints, and not absolute prohibitions, are valid. A condition that a person should marry with the advice of A. B., held *pro non scripto*, whether made by a parent or by a stranger (*Culbirnie, Kennoway*). A condition of the nature of a restraint imposed by a stranger was placed by later decisions on a different footing from one imposed by parents, and effect was given to it (*Rae* v. *Glass*). Later, again, conditions imposed by parents were assimilated to those imposed by strangers (*Buchanan*). Rigour relaxed so that effect was not given to unreasonable conditions (*Foord, Gordon* v. *Petrie, M'Kenzie*). The same became the law gradually with respect to restraints imposed by parents (*Buntine's Trustees, Wellwood's Trustees*). The law of England supports our view (*Bellairs, Allan*). The tendency gradually of the law in Scotland has been against such restrictive conditions, though formerly it was otherwise.

Authorities:—Stair, i. 3, 3; Ersk., iii. 385; Bell's Prin., § 39, § 1785; Bankton, i. 5, 29; Bell's Comm. (M'Laren), 321; *Culbirnie* v. *Laird of St Monance*, 1578, M. 2963; *Kennoway* v. *Campbell*, 1617, M. 2964; *Rae* v. *Glass*, 1673, M. 2966; *Buchanan* v. *Buchanan*, 1680, M. 2968; *Foord*, 1682, M. 2970; *Gordon* v. *Petrie*, 1682, M. 2974; *M'Kenzie*, 1774, M. 2977; *Buntine's Trustees* v. *Buchanan*, 1710, M. 2972; *Wellwood's Trustees* v. *Boswell*, 1851, 13 D. 1211; *Bellairs* v. *Bellairs*, 18 L. R., Eq. 510; *Allan* v. *Jackson*, 19 L. R., Eq. 631.

Argued for second parties—The law of Scotland recognises no such doctrine as presented by the English authorities.

Authorities;—*Kidd* v. *Kidd*, 2 Macph. 227, 10th Dec. 1863; *Stackpoole* v. *Beaumont*, 3 Ves.

viii. 9; *Wellwood's Trustees*, 13 D. 1211, and 19 D. 187; *Fowlis* v. *Gilmour*, 1672, M. 2965; *Hay* v. *Wood*, M. 2982; *Ommaney* v. *Bingham*, 3 Paton, 461; *Fraser* v. *Rose*, 11 D. 1466; Jarman on Wills, ii. 46; *Newton* v. *Marsden*, 31 L. J. Ch. 690.

At advising—

LORD JUSTICE-CLERK (after referring to the clauses in the trust-disposition and settlement under which the case arose)—The share of the fund which forms the subject of the present case is one-ninth of the profits of the business for one year. We had addressed to us a very able argument on the principle of restraints upon marriage and the effects of them, and were it necessary to decide that particular point I should incline to give effect to the contention of Mr Fraser, for it is not, I think, a doctrine of the law of Scotland that in the ordinary case where a provision is made in regard to a future marriage—a provision of restriction or limitation—the testator is debarred from attaching to the gift he makes any condition as to the marriage of the legatee, and that such condition is to be simply held *pro non scripto*.

But, my Lords, this is not a case which raises such a question. What we have here is a fund left by the testator, who by his will directs his trustees what to do with the profits of the fund year by year. Now they are directed not to pay these profits or the third of them over to Mrs A., but into the residuary fund. She never had right to this legacy; there was no restraint put upon her, for she was married before the testator's death, and the Court can only be guided by the deed. The whole argument proceeded, I think, upon a misapprehension of the English principle. I may here refer to one case which seems admirably to illustrate the distinctions drawn by the law of England between conditions antecedent and conditions subsequent—that is, the case of *Davis*, 6th June 1862, Law Times, vol. vi., p. 850. Where a testator leaves a sum of money to a person, say on condition of his marrying a certain lady, that would be a condition antecedent—until he married the lady in question he acquired no right to the money; where, on the other hand, the condition of the legacy is that the legatee should lose the money if he married a certain lady, that would be a condition subsequent, and as such null and void.

I may only add that the fact of these profits forming no part of the estate of the testator, not having been earned until after his death, does not affect the point at issue.

LORD NEAVES—I am of the same opinion. I do not think that the views suggested apply in the present case, nor do I think that they are in accordance with the law of Scotland.

LORD ORMIDALE—After hearing the argument in this case I felt desirous of having an opportunity of considering the case of *Bellairs* v. *Bellairs* with deliberation, as I was much struck by some of the points raised by it. I have now done so, and I am entirely satisfied that that case is not in point, even were this Court to be ruled by a decision pronounced in England by the Master of the Rolls, a decision which that learned Judge himself says appears to him "against reason," and to which he has only been led by the fact of the previous English cases on the same side. But, moreover, in *Bellairs* the condition was subsequent, and much turned upon that fact. Here we have no vesting, and there the property had already vested. Evidently there exist in the law of England many distinctions in conditions which have no place in the law of Scotland. For instance, they have certain distinctions in the effect of conditions where the property is real and where it is personal. But, my Lords, if authority be required, we have authority quite in point in the case of *Kidd*. In conclusion, I may observe that the testator does not say anything as to Mrs A., his married daughter, who is here to-day as the first party to this case, but before her father's death she might have become a widow, and in that way acquired a right to share perhaps in this fund. This very likely may be the key to the true meaning of the testator.

LORD GIFFORD—I am of the same opinion. Under this settlement there is really no question at all of restraint upon marriage. The testator seems to have contemplated the event of his widow and children requiring maintenance after his death. (His Lordship quoted the terms of the deed)—The simple meaning of all this is—my daughters are to be maintained after my death out of the profits of any business until they be married. The word "lapse," as used of these provisions in the deed, is, I think, just equivalent to "her share shall cease." We have not in Scotland, and indeed I should be sorry if we had, the English rule that a thing done, a condition framed in one form, is good, and in another bad, and to introduce such a technical rule would be very injurious.

On both grounds the clause must receive effect according to the terms in which it is couched. The lady was married before the death of the testator, her father, and to argue that this was a condition to restrain from marrying a lady already married seems almost absurd.

The Court answered the question in the negative.

On the question of expenses, counsel for Mrs A. submitted, on the authority of the case of *Wright*, 1870, that the matter having been fairly brought before the Court, and the ambiguity having been caused by the testator himself, he was entitled to Mrs A.'s expenses out of the estate of the testator.

Counsel for Mrs B. said that he must resist this motion, although he would not ask expenses against Mrs A.

LORD JUSTICE-CLERK—I think the testator's intention was plain; there was no ambiguity.

LORD ORMIDALE—I don't differ, but I think there is a little room for some ambiguity from the expressions used in the deed.

LORD NEAVES—I entirely approve in general of bringing special cases to clear up doubts as regards the intention of deeds especially, but I do not consider this was a case for such a course, as all seems quite clear.

LORD GIFFORD—I concur.

The Court refused to allow Mrs A's expenses out of the trust-funds.

Counsel for Mrs A.—Dean of Faculty (Clark, Q.C.) and Crichton. Agents—Duncan & Black, W.S.

Counsel for Mrs B. and Others—Fraser. Agent—John Galletly, S.S.C.

R., Clerk.

Saturday, June 26th.

SECOND DIVISION.

CAMPBELL'S TRUSTEES, *v.* CAMPBELL.

Succession—Direction to Purchase Land—Vesting.

A testator left a sum of money to his trustees, with directions to them to purchase lands adjoining his estate, so far as an eligible purchase could be obtained. Although contemplated, no deed of entail of his estate was ever executed, and upon his death the testator was succeeded by his grandson, at that time Major, who was served heir and infeft. This grandson died without issue, and "left and bequeathed" his whole estate, heritable and personal, to a brother, who was served his nearest lawful heir in special and also his heir in general. The second brother, also dying without issue, conveyed all his estate, heritable and moveable, to trustees, the rents and interest of the same to be paid to his wife during her life, and thereafter to the other party to the case. Neither of the two grandsons of the original testator wished land to be purchased with the sum of money laid aside, and accordingly no land was purchased. In a question between (1) the original trustees, (2) the trustees of the last proprietor, (3) the fiar under his will,—*Held* that the dividends on the sum of money fell to be paid to the widow of the last grandson, and not to the heir succeeding on her death, as the fund vested in fee simple in the person of the first grandson on the original testator's death, and thence through him, under his will, and that of his brother, successively in the persons therein named, and that consequently the heir claiming could only do so under the testament of the last proprietor, which testament gave the entire liferent to the widow.

This was a Special Case for the opinion and udgment of the Court. The parties to the case were as follows:—1. The trustees of Sir Archibald Campbell of Succoth, Baronet, of the first part, 2. The trustees of Sir George Campbell of Succoth, Baronet, of the second part, and 3, Sir Archibald Spencer Lindsey Campbell, now of Succoth, Baronet, of the third part.

By contract of marriage, dated 12th July 1824, between the late John Campbell, younger of Succoth, eldest son of the honourable Sir Archibald Campbell of Succoth, Bart., with consent of his father, and Anna Jane Sitwell, the estate of Garscube was settled upon the heirs of the marriage, whom failing, as therein mentioned. The destination is as follows:—'The said Sir Archibald Campbell, with consent of the said John Campbell, dispones and conveys to himself, and, after his decease to the said John Campbell, his eldest lawful son, and the eldest and other son or sons to be procreated of the marriage hereby contracted between the said John Campbell and the said Anna Jane Sitwell successively in their due order of seniority, and the heirs-male of their bodies respectively; whom failing, to certain other parties whom failing, to the other heirs-male of the body of the said Sir Archibald Campbell; whom failing, to the heirs-female of the body of the said Sir Archibald Campbell,' &c. By this contract of marriage power was given to John Campbell to alter the order of succession, as therein mentioned. It was declared to be in the power of Sir Archibald and John Campbell during their joint lives, or of the survivor, to entail the estate. By trust-disposition and settlement, dated 27th October 1830, and registered in the books of session 24th February 1847, Sir Archibald conveyed to the trustees therein named the estate of Cumlodden in Argyleshire, the lands of Gilshochhill and others in the counties of Lanark and Dumbarton, and houses in Park Place, Edinburgh; as also all his moveable and personal means and estate. This trust-disposition directs the trustees to invest the residue in the purchase of lands as near and convenient as can be reasonably had to Garscube, and until an eligible purchase could be made to invest the residue on heritable security, or in Government stock, or Bank of Scotland or Royal Bank stock, so far as it is not already in these stocks, or in the stock or shares of the Forth and Clyde or Union Canals. The said trustees are further directed to accumulate the free yearly interest and profits of the residue, and the yearly rents of the lands mentioned and of the houses in Edinburgh, and the yearly rents of any lands purchased, and to invest the accumulations in the purchase of lands, and that so long as the heir succeeding to Garscube and others under the destination contained in the contract of marriage should be a minor. The deed proceeds as follows:—'And providing that in virtue of the powers reserved to me in the said contract of marriage between the said John Campbell and Anna Jane Sitwell, I shall execute an entail of the lands and estate of Garscube and others upon the series of heirs mentioned in the said contract, then and in that case my said trustees shall execute an entail or entails of the said lands of Gilshochhill, Lochburn, and parts of Burnhouse, and lands of Bonville (if I have not done so), and of the estate of Cumlodden, if it shall be thought more advisable not to sell that estate, and also of the whole lands to be purchased by them, and by the said entail or entails they shall dispone the said lands to the same series of heirs as are called to the succession of the said estate of Garscube and others, in terms of the destination contained in the said contract of marriage;—and providing no such entail of the lands of Garscube and others shall be executed by me, then my said trustees shall dispone and make over in fee-simple to the person, and to the series of heirs appointed by the said contract of marriage to succeed to the said lands of Garscube and others, the said lands of Gilshochhill, Lochburn and parts of Burnhouse, the lands of Bonville, and the estate of Cumlodden, providing it shall not be sold, and the lands that my said trustees shall have then purchased, to the person succeeding to me in the said lands of Garscube, on his attaining majority, but always with and under the conditions contained in the said contract of marriage; and in case the heir who shall succeed to the said lands and estate of Garscube shall have attained the age