persons having interest are parties to the petition, and that it is just another way of giving effect to the object of the petition, I think it may be allowed.

LORD PRESIDENT and LORD M'LAREN concurred.

LORD KINNEAR was absent at the hearing.

The petitioners thereupon proposed to amend the prayer of the petition by substituting for the words "to remove" down to "is now situated" the following — "Authorise and ordain the trustees under the trust-disposition of 16th April 1849, or a quorum of their number, to dispone and convey the property held by them as trustees to and in favour of His Grace William Henry Walter Duke of Buccleuch and Queensberry, K.T., John Murray, Esq. of Wooplaw, in the county of Roxburgh; Lieutenant-General John Sprot of Riddell in the said county, Charles Erskine, Esq., residing at Friarshall, Melrose, and the Right Rev. John Dowden, D.D., residing at Lynn House, Gillsland Road, Edinburgh, the present Bishop of Edinburgh in the Scottish Episcopal Church and his successors, so long as Trinity Church, Melrose, is situated in the diocese of Edinburgh, and thereafter the Bishop of the diocese of the said Scottish Episcopal Church in which Trinity Church, Melrose, may for the time be situated, and that as trustees for the purposes and subject to the conditions and declarations contained in the said trust-disposition."

The Court allowed the prayer of the petition to be amended as proposed, and thereupon granted the first alternative as craved.

Counsel for the Petitioners — Mackay. Agents—Strathern & Blair, W.S.

Saturday, June 17.

FIRST DIVISION.

STEWART & COMPANY *v.* JOHNSTONE.

Process—Expenses—Objections to Auditor's Report—Time of Lodging—Act of Sederunt of 6th February 1806.

The Act of Sederunt of 6th February 1806 provides that "in case either party means to object to the report of the Auditor, he shall immediately lodge with the clerk a note of his objections."

Held that objections to an Auditor's report must be lodged within forty-eight hours, unless special cause is shown to justify further delay, and that objections lodged a month after an account had been taxed came too late.

In this case the Court found the defender entitled to expenses under deduction of one-fourth. The defender's account was taxed on 11th May, and objections thereto by the defender were lodged on 10th June.

The pursuers argued — The objections came too late and could not be entertained. They should, according to the construction usually put upon the Act of Sederunt, have been lodged within forty-eight hours — *Adamson & Gulland* v. *Gardner*, July 4, 1878, 15 S.L.R. 664.

The defender argued—The delay in lodging the objections had been caused by there having been double agency in the case, but intimation of the objections had been made to the pursuers' agents soon after the taxing. Further, the question raised was really whether the Auditor had construed the Court's interlocutor correctly. In taxing the account he had first disallowed expenses wherever the defender had been unsuccessful, and had then deducted a fourth from the remainder. The objections proceeded on the footing that the fourth alone should have been deducted. In these circumstances the terms of the Act of Sederunt should not be construed too strictly against the defender.

At advising—

LORD PRESIDENT—The Act of Sederunt requires that objections to the Auditor's report shall be lodged immediately. According to custom forty-eight hours has been regarded as the measure of latitude thus allowed. It is not necessary to hold this an inflexible rule if special cause were shown why compliance with it could not be rendered. It is enough to say that in the present case no such cause has been shown, for here the departure from the duty of lodging objections immediately is wide and has not been excused.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court refused the note of objections.

Counsel for the Pursuers—A. S. D. Thomson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender—W. Thomson. Agent—Arthur S. Muir, S.S.C.

Tuesday, June 20.

FIRST DIVISION.

[Lord Low, Ordinary.

MARTIN *v.* FERGUSON'S TRUSTEES.

Succession — Marriage-Contract — Mutual Settlement—Power to Revoke—Husband and Wife.

An antenuptial marriage-contract contained certain provisions in favour of the next-of-kin of the spouses in the event (which happened) of there being no children of the marriage, and a condition that the survivor of the spouses should forfeit certain benefits in the event of re-marriage.

After the marriage the spouses, on the narrative that they were under essential error at the time of entering into the marriage-contract, executed a deed of revocation and mutual settlement, revoking expressly the above provisions and declaring that (failing children) the whole estate of the predeceaser should belong to the survivor.

By a codicil executed some years subsequent to this deed by the husband during the wife's lifetime, but without her consent, he restricted his wife's rights in his estate to a liferent, and directed that at her death it should be divided among his relations.

At the date of the marriage the husband had about £300. It was alleged but disputed that the wife had also £300. At the date of the mutual settlement the husband's estate amounted to about £10,000; and at the time of his death (which occurred a few days after the execution of the codicil) it amounted to about £30,000. The wife's fortune at the date of the mutual deed was said to consist of £800 in possession and certain expectations.

On the husband's death the *curator bonis* for the wife, who was then incapable of managing her own affairs, raised an action against the husband's testamentary trustees for reduction of the codicil and declarator that the wife was entitled to the fee of her husband's whole estate.

Held (*rev.* judgment of Lord Low) that the codicil was *ultra vires* of the husband, the settlement of the estate contained in the marriage-contract read together with the mutual deed being contractual as between the spouses.

On the question of administration, see same case, *ante* February 16, 1892, vol. xxix. 401, 19 R. 474.

James Christal Ferguson, shipmaster, Kirkcudbright, was married to Elizabeth Jane Brown Christal on 10th April 1860.

By antenuptial marriage-contract dated 7th April 1860, "the spouses assigned and disponed to and in favour of themselves, and the survivor of them, one-half of the whole estate, heritable and moveable, that might belong to them, or either of them, at the dissolution of their marriage, and to and in favour of the survivor of them, for the survivor's liferent use only, and the children of the said marriage, whom failing, the next-of-kin of the spouses, in fee, the other half of the estate—it being declared that, in the event of the failure of issue, one-half of the said liferented portion of the estate should fall to the next-of-kin of the said James Christal Ferguson, and the other half to the next-of-kin of the said Elizabeth Jane Brown Christal or Ferguson. It was further declared that if the surviving spouse should marry again, he or she should forfeit his or her right to the liferent, and the children of the marriage, whom failing, the next-of-kin of the predeceasing spouse, should have a claim against the survivor so remarrying for repetition of the value of the half of the whole estate provided to the survivor as aforesaid. The contract further provided that it should not be lawful to, nor in the power of, the spouses, or either of them during the subsistence of the marriage, to discharge, renounce, or restrict the said provisions therein contained in their favour or in favour of either of them, or any part thereof, or to convey or assign the same onerously or gratuitously, in whole or in part, without the express consent of Robert Christal, the father of the said Mrs Elizabeth Jane Brown Christal or Ferguson; and it was declared that any discharge or renunciation, conveyance, or deed of restriction, or any other deed whatever in relation to the said provisions granted by the spouses or either of them, without the consent of the said Robert Christal, should be null and void. The clergyman for the Established Church of Scotland for the parish of Kirkcudbright, and his successors in office, were appointed trustees in succession to see the purposes of the contract carried out, and the spouses also nominated the said clergyman, whom failing his successors, to be their executor. The said Mrs Elizabeth Jane Brown Christal or Ferguson accepted the foresaid provisions in her favour as in full of all terce, legal share of moveables, and everything she, *jure relictæ* or otherwise, could claim, or that her nearest of kin could claim, from the said James Christal Ferguson, or his heirs, executors, or representatives; and the provisions in favour of the children of the marriage were also declared to be in full of their legal rights."

On 17th January 1878 the spouses executed a deed of revocation and mutual settlement, which proceeded on the narrative "that shortly before their marriage they were induced by the said Robert Christal to sign a deed which they understood and believed to be a contract of marriage, containing the usual provisions in similar cases, which deed had been prepared by the law-agent of the said Robert Christal, had not been revised by anyone on behalf of the said James Christal Ferguson, and was subscribed by the parties thereto without being explained to or understood by them; that on reading over a copy of said antenuptial contract of marriage they became satisfied that the provisions and clauses contained therein were unusual and improper, and that the same, being contrary to their belief and intention, the deed had been signed by them under essential error, and that, without prejudice to any remedies competent to them, or either of them, to challenge and reduce the said deed, they had resolved and agreed to revoke and alter the same in manner and to the extent and effect thereinafter written." By this deed "they revoked and recalled (first) all provisions in favour of, and rights and powers conferred on the next-of-kin of them, or either of them, by the foresaid contract of marriage, in the event of the predecease of either of them, and they declared that in

the event of either of them dying without leaving a child or children procreated of their said marriage, the whole estate and effects, real and personal, of the party deceasing should descend and belong to the survivor of them, and his or her heirs, and that whether such survivor should enter into a second marriage or not; and (second) they recalled and revoked the nomination of trustees and executors contained in the said contract of marriage, and nominated the survivor of them to be sole trustee and executor to the predeceaser. Mr Robert Christal was asked to give his consent to this deed, but he refused to do so."

On 14th June 1890 James Christal Ferguson, while on board his ship on a voyage to Australia, executed a holograph codicil to the foresaid mutual deed, which, after providing for certain pecuniary legacies to the amount of about £1000, proceeded thus—"'I wish my estate to be managed by the same trustees as my brother John Christal Ferguson, dead or alive, including to my wife Mrs Elizabeth J. B. Ferguson, who is to owen all in life rent, except legacys mentioned, and at her decease to be divided as my brother, John Christal Ferguson's estate.' The testator then provided for the protection of his wife and her property should she become incapable of managing her affairs, and left annuities to his sister-in-law, and his sister, and legacies to his trustees."

James Christal Ferguson died at sea on 21st June 1890, survived by his wife. No children were born of the marriage. His brother John Christal Ferguson died on 11th May 1890, leaving a settlement wherein he appointed trustees for the administration of his estate.

At the date of the marriage James Christal Ferguson was mate in a merchant vessel, and had saved about £300; it was disputed whether his wife had any means. At the date of the mutual deed the value of his estate was about £10,000, while Mrs Ferguson was averred to possess estates to the value of £800, and to have certain expectations from her father. At the date of his death Mr Ferguson's estate amounted to about £30,000.

Mrs Ferguson became insane soon after the execution of the mutual deed, and was at different periods confined in an asylum. In 1891 James Martin, chartered accountant, Edinburgh, was appointed *curator bonis* to her.

The question having been raised whether James Christal Ferguson had power to alter the provisions contained in the mutual settlement by the codicil which he had executed without his wife's consent, Martin raised an action against the trustees of John Christal Ferguson, who were also Captain Ferguson's trustees, under the terms of the codicil, in which he concluded (1) for reduction of the said codicil, and (2) for declarator "that the said Mrs Elizabeth Jane Brown Christal or Ferguson is entitled in fee, for her own absolute use and behoof, and free from all burdens and deductions whatsoever, except the payment of the said James Christal Ferguson's debts, to the whole means, estate, debts, and effects, real and personal, which belonged to the said James Christal Ferguson at the time of his death, conform to and in virtue of the provisions to that effect in her favour, contained in the said deed of revocation and mutual settlement."

The pursuer pleaded—"(1) The deed of revocation and mutual settlement was an onerous deed, competently made by the spouses, and irrevocable and unalterable, except by their joint act. (2) It being incompetent for the said James Christal Ferguson to execute the said pretended codicil, it is inept, and should be reduced in terms of the reductive conclusions of the summons. (3) The said deed of revocation and mutual settlement never having been validly revoked or altered, the pursuer is entitled to decree in terms of the declaratory conclusions of the summons."

The defenders pleaded, *inter alia*—"(1) The action is irrelevant. (2) *Separatim*, in any view the reductive conclusions of the summons are irrelevant and unnecessary. (3) The said deed of revocation and mutual settlement was revocable at the instance of Mr James Christal Ferguson in respect (1) it was gratuitous; (2) it was testamentary."

On 28th October 1892 the Lord Ordinary (Low) found that Mrs Ferguson "was not entitled in fee to the whole means and estate of her deceased husband . . . in virtue of the deed of revocation and mutual settlement mentioned in the summons: Therefore repelled the pursuer's pleas-in-law, assoilzied the compearing defenders from the reductive conclusions of the summons; and *quoad ultra* dismissed the action.

"*Opinion.* — [*After summarising the deeds*]—Mr Ferguson was in the merchant service. He had latterly command of a ship, but at the date of his marriage he was in the position of a mate. He was then possessed of some £300. The pursuer avers that Mrs Ferguson had an equal amount, but I do not think that that is a matter of importance, as whatever she had passed to her husband *jure mariti*. Apparently, chiefly by successful trading at the ports to which he sailed, Mr Ferguson rapidly increased his fortune, which at the date of the mutual deed in 1878 amounted to £10,000, and at the date of his death to £30,000. The pursuer avers that the trading was done by Mrs Ferguson, but the defenders deny that this was the case. I do not think that it is necessary to have inquiry upon the point, as the money traded with was Mr Ferguson's, and the £30,000 in question is the produce of his means.

"The summons concludes for reduction of the testamentary writing of 1890 and for declarator that Mrs Ferguson is entitled in fee, for her own absolute use and behoof, and free of all burdens and deductions, except the payment of Mr Ferguson's debts, to his whole means and estate, conform to and in virtue of the provisions of the mutual settlement of 1878.

"The pursuer contended that the mutual

settlement was an onerous deed which Mr Ferguson could not revoke; that the holograph will was therefore *ultra vires* of Mr Ferguson and should be set aside; and that Mrs Ferguson should be found entitled to the whole estate under the mutual settlement.

"The defenders, upon the other hand, argued that the marriage-contract was altogether revoked and set aside by the mutual settlement, and that the latter deed, being entirely testamentary and gratuitous, could in turn be revoked by either spouse, as regarded his or her estate. They therefore maintained that Mr Ferguson's succession was ruled by his holograph will alone.

"I am unable to agree altogether with either of these views.

"In the first place, assuming that it was in the power of the spouses to revoke the whole provisions of the marriage-contract, I do not think that they did so. In the mutual settlement they expressly revoke and recal—1st, All provisions in the marriage-contract in favour of their next-of-kin; 2ndly, the forfeiture attached to the marriage of the surviving spouse; and 3rdly, the nomination of trustees and executors. Further than that there is no express revocation of the contract. The defenders, however, maintained that there was an implied revocation (in the event of there being no children) of all the remaining provisions of the contract involved in the declaration that (failing children) the whole estate of the predeceaser should belong to the survivor. That, they maintained, was a new and complete settlement of the whole estate, leaving no room for the operation of the marriage-contract, and therefore superseding it. No doubt the declaration in the mutual deed necessarily revoked the provision in the contract whereby the surviving spouse was, as regards one-half of the estate, restricted to a liferent, and enlarged the right of liferent to one of fee. But to effect that object it was not necessary to revoke the conveyance in the contract of the fee of one-half of the estate to the survivor. And, in my judgment, the scheme and phraseology of the mutual deed show that it was only the intention of the spouses to revoke, and that they only did revoke, the marriage-contract in so far as that was necessary in order to give effect to the views that they then entertained as to the disposition of their estates. In the deed they state that they have agreed not to revoke the contract as a whole, but only 'to revoke and alter the same in manner and to the extent and effect underwritten.' Then, as I have pointed out, there follows the express revocation of three of the provisions of the contract, and the implied revocation of one provision. Beyond that it seems to me that the contract was allowed to stand. It certainly remained operative, except in so far as expressly revoked, in the event of children being born, and I think that it also remained operative in so far as it gave a fee of one-half of the estate to the survivor. I see no reason why the spouses should have revoked that provision, because it was in accordance with their wishes, and I am of opinion that upon a sound consideration of the mutual deed, it absolutely revoked the provisions of the contract which were expressly revoked, and altered the contract to this extent, that if there were no children, the surviving spouse was to have a fee of the one-half of the estate of which he or she was under the contract only entitled to a liferent. The result is, that in my judgment Mrs Ferguson, as the surviving spouse, was entitled under the contract to one-half of the estate.

"The next question is whether the spouses had power to revoke or alter the marriage-contract to the extent to which they did alter and revoke it. Whatever might be said in regard to such provisions of the contract as were proper marriage provisions for the spouses and their issue, I think that it can hardly be doubted that the spouses were entitled to alter and revoke the provisions in favour of next-of-kin. These were provisions of a testamentary nature, and were not even protected by the condition that the marriage-contract should not be altered without the consent of Mr Christal, because that condition was limited to the provisions in favour of the spouses.

"By the revocation of the destinations in the marriage-contract to the next-of-kin, the spouses set free the fee of one-half of their joint estate for re-settlement, and they re-settled that half by declaring that it should belong to the survivor. In these circumstances the question is whether Mr Ferguson, the predeceasing spouse, was entitled to revoke the destination in the mutual settlement of one-half of his estate to his wife.

"If I am right in the view which I have taken, that the mutual deed did not revoke the provision in the marriage-contract of one-half of the joint estate to the surviving spouse, there is no question here of a reasonable provision for Mrs Ferguson. The question is whether the mutual settlement was onerous, and could not be revoked by either party without the consent of the other. That, I think, depends upon whether the provisions made by Mrs Ferguson for her husband bore any reasonable proportion to the provisions made by her husband for her. I do not think that they did so. At the date of the mutual deed Mr Ferguson's estate amounted to £10,000, and it was an estate which was growing year by year, as is shown by the fact that when he was married in 1860 he had only a few hundred pounds, and when he died in 1890 he had some £30,000. Mrs Ferguson, on the other hand, had (even assuming the pursuer's averment, which is denied, to be correct) only £800 in possession, and certain expectations from her father, which are said to have ultimately turned out to be worth £1400. In these circumstances, I do not think that there was a reasonable proportion between the fortunes dealt with on the one hand and on the other. There was £800 in pos-

session as against £10,000 in possession, and an expectancy of succession which ultimately turned out to be worth £1400, as against a probability of increase which, in the end, amounted to £20,000. I am therefore of opinion that the liferent of Mr Ferguson to his wife of the fee of one-half of his estate was a donation and was revocable by him.

"The result in my judgment is, that the fee of one-half of Mr Ferguson's estate was carried by his will of 1890.

"The question remains whether Mrs Ferguson is or is not entitled to the liferent of the one-half of her husband's estate which she does not take in fee. This is a question upon which no argument was submitted to me, and upon which I express no opinion. The only claim which is made for Mrs Ferguson in this case is to the fee of the whole of her husband's estate, and for the reasons which I have given I am of opinion that she is not entitled to decree to that effect."

The pursuer reclaimed, and argued—With regard to the objections to the form of the summons, reduction was a perfectly competent way of getting rid of a deed *a non habente potestatem*—Stair, iv. 20, 35; Shand's Practice, i., 215; *Mackie v. Gloag's Trustees*, *infra*. The provisions in the marriage-contract in favour of the next-of-kin were both testamentary and contractual—testamentary because they were only to come into operation on the death of one of the spouses, contractual because the spouses agreed to make corresponding destinations in favour of the next-of-kin of the other—Ersk. i. 6, 29. By the marriage-contract rights were secured to the wife which put her in a position to contract with her husband on a footing of equality in 1878, when the spouses proposed to renounce the provisions in favour of next-of-kin. The deed of 1878 was therefore an onerous contract and irrevocable. The wife was therefore entitled to the whole estate—to one half under the marriage-contract, and to the other half under the mutual deed which was onerous in respect of the surrender of rights secured by the marriage-contract. The case of *Beattie's Trustees*, May 23, 1884, 11 R. 846, seemed to be a contrary authority; but the provisions in the antenuptial contract in favour of the next-of-kin of the wife distinguished the present case—*Lang* v. *Brown*, May 24, 1867, 5 Macph. 789; *Rae* v. *Nielson*, May 14, 1875, 2 R. 676; *Hall's Trustees* v. *Macdonald*, March 8, 1892, 19 R. 567, were also cited.

Argued for the defenders—The conclusions of the summons were not appropriate to try the question; the reductive conclusions were incompetent. The proper course would have been to bring an action of multiplepoinding in the hands of the testamentary trustees. *On the merits*—It had been argued that the spouses were on an equal footing, each having the same estate to surrender and receiving the same equivalent. But the postnuptial contract on the face of it repudiated the existence of mutual and equal rights secured by the marriage-contract, for it declared that the marriage-contract was granted under essential error. That was fatal to the argument that there was valuable consideration. Again, the husband had under the marriage-contract the power of testing on one-half; for on a true construction the provisions to the spouses and their children were contractual and could not be innovated on by either, but the destination to next-of-kin was testamentary and revocable. The presumption was against the surrender of the power to test as regards third parties, as these were not within the purpose of the matrimonial provisions—*Mackie* v. *Gloag's Trustees*, March 9, 1883, 10 R. 746 (*per* Lord Rutherfurd Clark)—March 6, 1884, 11 R. (H. of L.), 10 (*per* Lord Watson); *Mitchell* v. *Mitchell's Trustees*, June 5, 1877, 4 R. 800; *Hall's Trustees* (*per* Lord M'Laren), 579.

At advising—

Lord Adam—By antenuptial marriage-contract dated 7th April 1860, Mr and Mrs Ferguson disponed to and in favour of themselves, and the survivor one-half of the whole means and estate which should belong to them or either of them at the dissolution of the marriage. The other half they disponed to the survivor of themselves in liferent for the survivor's liferent use only, and to the children of the intended marriage and the issue of their bodies equally among them, whom failing, one-half of the said half to the next-of-kin of Mr Ferguson equally among them in fee, and the other half of the said half to the next-of-kin of Mrs Ferguson equally among them in fee.

The antenuptial contract contained a clause declaring that in the event of the survivor remarrying, he or she should forfeit the liferent above mentioned, and also a clause to the effect that the spouses should not be entitled to discharge, renounce, or restrict the provisions in their favour without the consent of Mr Christal, Mrs Ferguson's father. He is not, however, a party to the contract. Mrs Ferguson, renounced her legal rights, and the legitim of the children was excluded.

There were no children of the marriage, and Mr and Mrs Ferguson became dissatisfied with some of the provisions of this contract, and executed in 1878 a deed of revocation.

I agree with the Lord Ordinary that this deed is not a total but only a partial revocation of the antenuptial marriage contract. It proceeds, *inter alia*, on the narrative that the contract contained clauses that were unusual and improper, and that the same being contrary to their belief and intention, they had signed the deed under essential error—that therefore they had resolved to recal and revoke the same in the manner and to the extent underwritten.

The extent to which they revoke the antenuptial contract, is that they recal all provisions in favour of, and rights and powers conferred upon, the next-of-kin of them or either of them in the event of the predecease of either of them, and they declared that in the event of either of them dying

without leaving a child or children procreated of the marriage, the whole estate and effects of the party deceasing should descend and belong to the survivor of them, and his or her heirs, and that whether such survivor entered into a second marriage or not, the condition in the contract in regard to the survivor entering into a second marriage being thereby revoked.

It will be observed that the effect of this deed of revocation was that the whole estate of the predeceaser went to the survivor.

The marriage was dissolved by the death of the husband on the 21st June 1890. Seven days before his death he executed a holograph deed, by which he left the liferent of the whole estate to the survivor his wife, subject to the payment of certain legacies. In the meantime his wife had become insane, and the pursuer was appointed the *curator bonis*. He has raised this action to have the holograph deed by Mr Ferguson reduced and set set aside as being *ultra vires* of him, on the ground that his ward Mrs Ferguson was entitled to the fee of the whole estate.

In order to solve this question it is necessary to determine in the first place what were the relative rights of Mr and Mrs Fersuson under the antenuptial contract.

As I have said, I agree with the Lord Ordinary in thinking that the deed of revocation operated only a partial revocation of the antenuptial contract, and that the destination of one-half of the estate, which should belong to the spouses at the dissolution of the marriage, to the survivor remained unaffected, and it is unnecessary to repeat the Lord Ordinary's reasons for coming to that conclusion.

The question therefore relates to the other half of the estate, which was destined, failing children, one-half to the next-of-kin of the husband, and one-half to the next-of-kin of the wife. Now, so far as concerns the next-of-kin, I am of opinion that this provision was purely testamentary. I think that they acquired no *jus crediti* under the contract against the parties to the contract or their heirs. But I think that, as between the spouses, the provision was contractual. The wife had a right and interest to stipulate if she chose, that a right to a share of the estate should go to her next-of-kin, and having done so I do not think that the husband could, without the consent of the wife, defeat the provision.

Had the marriage-contract, therefore, not been interfered with, the position of matters upon the dissolution of the marriage, in the event which occurred of their being no children of the marriage, would have been, that the survivor would have got the fee of one-half of the estate under the first provision of the contract, and under the provision in question he or she would have got the liferent of the other half, and upon his or her death the fee would have gone equally between the next-of-kin of the husband and wife respectively.

That this provision in favour of next-of-kin should be unsatisfactory to the spouses one can easily see, and accordingly what they did was to revoke and recal "all provisions in favour of and rights and powers conferred upon the next-of-kin of us, or either of us, by the foresaid deed, in the event of the predecease of either of us, and we declare that in the event of either of us dying without leaving a child or children procreated of our said marriage, the whole estate and effects, real and personal, of the party deceasing, shall descend and belong to the survivor of us and his or her heirs," and they also revoked the provision as to entering into a second marriage.

Now, I do not doubt that it was quite within the power of the spouses together to revoke the provisions in favour of next-of-kin, and to re-settle the half of the estate affected thereby. But, as I have before said, I do not think that it was in the power of either of the spouses to affect the fourth of the estate destined to the next-of-kin of the other spouse. The benefit, therefore, which each of the spouses obtained by this re-settlement of the half of the estate was that if the husband was the survivor he got from his wife one-fourth of the estate which would otherwise have gone to her next-of-kin; and so the wife, if she was the survivor, got from her husband the one-fourth of the estate which would have gone to his next-of-kin. I regard, therefore, this settlement of the estate as a matter of contract for which consideration was given, and which neither of the parties to it could defeat.

If the parties were dissatisfied with the antennptial contract they were free to make another, and I think that is what they did. That is not, however, the view of the Lord Ordinary. He says—"The question is whether the mutual settlement was onerous and could not be revoked by either party without the consent of the other? That I think depends upon whether the provisions made by Mrs Ferguson for her husband bore any reasonable proportion to the provisions made by her husband for her." He then states the relative proportions of their fortunes at the time, and comes to the conclusion that there was no reasonable proportion between the fortunes dealt with on the one hand and the other. But in so treating the case the Lord Ordinary ignores the effect on the position of parties of the antecedent contract entered into by them, and that it conferred on them both equal rights and powers over the whole estate. He treats the revoeation of the provision in favour of the next-of-kin, and the settlement in place thereof of the estates in question on the survivor, as being separate and distinct transactions, and that the revocation enabled the parties to deal with their separate estates as they pleased. But it appears to me that the revocation and the settlement was all one transaction, and cannot be separated.

But it was argued to us that the revocation bears on the face of it, under the hands of the spouses, that they had signed the antecedent contract under essential error, and that if an action of reduction of it had

been raised it must have been set aside, and that the revocation and settlement in question must be read in that light. I do not know what the result of such a reduction might have been if such a course had been followed, whether the contract would have been reduced *in toto* or only the objectionable clauses, and if so, on what terms. But the spouses did not adopt that course, and I think we must deal with the case as they dealt with it. The course which they did adopt was to leave the antenuptial contract standing, to revoke only those provisions in it to which they objected, and to add others, and so no doubt to bring into conformity with their original belief and intention, and to get rid of the error complained of. This they did, as the deed of revocation bears, by mutual agreement, and to make provision for the survivor. It must be presumed therefore that they intended and agreed that the antenuptial contract and the deed of revocation and settlement should together form the contract which was to regulate the succession to their estates, and come in place of the original contract; and so reading it I am of opinion that it was matter of contract between them that the fee of the half of the estate in question should go to the survivor of the spouses. I am therefore of opinion that the holograph deed of Mr Ferguson was *ultra vires* of him, and that the pursuer is entitled to decree in terms of the reductive conclusions of the action. I also think that he is entitled to decree in terms of the declaratory conclusion that he is entitled to the whole estates which belonged to Mr Ferguson with this alteration, that he is so entitled under the antenuptial contract and deed of revocation, and not under the latter deed alone as set forth in the summons.

LORD M'LAREN—While concurring unreservedly in the judgment proposed, it is right to say that my first impression after hearing the argument was in favour of the Lord Ordinary's view on both branches of the case. It appeared to me that if Mrs Ferguson were maintaining the action which has been instituted by her curator, she could not consistently maintain the two propositions (1) that the antenuptial contract in so far as it contained provisions in favour of her next-of-kin was affected by error *in essentialibus*, and (2) that she had waived the right to maintain the provisions in favour of her next-of-kin in consideration of receiving an equivalent benefit to herself.

But on further consideration I have come to see that these propositions are not really inconsistent. I see no reason to doubt the statement contained in the postnuptial deed, and also in a separate holograph writing, that the provisions in favour of next-of-kin were inserted in the antenuptial contract without the authority of the spouses, and that as regards those provisions the deed did not express the true intention of the parties. But then it was not possible after the marriage (when the error was first discovered) for the husband to reduce the contract so as to obtain the control of the fee of that part of his estate which had he destined to his wife's next-of-kin, because in the nature of things *restitutio in integrum* was then impossible. I need not say that in our practice the Court of Session does not possess the power which is often exercised with advantage by courts of equity elsewhere, of re-forming a marriage-settlement, so as to bring its provisions into conformity with the stipulations by which the spouses intended to be bound. Mrs Ferguson was then in this position, that she might frankly admit that the antenuptial deed gave a right to her next-of-kin for which she never stipulated, and might yet maintain that the deed could not be altered without her consent. This apparently was the view which the spouses were disposed to take when they executed the postnuptial deed. The husband did not claim to be entitled to revoke the provisions in favour of his wife's next-of-kin without her consent, and then her consent was given, not to an act of revocation pure and simple, but to a deed in which she herself is substituted as fiar in the place of her next-of-kin in the event of the failure of issue of the marriage. Her consent, as I think, was necessary to the proposed alteration of the antenuptial deed, and we do not know that such consent would have been given if the husband had claimed the right to dispose of this part of the estate as he pleased. The fair inference is that this was a conditional revocation of the right of the wife's next-of-kin — conditional, I mean, on the new provisions receiving effect. I should come to the same conclusion even if there were more to be said in favour of the existence of a right in the husband to revoke this provision, because even on that assumption I should regard the postnuptial deed as of the nature of a compromise of a doubtful question agreed to in the knowledge of all the facts, and therefore not subject to be reopened. The result is that in the event which happened, of the husband's predecease without issue, his testamentary writing is altogether inoperative, and the estate is irrevocably disposed of by the postnuptial deed.

LORD KINNEAR — I am of the same opinion.

The LORD PRESIDENT concurred.

The Court reversed the interlocutor of the Lord Ordinary and gave decree in terms of the conclusions of the summons.

Counsel for the Pursuer and Reclaimer—Rankine—Cook. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Defenders and Respondents—Jameson—C. N. Johnston. Agents—T. & W. A. Maclaren, W.S.