by the terms of the report, is, that the pursuer, unable to say the deed was effectual to form in itself the first step in the creation of a real burden, yet maintained that it was clear the testator meant to do what he had failed to do, and that in some way the defender, as the law-agent completing the title, was bound to give effect to this intention, and to see that the legacy in the pursuer's favour was made a real burden on the lands. The deed contained no terms of obligation on the general disponee to constitute a real burden, and no condition that by acceptance of its benefits he should become bound to do so, and my opinion was and is that in these circumstances the mere ineffectual attempt by the testator to create a real burden did not infer such an obligation, and that at all events it could not confer any obligation on the law-agent there sued. If the judgment of the learned Judge, Lord Mure, and of myself, and the general concurrence of my learned brother Lord Adam, be read in the light of what I have now said, I think it becomes apparent that the rubric of the report is correct in stating as merely "Opinion (per the Lord President)" the *dicta* by his Lordship, which have been so fully discussed in the House and in the Court below. I think it is clear that his Lordship's views as so expressed were not the ground of decision of the case, and were not necessary as grounds even of his Lordship's judgment.

On the question itself, which now I think occurs for decision for the first time, I agree with the views of my noble and learned friends. I have already adverted to the fact that the disponee has himself recognised the validity of the real burden, or at least has by the mode of making up his title accepted the lands expressly under the real burden which by his act now qualifies his absolute right on the record. I should be very unwilling to hold that in such a case the disponee's own interpretation of the effect of the general disposition, and his election (even were it an election only and not an obligation) to make the burden real by registration, would not be effectual. I agree with my learned brother Lord Rutherfurd Clark in the view which he thus expresses—"He made up his title in such a form as he thought would be effectual to make the burden real. The question is whether the form was sufficient for that purpose, and that question cannot, in my opinion, depend on the rights or obligations of the grantee, but on the legal effects of the title which he has actually made up."

This view is sufficient for the decision of the case. But I must add that I also agree in holding that a general disponee who obtains his right by a conveyance in apt terms, qualified or restricted by a declaration that the general disposition is subject to real burdens, is bound to give effect to this declaration, and can be required to do so by having these burdens entered in the register of sasines; and adopting the reasons stated by your Lordships and by Lord Rutherfurd Clark in his carefully reasoned opinion, I also hold that this can be effectually done by a registered notarial instrument under the statute, in the mode adopted in the present case.

On the question of costs, WILSON, for the respondent, submitted that costs should only be given against the respondent *qua* trustee.

LORD WATSON—The trustee must litigate at his own expense. That has been decided again and again.

MR WILSON—He has a judgment of two Courts in Scotland in his favour, and I should submit that the case of *Williamson* v. *Begg* justified his proceeding.

LORD WATSON—If he chooses to litigate he must see that the creditors back him, or he must sue himself personally.

LORD SHAND—Quite so.

The House reversed the decision of the Second Division and allowed the appeal with costs.

Counsel for the Appellant—T. Shaw—Greenlees. Agents—Keeping & Gloag, for A. Lawrie Kennaway, W.S.

Counsel for the Respondent — John Wilson — Le Breton. Agent — Andrew Beveridge, for Welsh & Forbes, S.S.C.

Monday, July 24.

Before the Lord Chancellor (Herschell), and Lords Watson, Macnaghten, Morris, and Shand.)

MACDONALD AND ANOTHER *v.* HALL AND OTHERS.

(*Ante*, vol. xxix. p. 465, and 19 R. 567.)

Succession—Antenuptial Contract of Marriage — Provisions for Grandchildren, whether Onerous or Testamentary—Subsequent Trust-Disposition and Settlement by the Husband — Power to Increase Wife's Provisions.

A husband by an antenuptial contract of marriage disponed his whole estate, heritable and moveable, to his wife in liferent and to the child or children of the intended marriage, and the issue of the bodies of such children, whom failing to his own heirs whomsoever in fee, under a declaration that if there was no child alive at the dissolution of the marriage the wife's liferent should be limited to £150. There was no trust created by this deed, and the husband retained his whole estate in his own possession until his death. He died, predeceased by his only child, and survived by his wife and one grandchild, leaving a trust-disposition and settlement executed a few years before his death under which his wife was given the unrestricted liferent of

his whole estate. After her death his whole estate was to be converted into money, his grandchild was to receive a legacy upon attaining twenty-one years of age, and after payment of other legacies the residue of the estate was to be divided among the nephews and nieces of himself and of his wife.

Held (*rev.* the decision of the First Division) that the conveyance to the issue of children of the marriage was contractual and irrevocable, and conferred on the grandchildren a protected *spes successionis*, which could not be defeated by their grandfather's settlement.

This case is reported *ante*, vol. xxix. p. 465, and 19 R. 567.

Macdonald and Mrs Hall appealed.

At delivering judgment—

LORD CHANCELLOR—In this action of multiplepoinding the contest arose with regard to the rights or alleged rights acquired under a marriage-contract of the 7th of May 1849. By that marriage-contract it was "contracted and agreed and matrimonially ended between the parties following, viz., Andrew Hall, farmer, Scribercross, on the one part, and Miss Jane Chisholm Scott, daughter of John Scott, Esq. of Ashtrees, on the other part, in manner following, that is to say, the said parties have accepted of each other and hereby accept of each other for lawful spouses, and promise to solemnise the bond of marriage with all convenient speed agreeably to the rules of the Church. In contemplation of which marriage the said Andrew Hall hereby assigns, dispones, and makes over to and in favour of the said Jane Chisholm Scott, his promised spouse, in liferent for her liferent use allenarly, subject to the restrictions in the events after mentioned, and to the child or children of the said intended marriage and the issue of the bodies of such children, whom failing, to the said Andrew Hall's own heirs and assignees whomsoever in fee, all and sundry" his "lands and heritages, goods and gear, debts and sums of money, household furniture of every description, and in general" his "whole estate and effects."

Andrew Hall died leaving his wife surviving, and leaving surviving also an only child of a daughter of the marriage. There were no other children of the marriage except this daughter.

The first and the main question which arose in the action was whether the contract of marriage gave to the grandson whom I have mentioned a pactional and onerous right which could not be defeated by a testamentary disposition of his grandfather, or whether the disposition in favour of the issue of the children of the marriage was gratuitous only, so that it could be defeated by a testamentary disposition of the truster. Now, it is well settled that a disposition made in favour of the children of the marriage under a marriage-contract is pactional and not gratuitous. A disposition such as this of the whole of the truster's property does not confer, of course, an onerous right as against his creditors; but it is certain that as regards the children it does confer an onerous and pactional right in their favour so as to preclude his making any testamentary disposition which would defeat that right. It is equally well settled that a disposition in favour of a stranger to the marriage under ordinary circumstances does not confer any pactional rights, but is to be regarded merely as gratuitous, so that notwithstanding the marriage-contract a good disposition may be made to any other party, which would defeat the right of the stranger who was under the disposition to take benefits. The question is whether grandchildren are in the same position as the children, so that the dispositions in their favour are pactional, or whether their position is that of strangers, so that the disposition would be regarded as gratuitous only.

The learned Judges in the Inner House have determined that in the present case the disposition in favour of the grandchildren was gratuitous merely; and therefore Andrew Hall having by a testamentary disposition disposed of the whole of his estate in liferent to his widow, and subject to that liferent having given to the grandson of the marriage £5000 only, and disposed of the rest of the estate amongst collateral relations, this testamentary disposition has been held effectual to deprive the grandson of the marriage of the rights given to the issue of the bodies of the children of the marriage in the marriage-contract, and to limit the grandson's right to the sum of £5000 only, securing to the widow absolutely her liferent in the whole of the estate. The latter point was of importance, inasmuch as under the marriage-contract, by provisions which I do not think it necessary to trouble your Lordships with, the liferent of the widow was reduced to a sum of in one event £150 a year, and in other events £50 a year, and a discussion arose in the action, upon which there was a determination in the Court below as to whether the events had happened which restricted her liferent to one or the other of those sums. It is unnecessary that your Lordships should pronounce any decision upon that point, inasmuch as it was agreed at the bar on behalf of the appellant that if it should be held that he took a right under the marriage-contract which could not be defeated, he was content that his grandmother should receive in liferent the whole of the property, and had no desire to contend before your Lordships that events had happened which reduced her right to one or other of the smaller sums which I have mentioned.

The sole question, therefore, for determination is, as I have said, whether the claim of the grandson under the words in the marriage-contract was pactional or gratuitous.

There can be no doubt that according to the law of England a stipulation on behalf of a grandchild of the marriage would be regarded as within the consideration of marriage, and binding as completely as any stipulation in favour of a child. But of

course it is necessary in considering the question now before your Lordships to put aside entirely any views derived from a consideration of the law of England, and to devote attention exclusively to what has been laid down by text writers, or is to be found in decisions, as to the law of Scotland.

Looking at the matter apart from authority, I confess that none of the arguments which I heard at the bar satisfied me that there was any sound ground for holding that provisions in favour of the issue of the children of the marriage were to be regarded as analogous to stipulations in favour of strangers, and were not within the principles which protect stipulations in favour of the children of the marriage, and treat them as onerous and not gratuitous. Great reliance was placed in the argument at the bar upon passages to be found in Bankton and Erskine. The passage relied on in Bankton is this,—"Though the children are creditors in such provisions with respect to gratuitous deeds made in contravention thereof, yet this extends not to the substitutes failing children, for the children only are *in obligatione* in whose favour the provision as binding was made, the intention of parties being only to secure their interest; but other substitutes are only *in destinatione*, heirs by simple destination, and so may be disappointed of their hope of succession at pleasure as any other heirs by naked destination."

Now, I am not satisfied that in that passage upon which so much reliance is placed there was any intention on the part of the learned writer to draw a distinction between children and the issue of children—those who are descended from and the fruits of the marriage. A distinction is drawn between children and those who are strangers, and I do not think that there was any intention by the use of the word "children" in the passage which I have read to exclude grandchildren, and to indicate that in the case of grandchildren no onerous right is created.

The passage in Erskine upon which reliance was placed runs thus—"The father lies under no degree of restraint in favour of the substitutes who are called by the marriage contract after the issue of the marriage, and who acquire no right by such substitution." Now, it seems to me that in the natural meaning of the words "issue of the marriage," the grandchildren are included as much as the children. I do not accede to the argument that the primary meaning of "issue" is "children" only, and that it is departing from the primary meaning if in "issue of the marriage" you include the children of children. Therefore, as I read the passage in Erskine, so far from its favouring the view contended for on the part of the respondents, it really favours the view for which the appellants argued.

It is certain that it is elsewhere laid down by Bankton that the heirs of the marriage take pactionally, and that Bankton in the passage in which he refers to the rights which the heirs thus acquire includes in "heirs" not merely the children but the children of children.

It was said in the Court below that the point was really determined in favour of the respondents by the decision of the Court of Session in the case of *Pretty* v. *Newbigging*. That, so far as I can see, was the only authority, apart from the text writers to whom I have called attention, upon which reliance was placed by the Court below. In *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667, the question which arose was this: The person who made the settlement having died leaving a widow entitled to a liferent, and an only child, the question was whether if the widow renounced her liferent the child could call for an immediate conveyance from the trustees. The point decided was that inasmuch as the terms of the contract did not show any intention that this should not take place for the purpose of securing and continuing the liferent to the widow, by the widow renouncing the liferent the child was in a position to call upon the trustees for a conveyance.

With all respect, I am unable to see that the decision in the case of *Pretty* v. *Newbigging* determines the point now before your Lordships. It appears to me that if it had been absolutely settled law that a grandchild took a pactional right just as much as a child, the decision in *Pretty* v. *Newbigging* must have been precisely the same.

When the authorities on the other side are examined, it appears to me that they are decisions of great weight, which point in the contrary direction, and they lead me to a different conclusion from that arrived at by the Court below. I do not intend to detain your Lordships by any minute examination of those authorities, inasmuch as I have had an opportunity of reading the opinion which my noble and learned friend Lord Watson will presently deliver, and I entirely concur in the views which he will express as the result of his examination of the authorities; but I would say that there is one authority which appears to me most strongly to favour the view of the appellants. I do not suggest that the other authorities are not of the very greatest weight, where it is clearly shown that the rights acquired by the heirs of the marriage are acquired as much by the heir, who is the son of the eldest son, as they are acquired by the eldest son himself, and that the settlor can no more defeat the right of his grandson under a provision in favour of the heirs of the marriage by a disposition in favour of younger children than he can defeat the right of the eldest son. But the case which, as it seems to me, is perhaps, in respect of the inevitable inference from the decision, most strongly in favour of the appellants is the case of *Arthur & Seymour* v. *Lamb*. In that case the provision was in favour of the children of the marriage, but it was held by the Court of Session that where a child had died leaving a child surviving, the provision in favour of children of the marriage enured for the benefit of the grandchild, and that this right so obtained could not be defeated by a subsequent gratuitous disposition on part of the

settlor. My Lords, that decision proceeded upon the well-known rule of Scotch law which is known as the condition *si sine liberis*, by which the grandchild is regarded as obtaining the same right as the parent would have had. Now, I quite agree with the view which my noble and learned friend Lord Watson entertains, that it would be strange indeed if by a disposition in favour of the children of the marriage a grandchild obtained a better right than would have been obtained by him or her if the disposition instead of being in favour of the children of the marriage, had been in favour of the children of the marriage and their issue specifically mentioned. It seems to me to be only a logical conclusion from the decision in the case to which I have alluded, that a grandchild must, under a disposition such as that with which your Lordships have to deal, have a right as well secured and as truly pactional as a child.

I do not think that I need trouble your Lordships with any further observations. I have thought it right to indicate the grounds upon which I have come to the conclusion that the judgment of the Court below must be reversed, although, in truth, I need hardly have added anything (except for the purpose of showing that I have independently arrived at this conclusion) to the observations of my noble and learned friend Lord Watson in the opinion which he is now about to deliver.

LORD WATSON—The late Andrew Hall, of Calrossie, was married in May 1847 to the respondent Mrs Jane Chisholm Scott or Hall, and he died in February 1891. One child only was born of the marriage, who became the wife of the Reverend Colin Macdonald, and predeceased her father, leaving issue, the appellant Andrew Hall Macdonald.

In contemplation of their marriage Mr and Mrs Hall entered into an antenuptial contract, by which he assigned and disponed the whole estate then belonging or which might belong to him at the time of his death to his promised spouse in liferent, for her liferent use allenarly, and to "the children of the said intended marriage, and the issue of the bodies of such children," whom failing, to his own heirs and assignees whomsoever in fee. For these causes Mrs Hall, of the other part, conveyed to her future husband absolutely the whole estate then belonging or which might pertain and belong to her during the subsistence of the marriage. In the event of there being more than one child of the said marriage, Mr Hall reserved power to divide and apportion among "the said children" the provisions made in their favour. Issue of children are not included in the power thus reserved, but it is declared that "failing of such division" these provisions shall "belong to and be divided among the said children equally, share and share alike, and to the issue of such of them as may predecease before the said provisions become payable."

I may observe here that issue of children are not called to the succession as substitutes, in the proper sense of that word. They are conditionally instituted, and take, if at all, in the first instance, and *pari passu* with surviving children. Whether they were meant to take as individuals, or as a class, is a matter which does not affect the questions raised in this appeal. My impression is that in competition with children they would only have been entitled to share *per stirpes*.

The liferent provided to the widow, which was subject to restriction in certain events, is declared to be in full satisfaction of her legal claims, but in the case of children there is no exclusion or discharge of legitim. In circumstances other than those which have occurred that omission might have been of great advantage to immediate children. Any child to whom the father had appointed less than his share of legitim could have elected to take the latter. Again, if Mr Hall had only left moveable estate, and had been survived by one child and several families of grandchildren, that child could have claimed one-half of the whole succession instead of the smaller share assigned to him by the marriage-contract.

At the date of his marriage Mr Hall appears to have possessed about £6000. At the time of his death the value of his estate, heritable and moveable, was about £56,000. I need hardly say that the increase of his means between these two periods could not alter his position towards descendants of the marriage whose provisions under the marriage-contract were pactional and not testamentary. On the 4th March 1885 he conveyed to trustees by a testamentary deed the whole estate of which he might die possessed, with directions to them, after payment of his debts, to convey the same to his widow in liferent, for her liferent use allenarly, and on her decease to realise and divide the fee. To the appellant he gave a legacy of £5000, burdened with conditions suspensive of its vesting, and requiring the appellant to assume the name of Hall. The whole remainder was bequeathed to collateral relations of the truster, and other strangers to the marriage.

Provisions to the issue of a marriage may be so conceived as to give them either a right of fee or a *jus crediti*, which will vest as soon as they come into existence, or, as in this case, to give them a *spes successionis*, which will not open until the death of the settlor. It is not disputed that all such provisions made by parents *intuitu matrimonii* are onerous and obligatory, in so far as immediate children of the marriage are concerned. But the effect of the obligation differs in each of these cases. Provisions of fee to children on their birth, through the medium of a trust or otherwise, need not be referred to, because they throw no light upon this case. When the child takes a proper *jus crediti* he can compete with other onerous creditors, and can restrain his parents by legal diligence from alienating or burdening the subjects destined to him. When the provision is of all the estate of which the parent may be possessed at the time of his death the

parent remains full owner, and may, during his lifetime, squander his entire means if he thinks fit. The interest of the child is not that of a creditor but of an heir. Yet inasmuch as the provision is contractual his *spes successionis* is held to consist not in *in destinatione* merely but also *in obligatione*, so that his parent cannot, by any gratuitous deed, create rights which will impair or defeat his *spes*.

If Mr Hall had died without leaving a settlement, the appellant, being the only living descendant of the marriage, would admittedly have taken his whole succession as institute under the marriage-contract whether his right was onerous or gratuitous. The respondents, including Mrs Hall, as trustees under the settlement of March 1885, claim the succession in preference to him, upon the ground that the destination to issue of the bodies of children of the marriage was not a contractual but a testamentary provision, and was therefore competently revoked by the gratuitous disposition which forms their title.

In these circumstances two issues, which were purely legal, were presented to the Courts below: Is the marriage-contract provision in favour of grandchildren pactional and obligatory? If so, is the widow's liferent, in the events which have occurred, restricted to an annuity of £50? The Lord Ordinary (Kincairney) answered both issues in the affirmative, but the learned Judges of the First Division reversed his decision upon the first issue, so that it became unnecessary for them to decide the second. At the bar of the House the appellant, with great propriety, intimated that, in the event of your Lordships reversing the judgment of the Inner House, he did not intend to dispute his grandmother's right to retain the full life estate provided to her by the marriage-contract. That point has accordingly been withdrawn from our judicial cognisance.

In explanation of the grounds upon which the decision of the Inner House proceeded, I cannot do better than refer to the rule laid down by Lord Kinnear, which was repeated in different language by Lords Adam and M'Laren. His Lordship said (19 R. 573)—"The general rule which is applicable to marriage-contracts is that when the husband settles his property, or any part of it, upon the wife and children of the marriage, with a destination to other persons on the failure of children, there is no *jus crediti* given to anyone as against him and his heirs except to the wife and to the children of the marriage, and any clauses of eventual destination to strangers and remoter heirs must be regarded as mere gratuitous destinations, which create no obligation against the granter and his heirs, and which he may therefore defeat at his pleasure." I do not think that the rule thus stated can be impugned, except in so far as it is meant to include heirs or descendants of the marriage of remoter degree than children in the same category with heirs ascendant or collateral and other strangers to the marriage. His Lordship then goes on to say—"The law is so laid down by Erskine and Bankton, and it has received effect in a series of decisions to which I think it quite unnecessary to refer in detail, both because they are very familiar, and because the principle is nowhere more clearly stated than by Lord Watson in the recent case of *Mackie* v. *Herbertson*, March 6, 1884, L.R. 9 Ap. Cas. 303, 11 R. (H. L.) 10.

I take this opportunity of stating that in my opinion the recent case thus referred to, which the Lord Ordinary regarded as an authority against the rule adopted by the Inner House, has really no bearing upon the question now raised for our decision. The appellants in that case were strangers to the marriage, being the children of the wife by a former husband, and their provisions would unquestionably have been revocable and revoked if they had been within the scope of the rule. But they were neither substitutes nor conditional institutes; they were directly instituted along with the children of the marriage, and the judgment of the House in their favour went upon the view taken by Lord Rutherfurd Clark in the Court below, viz., that the parent was completely divested and a beneficial fee vested in them by a delivered conveyance to trustees for their behoof. I regret that the language which I used in *Mackie* v. *Herbertson* should have misled Lord Kinnear as to the interpretation which I put upon the rule as bearing upon this case. It was not my intention to discuss the rule in that bearing, and the construction now attributed to me is one which never occurred to me at the time. I understood then, as I do now, that the expression "issue of the marriage," as it occurs in the text of Mr Erskine, which I cited, was meant by the learned author to embrace every person lineally descended of the marriage for whom a provision is made by the spouses, and that the only persons whose provisions are to be regarded as gratuitous and defeasible at will are relations not descended of the marriage and strangers in blood.

The general rule of the law of Scotland is that every stipulation in a mutual agreement is binding upon the person obliged, whether it be conceived in favour of the other contractor or of a third party. The exception in the case of marriage-contracts, which are the most onerous of all, appears to rest upon the assumption that in instruments of that kind the parties are merely contracting with reference to their matrimonial union and its consequences; and that stipulations which travel beyond these objects, and have no relation to their marriage, though contractual in form, are, *prima facie*, not meant to be so in substance. If the question were an open one, I think it would be difficult to find a satisfactory reason for holding that in contracting with a view to marriage the spouses have not in contemplation the interests of their grandchildren and remoter heirs of the marriage, as well as the interests of their children. I conceive, however, that it is not an open question,

and that its decision must turn, not upon considerations of general policy, but upon Scotch authorities.

The text of Bankton (Inst. i, 5, 9) is to the effect that "where one provides his estate in his contract of marriage to heirs whatsoever of the marriage, he cannot in prejudice of his eldest son, or of his issue, dispone or tailzie the estate in favour of his own second son, though such provisions are chiefly intended to debar the providing the estate to children of another marriage." There can be no clearer authority for the proposition that a grandchild called as a conditional institute, in the character of an heir whomsoever of the marriage, has an interest which his grandfather cannot gratuitously defeat, even though his object be to prefer a child whose right of succession is onerous.

The language used by Mr Erskine in pressing the rule is less precise than that of Bankton. He does not speak of "heirs of the marriage," but of "issue of the marriage" and "issue of the wife," both of which are flexible terms, which may either signify immediate children or remoter descendants of the marriage. The reason which he assigns for the rule appears to me to indicate that he meant to use the words in their wider sense. It is this—"The wife and her relations, who are the only contractors with the husband, are not interested in the succession, except in so far as it is provided to the wife's issue." I can hardly conceive that Mr Erskine should have meant to affirm that the wife and her relations had no interest to stipulate that the provision to her children shall on their predecease devolve upon her grandchildren, who are her own heirs, in preference to the heirs and nominees of her husband.

I therefore construe Mr Erskine's text as stating the same rule which is laid down by Bankton. Assuming that he did understand the rule which he lays down in the sense attributed to him by the First Division, I should regard it as matter of little consequence, because Bankton's rule had been judicially recognised and applied, not only by the Court of Session, but by this House, many years before Erskine wrote, and authority of that kind cannot be impaired by the *dicta* of an institutional writer, however eminent.

One decision relied on by the First Division as directly establishing the doctrine that "the issue of the children of the marriage are in this respect in the same position as any other gratuitous substitutes" is the well-known case of *Pretty* v. *Newbigging*, March 2, 1854, 16 D. 667. In my opinion it has no bearing whatever upon the interests of grandchildren and remoter descendants. The marriage had been dissolved by the death of the father, leaving a widow and no descendant except one unmarried child; and the only question raised for decision was, whether upon the widow's renunciation of her liferent the child was entitled to demand a conveyance of the fee from the marriage-contract trustees. It was adjudged by a majority of the whole Court that the child was so entitled, because, in the first place, the contract did not require that the trust should be kept up for the protection of the widow's liferent, and, in the second place, the beneficial fee had vested in the child.

Stewart v. *Graham* (1744, 1 Paton, 364), which was decided here in the year 1744, is an authority much more in point. By an antenuptial contract the wife had conveyed her estate to the husband, who obliged himself to provide all heritable and moveable estate then belonging to him, and which he should happen to conquest and acquire during the time of the said marriage "to the heirs to be procreate of the said marriage in fee." The eldest and second sons of the marriage predeceased their father, the eldest without issue, and the second leaving one child, a daughter. The father was survived by his granddaughter and several children. Before his death he executed an entail of his lands, passing over his granddaughter, and calling the third son of the marriage, and the heirs-male of his body, in the first place. The Court of Session held (M. Dict. 13,010; and Elchies v. Mutual Contract, No. 20), that the granddaughter took, under the marriage-contract, a right preferable to that of the institute and heirs of tailzie, and set aside the entail as being *in fraudem tabularum*. On appeal their judgment was affirmed by the House. I have examined the printed papers in the appeal, and find that the appellants' case contains no plea to the effect that the granddaughter's provision was gratuitous, the reasons stated against the judgment being that upon a just construction of the marriage-contract, the father, being full fiar, had power to divide the estate among the heirs of the marriage, and could, for sufficient causes (which were said to be proved), exercise that power by displacing the issue of his second son and preferring his third son. From that circumstance I do not infer that the plea urged for the respondents in this case was overlooked; but that the rule laid down by Bankton as to the obligatory character of provisions to the heirs of a marriage was understood by the profession to be settled law.

Macleod v. *Macleod*, July 1, 1828, 6 S. 1043, which was decided by the First Division in the year 1828, although not so near in its circumstances to the present case as *Stewart* v. *Graham*, affords a strong illustration of the same principle. In that case the father by antenuptial contract disponed the estate of Raasay to himself and to the sons to be procreated of the marriage successively in their order of seniority, and the heirs whomsoever of their bodies respectively, whom failing, to the sons to be procreated by him in any subsequent marriage, whom failing, to the daughters of the intended marriage and other substitutes. He reserved power to affect the estate with entail fetters, but not to alter the order of succession. He subsequently executed a deed of tailzie in which he altered the order of succession by postponing the female issue of sons' bodies to

daughters of the marriage. He was survived by one son of the marriage, who made up titles and possessed under the entail, and thereafter brought a reduction of it, on the ground that his father had no power to defeat the right of his daughters as substitutes under the marriage-contract. Now, the father was fiar under the destination in the marriage-contract, and but for the obligations imposed upon him by that deed, could have defeated the rights of all or any of the substitutes including his children. If the destination to female issue of the son had not been obligatory, the entail would have been unimpeachable, because it gave to the son, whose substitution was admittedly onerous, all that he was entitled to by the marriage-contract, namely, a tailzied fee of the estate during his lifetime. The Lord Ordinary and the Inner House Judges concurred in setting aside the entail. The Lord President (Hope) said (p. 1047)—"There is here merely a reservation to entail so as to preserve the estate in favour of the heirs of the marriage, but not to introduce new heirs." And Lord Gillies observed—"I suppose we shall be called on by-and-by to decide whether the eldest son is the heir of his father. I look on this question as equally clear."

I shall only cite one other case—*Arthur & Seymour* v. *Lamb*, June 30, 1870, 8 Macph. 928, 42 Scot. Jur. 542, which was decided by the First Division in 1870 on a remit from the Court of Chancery. Having regard to the ground upon which the respondent's counsel endeavoured to impeach the authority of the decision, it becomes necessary to state not only the facts of the case but the terms of the remit, and the circumstances in which it was made.

Before his first marriage in 1815, Sir Charles Lamb bound himself by a contract with his intended spouse to settle and secure one-half of his estate then belonging to him, or which he might conquest and acquire or succeed to in fee-simple during the subsistence of the marriage, to and in favour of himself in liferent, and "to the children of the said intended marriage in fee." The marriage was dissolved by the wife's decease in 1848. One son was born of it who died in 1856, leaving a widow and four children, and also a settlement by which he conveyed his whole estate to certain persons therein named, and his trustees and executors. His estate was made the subject of an administration suit, in which the Vice-Chancellor gave the trustees leave to file a bill against Sir Charles Lamb for specific performance of the obligations undertaken by him to the children of the marriage by the contract of 1815. A bill was accordingly filed on the footing that the provision had vested in the only child of the marriage, and had passed to the plaintiffs as his trustees and executors. Sir Charles died in 1860, and his widow by a second marriage, whom he had appointed his executrix, universal devisee, and legatee, was made defendant in his stead. A case was then prepared and sent down for the opinion of the Court of Session with the view of ascertaining whether the marriage-contract obligation in favour of children was still binding upon the widow as representing her deceased husband, and if so, whether it had vested in the son of the first marriage. After hearing parties the learned Judges of the First Division declined to answer the queries put to them, because the case did not state whether or not the son had left issue of his body who were surviving at the death of Sir Charles in 1860. They accordingly sent back the case to the Court of Chancery for amendment in these particulars.

An amended case was thereafter sent down, in which particulars as to the then surviving issue of the son, and the pleas maintained by the parties respectively, were fully stated. As therein set forth, the plaintiffs, *inter alia*, maintained (1) that the rights provided to children by the marriage-contract of 1815 vested in the son, and were carried to them by his settlement, and (2) that if these rights did not vest in their author, they vested in his issue upon the death of their grandfather. The defendant, on the other hand, maintained that the provisions created no *jus crediti* in the child during his father's lifetime, and that being conceived in favour of children only, they lapsed by the child's predecease. The Court of Session was asked to decide whether and how far these respective contentions were well founded, and also, in the event of all or any of them being erroneous, what was the true legal interpretation, and what would be the legal effect and operation of the marriage-contract of 1815. It appears from the report of the case (8 Macph. 930-931) that all these points were fully argued. The First Division unanimously found that Sir Charles Lamb continued to be fiar during his lifetime of the estate settled upon the children of the marriage by the contract of 1815, so that their right of succession did not open until his death, that no *jus crediti* vested in the son of the marriage which he could dispose of by will, and that the provision did not lapse by his predecease, but subsisted in favour of his issue, whose right could not be defeated by a gratuitous deed. The last of these findings, in so far as it relates to the legal substitution of issue of the predeceasing child, was accepted as authoritative by this House in the recent case of *Hughes* v. *Edwards*, L.R., 1892, App. Cas. 583, 19 R. (H. of L.) 33.

It was argued for the respondents that the decision is of no authority, because the grandchildren whose right it affirms were not parties to the litigation. I am unable to take that view, because the point decided was directly and competently raised by the remit, and was fully argued by the trustees on the one hand, and on the other by the widow, who was the only person interested in maintaining that the provision had lapsed. In these circumstances I think the decision ought to be regarded as a deliberate and weighty expression of judicial opinion.

So far as I have been able to discover, the only differences between the facts of this case and the facts upon which judgment proceeded in *Stewart* v. *Graham* and *Arthur & Seymour* v. *Lamb*, are the following—In both these cases the father did not convey, but came under an obligation to convey, whereas in the present case, instead of obliging himself to do so, he made a conveyance. Again, in *Arthur & Seymour* v. *Lamb*, the provision was to "children of the marriage," and not as in *Stewart* v. *Graham*, to the heirs to be procreate of the marriage, or, as in this case, to children and the issue of their bodies. Notwithstanding these *differentiæ*, I think there is no room for drawing a distinction in principle between the three cases. To my mind it is simply inconceivable that, as the respondents maintained, an antenuptial conveyance by a parent to children or heirs of the marriage should be gratuitous and not binding upon him, and that his antenuptial undertaking to convey the same estate and in the same terms should be onerous and obligatory. The other difference, which occurs in *Arthur & Seymour* v. *Lamb*, is, in my opinion, most unfavourable to the respondents, because it establishes that, where the destination is only to children of the marriage, the issue of a predeceasing child take, by virtue of the condition *si sine liberis*, a right to his provision, which is protected against the gratuitous deeds of their grandfather. It is not easy to understand why substitutes introduced by legal presumption, in deference to the presumed will of the spouses, should take a higher right than they would have done if they had been called expressly.

There is really no conflict of authority upon the present question, the cases are all one way, not a single decision was cited at the bar in which it was held, or even suggested, that an antenuptial provision by one or other of the spouses, to descendants of their marriage, is not onerous as regards every such descendant in a question with the settlor. If any such case exists, which I venture to doubt, I have been as unsuccessful as the respondents' counsel in my endeavours to find it.

I think it right to notice that the respondents strongly relied upon the case of *Routledge* v. *Carruthers* (1816, 4 Dow, 392, and 1820, 2 Bligh, 692) as leading necessarily to the inference that provisions to heirs of the marriage more remote than children are gratuitous. That case establishes that when a father by antenuptial contract settles an estate upon himself with a substitution to children of the marriage (1) he can satisfy the provision by propelling the estate during his lifetime to the heir-apparent of the marriage, in prejudice of heirs who might have taken at his death, and (2) inasmuch as the expectant heir could reconvey the estate to the settlor immediately after its acceleration, he can by a transaction with the settlor discharge the provision, and thereby extinguish the rights of the other substitutes as well as his own. The rule is an anomaly, and in my opinion any inferences drawn from it for the purposes of this case might be very apt to mislead. I greatly doubt whether it has any application to cases in which the provision is of a *spes successionis* merely. I think Lord Eldon would in all likelihood have reversed the judgment appealed from, had it not been that a majority of the consulted Judges found, upon a question specially remitted for their consideration, that at the date of the transaction impeached, Mrs Routledge, the expectant heir, was "vested in the *jus crediti* under her marriage-contract, 1375, so as to give her power to discharge the obligation thereby incumbent on her father."

But assuming the rule of *Routledge* v. *Carruthers* to rest upon intelligible principle, and to apply in cases where the heirs of the marriage take a *spes successionis*, and not a *jus crediti*, how does it tend to support the conclusion that heirs who are children take an onerous, and heirs who are grandchildren a gratuitous right? The rule operates in the same way, and with precisely the same results, against the substitutes of either class. Propulsion by the parent settlor to the apparent heir, or a discharge of the marriage provision by the latter, extinguishes the right of substitutes who are children, and whose right is admittedly onerous, as effectually as the rights of grandchildren and remote descendants whose right is said to be gratuitous.

Entertaining these views I have no difficulty in coming to the conclusion that the appellant must prevail in competition with the respondents for the fee of his grandfather's estates.

LORD MACNAGHTEN — I have had an opportunity of reading the opinion which has been expressed by my noble and learned friend Lord Watson, and I entirely agree.

LORD MORRIS—My Lords, I concur.

LORD SHAND—My noble and learned friend Lord Watson was good enough to communicate to me the opinion which he has now delivered, and which contains a very careful statement of the grounds on which he rests the conclusion that the decision in the Court below should be reversed, and that the appellant should be found entitled to the estate left by his grandfather. I concur in his Lordship's views, and I shall content myself with merely adding a few general observations, for I could not hope to put the special grounds, on which the judgment of the House must rest, in more apt and clear language, and mere repetition would serve no good purpose.

By his antenuptial contract of marriage Mr Hall, the pursuer's grandfather, conveyed to the child or children of the intended marriage, and the issue of the bodies of such children, not only the estate of which he was then possessed, which was not of large amount, but the whole estate, real and personal, of which he might die possessed. Jane Chisholm Scott, after-

wards Mrs Hall, at the same time conveyed in favour of her intended husband and his heirs such estate as she then possessed or might acquire during the subsistence of the marriage, and the marriage followed on the faith of the deed. The parties are agreed that neither children of the marriage nor grandchildren could maintain that the deed conferred on them a *jus crediti* in Mr Hall's estate so long as he lived, for the reason that down to the time of his death he was entitled to deal with that estate as his own, and without control of any kind. And the single question to be determined is, it being conceded that any child or children of the marriage surviving Mr Hall had a *spes successionis* protected—a protected right of succession—which their father could not defeat by *mortis causa* deed (except to a certain extent it might be in the event of his marrying a second time), whether failing a child by his predeceasing his father, his child, a grandchild, has or has not the same protected *spes successionis*.

The learned counsel for the respondents pressed strongly on the attention of your Lordships, as an element which ought to receive great weight, the consideration of the hardship that must result in the present case, as in other cases of the same class, from the circumstance that if the claim of the pursuer should receive effect, this affirms the view that Mr Hall, however large his means might have grown to be at his death, could not make a bequest even of small amount to any person, or for any purpose he might desire. To some extent this observation is met by the circumstance that what may not be done by testament can be done during life by one who has complete control over his estate. But I confess it has been surprising to me that settlements, even on the occasion of marriage, should so often contain a clause even in favour of children disposing of *acquirenda*, and embracing the whole of the estate of which a parent shall die possessed, however large, without even a reserved power to deal with part of it. I suspect this has arisen in a great measure from the adoption of words which are given in books of style, and without due consideration of the important consequences. But however this may be, if the terms used be clear and unambiguous, as they are in this case, they must receive effect. It is unquestionable they must do so in the case of children. The sole point for determination is whether grandchildren, failing their parents, have not by virtue of the contract the same rights; and the decision of that question must be the same whether the obligation of the contracting spouses or the terms of the words of destination in the conveyance relate to *acquisita* only or to *acquirenda* also. In both cases alike it must depend on the legal effect of the terms used.

The destination in this case is to children "and the issue of the bodies of such children." These words obviously create a conditional institution, not a substitution, and the provision is to be read as if it were expressed as failing children then to grandchildren, or it may even be descendants of children of a remoter degree than grandchildren. Was it then a part of the contract—a consideration on the faith of which the marriage took place—that grandchildren failing their parents should have by the terms of the destination in the deed a protected right of succession, or is the provision in favour of grandchildren voluntary and testamentary merely on the part of Mr Hall, and liable to revocation by him at any time by a *mortis causa* deed?

If the question were now to be presented for the first time, and without authority on either side, I confess I should have no difficulty in holding (what I understand to be the view acted on in England) that failing children, their descendants are within the consideration on which the marriage takes place. For myself, I do not attach the weight which Judges from time to time have done in elaborate opinions, in the class of cases to which I shall afterwards advert, to the fact that children have rights of legitim or even rights of maintenance, as indeed grandchildren also have when, failing their parents, necessity arises — a right and obligation which indeed it may be observed is reciprocal in its nature. I do not think that contracting spouses or their advisers have any such matters in view as a moving consideration for settling either an intended husband's or wife's means on children or descendants—though a man of business will very properly in many cases in preparing an antenuptial settlement exclude future claims of legitim. Indeed, in the case of means settled by a wife, no such consideration arises, and it will not be suggested that the same terms of obligation or of destination would be interpreted differently in the case of a husband from that of a wife. The consideration of the marriage, based on grounds of presumed natural affection, cannot, I think, be confined to children only, but extends to issue of the marriage in the wide sense of the term, including certainly grandchildren, but even remoter descendants, and I think the great strength of the presumption *si sine liberis* in the case of parents or of persons about to marry who have made provisions expressly in favour of children only with substitutions in favour of others is to a great extent to be traced to the same source, viz., presumed natural affection, which applies so as to bring in grandchildren by implication to the exclusion of substitutes, even though these may be heirs in the collateral line of succession.

But I am also of opinion, with reference to the authority of the institutional writers and the cases fully referred to in the judgment of my noble and learned friend, that the pursuer is entitled to succeed in his claim. The three cases of *Stewart* v. *Graham, Macleod* v. *Macleod*, and *Arthur & Seymour* v. *Lamb* do not appear to have been under the consideration of the learned Judges of the Court of Session, or indeed to have been cited in the argument—and

the last of these cases, decided in 1870, containing an obligation in favour of children only of the intended marriage, seems to me to be directly in point and to have been well decided. In that case, as here, Sir Charles Lamb's marriage-contract provision related to all estate which he might acquire during the subsistence of the marriage. His son predeceased him but his grandchildren were held to have a protected right of succession which he could not defeat—and this was so held, as I think, in conformity with the principle supported by the earlier authorities, even though there was not as in this case any direct mention of grandchildren, on the ground that under the condition *si sine liberis* it must be presumed that grandchildren were called to the succession, failing their parent the son of Sir Charles Lamb. The clause in that case was one of obligation and not of destination, but that could in my opinion make no difference. The obligation was to "settle and secure" the estate in favour of himself in liferent and "to the children of the said intended marriage in fee," and that obligation would have been in terms fulfilled if Sir Charles Lamb had executed a conveyance embodying these words as the destination. The meaning and legal effect of the words however must be the same, whether taken from the obligatory clause of the marriage-contract or from the dispositive clause in the conveyance or settlement. This disposes of one distinction which the respondents' counsel endeavoured to draw between that case and the present. The other criticism of the case, already noticed by my noble and learned friend, that it was decided in favour of the grandchildren although they were not represented in the suit, would seem to me, if it were so, to make the decision all the stronger when given in their favour. But their interests were obviously represented by the trustees under the settlement in competition with his widow, who claimed to be universal legatee, and the Court were appealed to to say "what was the true legal interpretation, and what would be the legal effect and operation of the marriage-contract?"

Their Lordships in the Court of Session have referred to certain cases which, in the view of the legal effect of the deed which they adopted, seem to them to have an important bearing on the matter in controversy. Of the case of *Mackie* v. *Herbertson* or *Gloag's Trustees* I have only to say that it seems to have been decided on the view already explained, that the parent had, by the trust created and by having parted with the property in question, entirely divested himself of the estate in favour of the beneficiaries under the trust, so that no deed such as Mr Hall's settlement in this case could any longer affect the property. The cases of *Pretty* v. *Newbigging*, *Routledge* v. *Carruthers*, and other cases of that class, undoubtedly involved an examination in many instances of the nature of the rights of children and of grandchildren under obligations or destinations somewhat similar to that which occurs in this case, and there are in these cases numerous *dicta* by different Judges of a very conflicting nature, which no doubt have a bearing on the question here in controversy. But any bearing they may have is only indirect when it is kept in mind what was the question to be determined in these cases. In all of them that question was really whether the term of payment or of fulfilment of the obligation or destination by the parent could be accelerated or anticipated by the renunciation of a liferent, or by propelling the fee so as to enable the child or first heir having right to the benefit of the obligation or destination to receive that benefit, or to transact with the parent in regard to it and grant a discharge with the result that a grandchild or other heir called failing children would have his *spes successionis* superseded or defeated. It has been repeatedly held that this could be done. But the ground of decision in these cases was not that the parent could at his own hand defeat the right of the grandchild or other conditional institute by executing a *mortis causa* deed by himself alone in favour of other beneficiaries, strangers, but only that he could give fulfilment of the obligation or destination to the heir first called by conveying or renouncing his own right, and so might also transact with that heir to acquire his right, on the footing that this had been done.

In this view the principle regulating these cases appears to be that the heir, called by Lord Rutherfurd Clark in the case of *Pretty* v. *Newbigging* the "primary creditor," has received, or in cases of transaction is held to have received, the benefit, and the "subordinate right" of the conditional institute is extinguished. If, however, no such transaction has taken place with the heir first called, and that heir should predecease his parent, these cases are no authority for the proposition that the parent can thereupon by his own *mortis causa* deed in favour of a stranger defeat the right of a grandchild called to the succession on the failure of children. There it might be suggested (I do not say it would be possible in the absence of any vested right in his daughter) that if Mr Hall in this case had procured a discharge by his daughter, the only child of the marriage, of the provision of the deed in favour of children and so had satisfied her *spes successionis*, the authorities referred to would have applied, and the grandchild's right would have been defeated. This would only have been in the view, however, that the term of fulfilment of the destination had been by transaction accelerated, and fulfilment had taken place. The case is quite otherwise where as here there has been no such transaction to affect the *spes successionis* of the grandchild which is protected against the *mortis causa* act or deed of the father alone. I feel, as my noble and learned friend does, that the decisions to which I have referred present an anomaly, and it may be the principle on which they proceed is not altogether satisfactory—as indeed there is reason to suppose Lord Eldon thought. That prin-

ciple is, however, clearly fixed and settled in the law, and must receive effect in cases to which it is applicable. But it appears to me it has no application in a case like this where there was no transaction between Mr Hall and his daughter, and nothing has occurred which could entitle Mr Hall alone to defeat his grandchild's protected *spes successionis* or right of succession against his *mortis causa* deeds.

I must add that it is satisfactory to me that your Lordships have not been called on to decide how far the widow could have claimed her liferent right, or how far the annuity in her favour should be reduced to a very much smaller amount. The counsel for the now successful party have agreed, and I think very properly agreed, that the provisions in favour of the widow should stand as a matter of arrangement between them.

Upon these grounds, concurring as I do with what has fallen from my noble and learned friend on the woolsack, and my noble and learned friend Lord Watson, I am of opinion that the decision in this case ought to be reversed.

THE LORD ADVOCATE—My Lords, before your Lordship puts the question, may I say that it has occurred to counsel on both sides that we were not quite certain whether in making the concession of the liferent in favour of the widow we had made it clear to the House that it was intended to be subject to the obligation on the part of the widow to support the grandchild under the clause in the deed. We are quite agreed that it should be so.

LORD WATSON—Would it be sufficient to give her the liferent?

THE LORD ADVOCATE—The only thing about it is this: I will just remind your Lordships of the words of the clause. The liferent is given, and then this follows:—"But declaring always that the said Jane Chisholm Scott shall be bound and obliged out of the said liferent to maintain and educate respectively until majority the children of the marriage." Of course with regard to the word "children" it might be open to question whether the word "children" included the grandchild, but the reasoning of the Court seems to indicate that it did. We are quite agreed upon that, subject to your Lordships' approval.

The House reversed the decision of the First Division and granted costs out of the estate.

Counsel for the Appellants—Lord Advocate (J. B. Balfour, Q.C.)—Graham Murray, Q.C. Agents—Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Solicitor-General for Scotland (Asher, Q.C.)—Walton. Agent—A. Beveridge, for Thomas White, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, December 12.

(Before the Lord Justice-Clerk.)

H.M. ADVOCATE *v.* MONSON.

Justiciary Cases—Murder—Proof—Competency—Photograph Recovered too Late to be Libelled in Productions.

In a trial upon charges of attempt to murder, and murder, one of the two accused was fugitated. The police recovered, but too late to be libelled among the productions, a photograph which was alleged to be a likeness of the fugitive, and the prosecutor proposed to prove his identity by showing it, in the hands of the police, to a witness who knew the fugitive, and asking him if he recognised it.

Held that the question was incompetent as the photograph had not been produced.

Alfred John Monson and Edward Sweeney *alias* Davis *alias* Scott were charged under an indictment which set forth as follows:—"(1) That you, having formed the design of causing by drowning the death of Windsor Dudley Cecil Hambrough, sometime residing at Ardlamont House aforesaid, now deceased, did in execution thereof bore or cause to be bored in the side of a boat, the property of Donald M'Kellar, boat-hirer, Tighnabruaich, Argyleshire, a hole, and having plugged or closed said hole, you did, on 9th August 1893, induce the said Windsor Dudley Cecil Hambrough to embark along with you Alfred John Monson in the said boat on the said date; or, on 10th August 1893, you Alfred John Monson, in execution of said design, did in Ardlamont Bay, in the Firth of Clyde, while the said boat was in deep water, remove, or cause to be removed, the plug from said hole, and admit the water into and did sink the said boat, whereby the said Windsor Dudley Cecil Hambrough was thrown into the sea; and you Alfred John Monson and Edward Sweeney *alias* Davis *alias* Scott did thus attempt to murder him: (2) That on 10th August 1893, at a part of a wood situated about 360 yards or thereby in an easterly or north-easterly direction from Ardlamont House aforesaid, you, Alfred John Monson, and Edward Sweeney *alias* Davis *alias* Scott did shoot the said Windsor Dudley Cecil Hambrough, and kill him, and did thus murder him; and you Edward Sweeney *alias* Davis *alias* Scott being conscious of your guilt in the premises, did abscond and flee from justice."

Sentence of outlawry was pronounced against Sweeney, and the trial proceeded against Monson. The police had obtained in England a photograph which was alleged to be a likeness of Sweeney, but it was received too late to be libelled among the productions for the Crown. In the