Saturday, February 8.

SECOND DIVISION.

DAWSON AND OTHERS (GILLON'S TRUSTEES) *v.* GILLON AND OTHERS.

Succession — Protected Succession—Settlement of Universitas—Power of Apportionment Reserved in Antenuptial Contract of Marriage—Ineffectual Exercise of Power.

A person by his antenuptial contract of marriage settled all he should happen to conquest during the marriage—which eventually proved to be his whole estate—upon himself in liferent and the children of the marriage in fee, reserving to himself the power of dividing and apportioning the said conquest among the said children. In the antenuptial contract of marriage of his younger daughter he bound himself to pay, six months after the death of the longest liver of himself and his wife, £2000 to his said daughter in liferent, and the heirs of her body in fee, which provision was accepted by his daughter as in full satisfaction of all claims competent to her through the decease of her father and mother. The father's marriage subsisted for sixty years, and he was predeceased by his only son, and survived by two daughters, who were both married.

By his trust-disposition and settlement and relative codicils he appointed the residue of his estate to be divided into three parts—one-third to be held and applied for his son's widow in liferent, and on her death for behoof of her children, her daughters' shares being restricted to a liferent; one-third to be held for behoof of his eldest daughter in liferent, and upon her death for her daughter in liferent; and the remaining one-third to be held for behoof of his younger daughter (after implementing the obligations in her marriage-contract) in liferent, and on her decease for her children, her daughters' shares being restricted to a liferent. He also left a legacy of £500 to the son of his deceased son.

Held that he had no power of apportionment except under his marriage-contract, and that his trust-disposition and settlement was not a valid and effectual exercise of that reserved power; that the said marriage-contract, under which upon his death his three children had each a right to one-third of his estate in fee, regulated the succession; that the legacy to his grandson was invalid; and that the £2000 secured to his younger daughter by her marriage-contract fell to be deducted from the residue of the estate before division.

The late John Gillon of Wardie House, merchant in Leith, was married to the late Jane Douglas or Gillon in 1819. He died on 5th April 1879, survived by his wife, who died on 21st October 1886. There were three children of the marriage, viz., John Gillon junior, who died on 17th September 1863, survived by a widow and four children; Margaret Gillon or Wotherspoon, wife of William White Wotherspoon, late of Her Majesty's Indian Army; and Euphemia Wilson Gillon or Dawson, widow of the late John Dawson, Greenpark, Linlithgow.

By antenuptial contract of marriage dated 28th June 1819 John Gillon senior bound and obliged himself to make payment to his wife if she should survive him of an annuity of £100, and he further bound and obliged himself "to provide and secure all and sundry lands, heritages, and sums of money, goods, gear, and other estate, real and personal, that he shall happen to conquest or acquire or succeed to during the standing of the present marriage, to and in favour of himself in liferent, and the children to be procreated of the marriage betwixt him and the said Jane Douglas, and the heirs of their bodies in fee, whom failing to his own nearest heirs and assignees whomsoever, subject always to the payment of the annuity before provided to the said Jane Douglas: But declaring always, as it is hereby expressly provided and declared, that if there shall be more children of the present marriage than one, the said John Gillon shall have it in his power, as he hereby expressly reserves to himself the power of dividing and proportioning the said conquest among the said children as he shall see proper, by a writing under his hand at any time of his life, or even on deathbed, and failing such division the same shall be proportioned equally, share and share alike, among the said children, the issue of the child or children deceasing succeeding to the share which the parent or parents thereof would be entitled to if in life; and for ascertaining the extent of said conquest it is hereby agreed that the same shall comprehend and extend to all and whatever estate, heritable or moveable, belonging or owing to the said John Gillon at the dissolution of the marriage, whether by purchase, donation, or succession, after deduction of the debts due by him,"—which provisions were declared to be in full satisfaction of all legal claims competent to his widow or to the children of the marriage.

Mr Gillon senior at the time of his death left estate amounting to about £20,000, all acquired by conquest after 1840, and consisting partly of heritage and partly of moveables.

In the contract of marriage entered into between his daughter Euphemia Wilson Gillon and John Dawson, dated 15th June 1841, John Gillon senior bound and obliged himself, on the decease of the longest liver of himself and his wife, to make payment to the said Euphemia Wilson Gillon and the heirs of her body of the sum of £2000, to be invested in favour of his daughter in liferent for her liferent use only, whom failing to her husband for his liferent use only, whom failing to the heirs of her body in such portions and under such conditions as she might appoint,

whom failing "to the heirs of the said John Gillon in fee; which provisions by the said John Gillon in favour of the said Euphemia Wilson Gillon, she and the said John Dawson hereby accept of in full satisfaction of all bairn's part of gear, legitim, portion-natural, executry, and every other claim competent to them through the decease of the said John Gillon and Jane Douglas or Gillon, his spouse."

By trust-disposition and settlement executed by John Gillon senior, dated 2nd February 1866, and two codicils dated respectively 21st January and 5th December 1874, he disponed in favour of the trustees therein mentioned, of whom the parties of the first part were now the sole trustees, his whole means and estate, heritable and moveable, but in trust for the purposes therein specified, viz.—Fifth, On the death of his widow the testator appointed the residue of his whole estate to be divided into three parts; and *primo*, to hold and apply one-third thereof . . . for behoof of Mrs Gillon junior in liferent, and on her death to hold the same for behoof of her children, . . . with power to Mrs Gillon to apportion the same among said children, with consent of the trustees as therein mentioned, the daughters' shares to be liferented by them, the fee going to the heirs of their bodies, whom failing their respective heirs and assignees; *secundo*, another third was appointed to be held by his trustees for behoof of Mrs Wotherspoon in liferent, and on her death for behoof of her daughter, and any other children Mrs Wotherspoon might have, in liferent, and the issue of their bodies, whom failing their nearest heirs and assignees in fee; *tertio*, the testator appointed the remaining third of residue to be held for behoof of Mrs Dawson (after implementing the obligations come under by him in her marriage-contract) in liferent, and on her decease for her children, . . . equally among them, the sons to be paid their shares on the death of their mother, and the daughters' shares to be held in liferent, the fee going to the heirs of their bodies, whom failing their heirs or assignees. The trustees were also authorised to restrict Miss Wotherspoon's liferent to such an annuity as they might consider necessary, and the provisions to the testator's wife and children were declared to be in full of all their legal claims. By his first codicil the testator cancelled certain of the legacies, and left a legacy of £500 to Douglas John Gillon, the only son of John Gillon junior, together also with some silver plate and oil paintings; and by his second codicil the testator appointed the share to be liferented by Miss Wotherspoon, in the event of her dying without issue, to be divided among certain of the other beneficiaries.

A special case was prepared and presented to the Court by (1) the trustees of John Gillon senior; (2) and (3) the widow and children of John Gillon junior; (4) William White Wotherspoon, on behalf of his wife Mrs Margaret Gillon or Wotherspoon, to whom he had been appointed *curator bonis*; (5) their only child Miss Jane Douglas Wotherspoon; (6) Mrs Euphemia Wilson Gillon or Dawson; (7) her children; and (8) the testamentary trustees of Mrs Gillon senior, for the determination of the following questions of law—"(1) Was the power of the said John Gillon senior, of dealing with his means and estate, limited to the power of division and apportionment reserved to him in his marriage-contract? (2) In the event of the preceding question being answered in the negative, do the means and estate of the said John Gillon senior fall to be administered in terms of his said trust-disposition and settlement? (3) In the event of the first question being answered in the affirmative, do the provisions of the said trust-disposition and settlement constitute a valid and effectual exercise of the said reserved power of apportionment to any, and if so to what effect? (4) Does the sum of £2000 provided to Mrs Dawson in her marriage-contract constitute a *pro tanto* apportionment of the conquest in favour of Mrs Dawson; or does the said sum fall to be deducted before ascertaining the divisible amount of the conquest fund? (5) Does the legacy of £500 to the said John Douglas Gillon fall to receive any, and if so what effect?"

The parties of the second and third parts maintained that as the testamentary deed of John Gillon senior was not *in fraudem* of the provisions of his marriage-contract, it should receive effect, and that on a sound construction thereof Mrs Dawson was not entitled to £2000 over and above the one-third of the residue. Alternatively they maintained that the testamentary deed was, in so far as it disposed of the residue of the estate of John Gillon senior, a valid apportionment in terms of the marriage-contract, and that in consequence thereof the residue of the estate of John Gillon senior fell to be divided into three parts, of which Mrs Gillon junior and her children were entitled to one, and that Mrs Dawson was not entitled to £2000 in addition to her one-third share.

The party of the fourth part, with consent of the party of the fifth part, maintained that Mrs Wotherspoon was entitled in fee to one-third of the whole means and estate left by John Gillon senior at his death, or at all events, that she was entitled in fee to her share of whatever estate the said John Gillon senior had left unapportioned. Alternatively, the party of the fifth part maintained that she was entitled to the share of the estate destined to her in liferent upon the death of her mother, absolutely and without any restrictions.

The party of the sixth part, with consent of the parties of the seventh part, maintained that she was entitled (1) to the sum of £2000 with accruing interest thereon from the date of the death of her mother Mrs Gillon, in terms of her marriage-contract; and (2) to one-third share in fee of the whole means and estate left by the said John Gillon senior; and, in any view, to such portion thereof as might be held to be unapportioned. Alternatively, Jane Douglas Dawson or Shepherd and Frances Mackell Dawson, two of the parties of the

seventh part, maintained that they were entitled to the share of the estate destined to them in liferent upon the death of their mother, absolutely and without any restrictions.

Argued for the second and third parties—The first question should be answered in the negative, and the second in the affirmative. The truster settled the *universitas* of his estate by his marriage-contract. That left him free—apart from the power reserved in the marriage-contract—to apportion his estate as he had done. The only restriction upon his power to deal with his estate was that he should make a distinct settlement and confine the benefits to members of his own family. Considering how long he had been married, and that he had grandchildren grown up, it was reasonable he should include his son's widow among the beneficiaries, and regulate the quality of the right of succession of his descendants, *e.g.*, by limiting children's right to a liferent, giving the fee to grandchildren. If the truster had not this right apart from the clause in the marriage-contract reserving a power of apportionment, he had it in virtue of that clause, and powers of reservation were to be more liberally construed, especially when they related to a *universitas*, than powers by constitution. The trust-settlement as a valid exercise of the reserved power fell to be upheld *in toto*. In any case, it was a valid exercise of the power in so far as it conferred a fee upon the son of John Gillon junior. His father having predeceased the truster, he was an object of the power. He accordingly was entitled to take one-third of the residue in fee. The remaining two-thirds as unapportioned would fall to be divided equally among John Gillon senior's descendants *per stirpes*. At any rate, John Douglas Gillon, as an object of the power, was entitled to the legacy of £500. Under the third clause of purpose 5 of the trust-settlement Mrs Dawson's marriage-contract provisions were to be deducted from her share of the residue, consequently the first part of question 4 should be answered in the affirmative—*Cuming* v. *Kennedy*, January 20, 1699, Mor. 12,959, and (fuller report) Mor. 6443; *Campbell* v. *Campbell*, 1738, Mor. 6849 (Kilkerran's Report); *Thomson*, 1762, Mor. 13,018; *Dick* v. *Lindsay*, 1776, Mor. Provision to Heirs and Children, App. No. 2; *Ormiston*, 1809, Hume 531; *Baikie's Trustees* v. *Oxley & Cowan*, February 14, 1862, 24 D. 589; *Champion, &c.* v. *Duncan, &c.*, November 9, 1867, 6 Macph. 17 (Lord Curriehill); *Churchill* v. *Churchill*, December 1867, L.R., 5 Eq. 44; *Moir's Trustees*, June 17, 1871, 9 Macph. 848; *M'Donald's Trustees* v. *M'Donald, &c.*, March 10, 1874, 1 R. 794, June 17, 1875, 2 R. (H. of L.) 125; *Lowden's Trustees* v. *Lowden, &c.*, June 1, 1881, 8 R. 741; *Mackie* v. *Mackie's Trustees*, July 4, 1885, 12 R. 1230; Act 37 and 38 Vict. c. 37 as to appointments under powers; Fraser's Husband and Wife, ii. p. 1369.

Argued for fourth, fifth, sixth, and seventh parties—The succession was ruled entirely by the marriage-contract. The trust-settlement was *ultra vires* of the truster. He had no power to deal with his estate apart from the clause in the marriage-contract. That clause gave him only a right of apportionment among his children. The trust-deed was not an exercise of that power. It attempted to limit the children's rights to a liferent, whereas on their father's death they had a right of fee; it apportioned the rights of grandchildren, and it conferred rights upon the son's widow, who was a stranger to the power. The other side had relied upon old cases in Morison but had ignored the newer cases. The case of *Arthur*, *infra*, alone was conclusive of the question. Even if the trust-deed were regarded as a partially valid exercise of the power, it could not be given effect to, because in other respects it was inept—Lord Curriehill in *Baikie's Trustees*, *infra*, p. 596. Mrs Dawson should receive the £200 secured to her under her marriage-contract before the estate was divided. It was a debt against the estate—*Smith Cunninghame and Mercer* v. *Anstruther's Trustees*, April 25, 1872, 10 Macph. (H. of L.) 39. The legacy to the grandson was clearly invalid—*Spiers, &c.* v. *Dunlop, &c.*, July 28, 1778, Mor. 13,026; Lord Ivory's Note on Ersk. Inst. iii. 8, 39; *Munro*, February 13, 1810, F.C.; *Arthur & Seymour* v. *Lamb, &c.*, June 30, 1870, 8 Macph. 928; *Boustead* v. *Gardner, &c.*, November 4, 1879, 7 R. 139.

At advising—

LORD RUTHERFURD CLARK—This case was very ably argued with much citation of authority, but, as I view it, it is not attended with much difficulty.

By his antenuptial marriage-contract the late Mr Gillon bound himself to provide and secure his whole estate, real and personal, to the children of the marriage, reserving only a power of apportionment among the children.

The nature of the right which the children took under this marriage-contract is not doubtful. It is conclusively settled by the case of *Arthur*, 8 Macph. 928—so conclusively that it is not necessary to examine any of the earlier cases—that they took a right of succession only, but a protected right of succession, which the father could not defeat by any merely gratuitous alienation, whether by deed *inter vivos*, by disposition *mortis causa*, or by testament. Mr Gillon has left no deed affecting his estate, save a *mortis causa* trust-disposition and settlement. It follows that that deed cannot defeat the right of his children under the marriage-contract, and that it can bear no effect except in so far as it is a valid exercise of the power of apportionment which he reserved.

It was argued that inasmuch as this power was reserved by the owner of the settled estate, and is applicable to a *universitas*, it should receive a wider and more liberal interpretation than a power conferred on another, or limited to a specific fund. I can find no support either in reason or authority for this proposition. A power of apportionment, however created, and to whatsoever estate it may relate, can be

nothing more or less than a power of apportionment. It enables the holder of the power to divide the fund among the objects of the power in such proportion as he thinks proper. But it does not enable him to alter the quality of the estate which is settled on them by limiting an estate of fee to an estate of liferent, nor to confer a benefit on persons who are strangers to the power.

So standing the case, it remains for us to consider whether Mr Gillon's trust-settlement is a legal exercise of the power which he reserved. It is very plain that it is not. For it confers a benefit on Mrs John Gillon who is a stranger to the power. It limits the interest of his daughters, Mrs Wotherspoon and Mrs Dawson, to a liferent, and it gives the shares which these ladies are to liferent to their children respectively in fee. But inasmuch as Mrs Wotherspoon and Mrs Dawson survived their father, their children are not objects of the power.

It was maintained that the trust-deed might be supported in so far as within the power, though having no further effect. I think that this point is conclusively determined to the contrary by the case of *Blaikie*, 24 D. 589. Lord Curriehill says—"A failure to execute the power in any respect vitiates the whole appointment. The reason is that you cannot tell what appointment the party entrusted with the power would have made, had he known that what he attempted to do was to some extent at least inept."

The £2000 provided to Mrs Dawson in her marriage-contract is a debt due by her father, and therefore must be deducted from her succession before their succession is divided in terms of his marriage-contract. The legacy to J. D. Gillon is bad.

LORD LEE—I have found this case to be attended with difficulty, but on the authorities which were very fully cited and discussed I have come to be of the opinion expressed by Lord Rutherfurd Clark.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was not present at the discussion.

The Court pronounced the following interlocutor:—

> "The Lords having considered the special case and heard counsel for the parties thereon, Answer the first of the questions therein stated in the affirmative, and the third in the negative; the fourth to the effect that the sum of £2000 falls to be deducted before ascertaining the divisible amount of the conquest fund, and the fifth in the negative: Find and declare accordingly, and find it unnecessary to answer the second question, and decerns."

Counsel for First and Eighth Parties—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Second and Third Parties—H. Johnston—Cook. Agents—W. & J. Cook, W.S.

Counsel for Fourth, Fifth, Sixth, and Seventh Parties—Asher, Q.C.—Gillespie. Agents—Alexander Morison, S.S.C.

Friday, January 24.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DUKE OF ATHOLE *v.* M'INROY AND OTHERS (M'INROY'S TRUSTEES).

Servitude — Road — Right-of-Way — Occasional Use—Use for Sporting Purposes.

In an interdict against the use of a path through a mountain pass the respondent proved that for more than 40 years he and his predecessors had used the path as a convenient short cut in passing from one part of their shooting to another. This use was only occasional, extending to 10 or 12 times a year, and was only made late in the shooting season. Between 1846 and 1878 the path was scarcely used by the respondent. Although this use by the respondent was known to the complainer's foresters, there was no evidence that it had been under the immediate observation of the complainer or his ancestors except on one occasion in 1857 when the use was challenged. *Held* (*diss.* Lord Rutherfurd Clark) that there had been no use to support a claim on the part of the respondent to a servitude right-of-way.

This was an action of suspension and interdict whereby the Duke of Athole sought to prevent the respondents, the surviving trustees under the late James Patrick M'Inroy's trust-disposition and settlement, and William M'Inroy of Lude as an individual, from crossing by the Cromalton Pass from one part of the lands of Lude to another. The property of Lude marched with the forest of Athole, and at one point a long tongue of the forest land ran into Lude property, and for its length divided the Lude property into two. Across the base of this tongue of land ran the Cromalton Pass. Its total length was about 1000 yards, while the detour round the tongue of land was about 5 or 6 miles. This strip between the divided portions of Lude had been claimed by the late Mr M'Inroy of Lude until the late Duke of Athole, then Lord Glenlyon, put an end to it by declarator in 1841.

The complainer averred that the use of the Pass complained of diminished the value of the forest.

The respondents averred that "there has been for time immemorial a public road or right-of-way leading through the said Pass from the public road in Glen Tilt to the public drove road through Glenloch leading through Glen Fernat to Kirkmichael, where there is a market. The said road or right-of-way has been constantly used for cattle, horses, and foot-passengers by all and sundry the members of the public for time immemorial, and for more than forty years prior to the presentation of this note, and down to the present date without challenge by anyone. The respondents moreover have, by themselves, their tenants,