A report has been obtained from a gentleman of high standing as a mining engineer and he reports that the price suggested, viz.—£1165, is a fair one. I have therefore no doubt that the proposed sale is in the interests of all concerned, and I accordingly suggest to your Lordship that we should sanction it and answer the questions stated in the case in the affirmative.

LORD ARDWALL and LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was absent.

The Court answered the questions of law in the affirmative.

Counsel for the First Party — Ingram. Agents — Adamson, Gulland, & Stewart, S.S.C.

Counsel for the Second Party—Ingram. Agents—Mackenzie & Fortune, S.S.C.

Counsel for the Third Parties — J. A. Christie. Agents — Lister Shand & Lindsay, S.S.C.

Wednesday, July 7.

SECOND DIVISION.

BERTRAM'S TRUSTEES *v.* BERTRAMS.

Trust—Inter vivos Disposition—Power to Revoke.

By deed of trust A made over to trustees certain moveable estate for the following purposes, *inter alia*, payment of the annual income thereof to himself and upon his death to his widow, "declaring that the said provisions in favor of me and my widow shall be for my and her respective liferent alimentary use allenarly, and shall not be affectable by my or her debts or deeds or by the diligence of my or her creditors." He further directed his trustees to hold the capital of the said trust estate for behoof of his lawful issue, and "in the event of there being no lawful issue who shall acquire a vested right to the capital of the said trust estate . . . my trustees, upon the death of the survivor of me and my widow, shall assign, dispone, convey and make over (First) one half of the capital of the said trust estate to my brother" B "and to his heirs and assignees whomsoever; and (Second) the other one-half to" C, "my stepsister, and to her heirs and assignees whomsoever." There was no declaration that the deed of trust was to be irrevocable. Thereafter A, who had never married, called upon the trustees to denude themselves of the trust funds in his favour.

Held that the trust deed was revocable, and that the trustees were bound to denude in A's favour.

The trustees acting under a deed of trust dated 20th, and registered in the Books of Council and Session 23rd August 1907, granted by Norman Stewart Bertram, engineer, then residing at 71 West Cumberland Street, Glasgow, and afterwards in London, *first parties;* the said Norman Stewart Bertram, *second party;* David Stanley Bertram, the second party's brother, *third party;* Dorys Jessie Bertram, the second party's step-sister, and her mother Mrs Hannah Isabella Chambers or Bertram, as her guardian and administrator-in-law, *fourth parties*, brought a Special Case with regard to the revocability of the said deed of trust.

The deed of trust provided—"I, Norman Stewart Bertram, engineer, seventy-one West Cumberland Street, Glasgow, considering that I have now received payment of my share of the estate falling to me under the antenuptial contract of marriage between my father and mother, amounting to over three thousand pounds, and that I consider it proper and prudent that a portion of the funds so received should be put in trust for the purposes after mentioned, therefore I do hereby assign, dispone, convey, and make over to and in favor of . . . as trustees . . . [*certain securities*] . . . making together at their present market value the sum of One thousand and seventy-four pounds, one shilling and elevenpence inclusive: But that in trust only for the ends, uses, and purposes, and with and under the powers, conditions, and declarations after mentioned:—(First) My trustees shall pay the expenses of executing this trust; (Second) My trustees shall during my lifetime pay to me during the whole days of my life the free annual income of the said trust estate before conveyed . . .; (Third) My trustees shall on my death pay to my widow, should I be married and be survived by her, so long as she shall remain my widow, the free annual income of the said trust estate before conveyed as aforesaid, declaring that the said provisions in favour of me and of my widow, shall be for my and her respective liferent alimentary use allenarly, and shall not be affectable by my or her debts or deeds, or by the diligence of my or her creditors; (Fourth) My trustees shall hold the capital of the said trust estate for behoof of my lawful issue, divisible between or amongst them, if more than one, in such shares and proportions as I shall appoint by any writing under my hand, and failing such apportionment then equally between or amongst such children; (Fifth) In the event of there being no lawful issue who shall acquire a vested right to the capital of the said trust estate under the provisions hereinafter written, my trustees, upon the death of the survivor of me and my widow, shall assign, dispone, convey and make over (First) one-half of the capital of the said trust estate to my brother, the said David Stanley Bertram, and to his heirs and assignees whomsoever; and (Second) the other one-half to Dorys Jessie Bertram, my step-sister, and to her heirs and assignees whomsoever. . . . [*The deed then dealt*

with the period of vesting in and of payment to the truster's issue, if any, and the trustees' powers of investment] . . ."

The case stated—"5. The second party at the date of the said deed of trust was and he is still unmarried.

"6. The second party has no estate apart from his interest in the estate conveyed by him to the first parties. He is anxious to raise some capital in order to start in business. He therefore desires to revoke the said deed of trust, and has called upon the first parties, upon his so revoking, to denude themselves of the trust thereby created.

"7. The first parties maintain that the said deed is irrevocable, and that they are bound to preserve the trust estate for behoof of the second party and of all other parties who may be beneficially interested in its provisions. The first parties also maintain that the second party cannot assign his alimentary liferent interest under the said deed. . . . The third and fourth parties adopt the contentions of the first parties.

"8. The second party maintains that the said deed of trust is revocable by him, and that he is entitled to revoke it accordingly, and that on his executing a deed of revocation in common form the first parties are bound to denude themselves of the office of trustees conferred upon them by the said deed of trust and to reconvey the trust estate to the second party. The second party also maintains that in any event the liferent conferred upon him by the said deed of trust is assignable by him. . . ."

The *questions of law* were, *inter alia* —"(1) Is the said deed of trust revocable by the second party to the extent and effect of entitling him upon his executing a deed of revocation to demand that the first parties should denude of the trust thereby created and reconvey the said trust estate to the second party? (2) Is the alimentary liferent interest of the second party in the income of the trust estate conveyed by the said deed of trust assignable?"

Argued for the first, third, and fourth parties—This deed being in no sense a deed for administrative purposes or of a testamentary character, was irrevocable—*Allan* v. *Kerr*, October 21, 1869, 8 Macph. 34, 7 S.L.R. 9; *Robertson* v. *Robertson's Trustees*, June 7, 1892, 19 R. 849, 29 S.L.R. 752; *Shedden* v. *Shedden's Trustees*, November 29, 1895, 23 R. 228, 33 S.L.R. 154; *Lyon* v. *Lyon's Trustees*, March 12, 1901, 3 F. 653, 38 S.L.R. 568; *Walker* v. *Amey*, January 11, 1906, 8 F. 376, 43 S.L.R. 242; *cp. Byres' Trustees* v. *Gemmell*, December 20, 1895, 23 R. 332, 33 S.L.R. 236. Whether the granter had children or not did not matter. No circumstance outside the deed could be noticed. The effect and operation thereof must be construed as at the time it was granted—*Mackie* v. *Gloag's Trustees*, March 6, 1884, 11 R. (H.L.) 10, L.-C. Selborne at p. 15, Lord Watson at p. 17, 21 S.L.R. 465, at pp. 467 and 468; and where an interest was given to children the deed was irrevocable—*Mackie, cit. sup.*; *Middleton's Trustees* v. *Middleton*, 1909 S.C. 67, 46 S.L.R. 48. It was questionable whether a party having an alimentary right could assign it—*Cuthbert* v. *Cuthbert's Trustees*, 1908 S.C. 967, 45 S.L.R. 760. There was no case where a deed was in part revocable, and in part irrevocable. Ersk. Inst. iii. 5, 2, and *Hughes* v. *Edwards*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911, were also referred to.

Argued for the second party—Any declaration by the granter making the income alimentary could be recalled by him, as it was his own deed. The trustees had not observed the distinction between the case where a man was dealing with his own estate and where it was not so—*Lord Ruthven* v. *Drummond*, 1908 S.C. 1154, 45 S.L.R. 901. Further, there was a presumption that if one part of a deed was revocable, the whole deed was revocable. No doubt the general law was as laid down in the cases quoted by the trustees, but the particular terms of this particular deed showed that it was intended for the purpose of administration. It was a question of intention in every case. The trustees must show an intention to create an immediate beneficial interest in favour of somebody else. The case would be different if the granter had children; they would have a *jus quæsitum*, but the destination-over to the brother and step-sister was purely testamentary. There was nothing to show that the deed was contractual. Its purpose was to provide for the wife and children of the granter in the event of his entering into a marriage—*Watt* v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267. In any case the granter was entitled to use the income as a fund of credit.

LORD LOW—It is not easy to reconcile all the decisions which have been given on the question whether a trust deed is revocable or not, but there are certain principles which may be gathered from the decisions, and they have been nowhere better stated than by Lord Dundas in the case of *Walker* v. *Amey* (1906, 8 F. 376). He says—"The question must always be one of intention, whether, on the one hand, the granter intended the trust to be one merely for the administration of his affairs, he retaining the radical and beneficial interest in the estate conveyed, and being entitled to revoke the deed at pleasure; or whether, on the other hand, he must be held to have divested himself of the estate so as to enable the trustees to hold it against him." That being the general principle, the precise provisions of this deed must be considered. It is clear that the principal objects for which Mr Bertram granted the trust deed were (first) that he should be protected against himself by being limited to an alimentary liferent, and (second) to provide for his wife and children in the event of his being married. It is certain that the first of these purposes will not render the deed irrevocable. A man may think it prudent to protect himself against his own facility or improvidence, and for

that object may convey his estate to trustees, but if he changes his mind he is entitled to revoke the deed and to call on the trustees to denude.

As to the second object, if Mr Bertram had married and had children, that might have rendered the deed irrevocable. But then he did not marry, and there is no person in existence who has acquired an interest or *jus quæsitum* which entitles him to found on this part of the deed. So far as regards the two main objects of the deed, therefore, I am of opinion that Mr Bertram was not debarred from revoking. But then it is said that he cannot revoke because he has given an interest which he cannot take away to his brother David Stanley Bertram and to his step-sister Dorys Jessie Bertram. That contention can only be well founded if it appears from the deed that the granter's intention was to confer a present right on these beneficiaries, although subject, it may be, to contingencies.

Now the way in which this matter comes into the trust deed is as follows:—By the fourth purpose the trustees are directed to hold the capital for the lawful issue of the truster, and by the fifth purpose it is provided that "in the event of there being no lawful issue who shall acquire a vested right to the capital of the said trust estate . . . . my trustees upon the death of the survivor of me and my widow shall assign, dispone, convey, and make over (First) one half of the capital of the said trust estate to my brother the said David Stanley Bertram, and to his heirs and assignees whomsoever; and (Second) the other one-half to Dorys Jessie Bertram, my step-sister, and to her heirs and assignees whomsoever." Now that appears to me to be a provision of a purely testamentary nature intended to prevent the estate falling into intestacy in the event of the truster marrying and being predeceased by all his children. I am therefore of opinion that the first question should be answered in the affirmative, and that being so it is unnecessary to consider the other questions.

LORD ARDWALL and LORD DUNDAS concurred.

The LORD JUSTICE-CLERK was not present.

The Court answered the first question in the affirmative, and that being so found it unnecessary to answer the other questions.

Counsel for the First, Third, and Fourth Parties — Wilton. Agents — Cuthbert & Marchbank, S.S.C.

Counsel for the Second Party — A. R. Brown. Agents—M. J. Brown, Son, & Company, S.S.C.

Thursday, June 24.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

HOULDSWORTH *v.* GORDON CUMMING.

Sale — Sale of Heritage — Subject Sold — Extrinsic Evidence — Competency of Parole Evidence to Explain Written Contract of Sale.

In December 1907 A purchased the "estate of D" from B under agreement constituted by correspondence. The parties thereafter differed as to what precisely was included within the estate which was sold, though they were agreed that a binding contract had been concluded between them. A accordingly raised an action against B for the purpose of obtaining implement of the contract by a valid conveyance of the subjects which he alleged he had purchased. He asked for a conveyance of the lands of D as the same were described in an instrument of disentail, which was the latest infeftment of the estate. The defender on the other hand averred that what he had sold to the pursuer was not the estate of D as described in the title-deeds thereof, but the estate of D as shown in a lithographed plan dated 1887. He further averred that in the course of the negotiations preceding the sale the pursuer's factor was furnished by the defender's factor with a copy of the plan as showing the lands to be sold, and the negotiations for the sale were throughout conducted, and the missives founded on exchanged, on the footing that the estate of D consisted of the lands shown in pink on the said plan. The plan was not referred to in the contract, nor was it signed by the parties as relative thereto. The parties having been allowed a proof of their averments, proof thereof was taken.

Held (*rev.* Lord Mackenzie) that, assuming the evidence with regard to the negotiations to have been competently led, the defender had not, on that evidence, proved that what he had sold to the pursuer was the estate of D as delineated on the plan, and that the pursuer was entitled under the agreement to a conveyance of the estate of D as possessed by the defender and his predecessors under the title-deeds thereof.

Question whether the evidence as to the negotiations of parties should have been admitted.

Opinions (*per* Lords Low and Ardwall) that where lands are sold by name extrinsic evidence is competent, and may be necessary, but only to identify the subject-matter and show what are the exact boundaries or extent of the lands described in and possessed under the title-deeds thereof.