ing a free passage for the salmon, an obligation which he has nominally professed to fulfil, although by structural alterations connected with the dyke the passage has become virtually useless. I am by no means prepared to say that if this state of things had continued for forty years it would have liberated the appellant from an obligation which is implied in the nature of his right. But it has certainly not continued for forty years, or for nearly so long a period. On the contrary, there is evidence that the dyke itself has been altered and raised on various occasions within forty years, and it is certain that the stone platform or shoeing, which extends down the stream from the base of the embankment, and is the main bar to the passage of the fish, is a comparatively recent construction. In giving the order complained of, therefore, the Fishery Board did not interfere with any right belonging to the appellant by charter or by immemorial usage.

The only remaining question therefore is what operations are necessary in order to carry out the bye-law of the Commissioners. That bye-law requires that there shall be a salmon-pass or ladder on the down stream face of every dam, weir, or cauld capable of affording a free passage for the ascending fish at all times when there is water enough in the river to supply the ladder. The question, What alterations on the dam may be necessary to produce this result? is one of engineering skill; and the Sheriff took the assistance of a very able scientific adviser, Mr Stevenson, who received suggestions from the parties, and modified his original views in some respects in consequence of representations from the appellant. The Sheriff has acted on his report, and has directed the appellant to construct the works described by him; and I am of opinion that we should not disturb that judgment.

The dispute between the parties ultimately resolved into two considerations; first, the nature of the pass; and secondly, the position in which it should be placed. The appellant did not dispute that the shoeing in front of the dam rendered the pass substantially useless; but he proposed to extend the existing ladder to the edge of the stone platform, so as to connect it with the deeper part of the stream. Mr Stevenson, however, is of opinion that the construction of the ladder itself is faulty, and that its position is unsuitable to the existing state of the river. On the first of these matters, which is entirely one of engineering science, I do not see that we can do otherwise than follow the views of the judicial reporter, which I do with the more confidence, that some experiments made on the part of the appellant, in the way of improving the present ladder, were admitted to have been unsuccessful. Mr Stevenson, it is true, only says of the last proposal of the appellant that he has no confidence in it; and in the face of that opinion I do not think we can sanction it as effectual. In regard to the position of the passage, Mr Stevenson's views are very strong and clear, and are in a large measure supported by the practical knowledge and experience of many of the witnesses examined. From various causes the channel of the river has altered of late years, and it is reasonable that the salmon-pass should be so placed as to communicate with that part of the bed of the river where the fish may be expected chiefly to run.

I concur with the appellant in thinking that he is not bound to furnish the very best passage for the fish, if he furnished one capable of accomplishing what is required by the bye-law. But it must be efficient, and I cannot hold that what the appellant proposes would be so.

The other Judges concurred.

Appeal dismissed.

Agents for Appellants — Mackenzie, Innes, & Logan, W.S.

Agent for Respondent—James Webster, S.S.C.

Monday, March 6.

FIRST DIVISION.

(Before the First Division, with three Judges of the Second Division.)

(SMITH CUNINGHAME *v.* ANSTRUTHER'S TRUSTEES)

MERCER *v.* ANSTRUTHER'S TRUSTEES.

Marriage Contract — Provisions to Children—Discharge—Power of Apportionment—Reduction—Essential Error. By antenuptial contract £4000 belonging to the husband, and the wife's whole estate, were settled on the spouses respectively and the survivor in conjunct fee and liferent, and the children of the marriage in fee, declaring that the father should have power to apportion among them the £4000; while in regard to the wife's estate the same power was conferred on the parents jointly, or the survivor; failing apportionment the funds were to be divided equally. There were three children, all daughters. The mother had at her marriage about £8000, and she succeeded to about £50,000. The marriage-contract of the eldest daughter, to which her father and mother were parties, contained a discharge of her whole claims under the marriage-contract of her parents in consideration of £5000 paid to trustees for her in liferent, and her children in fee.

The marriage-contract of the second daughter was in like terms, but her father only was a party to the deed, her mother being dead.

Thereafter the father contracted a second marriage, and left a settlement by which he directed £20,000 to be paid to his youngest daughter in full of her claims; £30,000 was settled upon his second wife in liferent and the youngest daughter in fee, and his two elder daughters were expressly excluded from any interest in his succession. The youngest daughter signed the trust-deed in token of her acceptance of the provisions in her favour.

The eldest daughter raised an action after her father's death against his trustees to have it declared that there had been no valid apportionment in terms of the marriage-contract, and that she was entitled to a third part of the provisions in favour of the children, deducting £5000, and to have her marriage-contract reduced on the ground of essential error so far as adverse to her claims. *Held*, unanimously, that the pursuer had shown no ground for reduction; and, by a majority of seven Judges (*diss.* Lords Neaves, Ardmillan, and Kinloch), that the mother being in a position to take an effectual discharge of claims on her estate, and the father of claims on the £4000, all claim on her part under the

marriage-contract of her parents was barred by her discharge.

The second daughter raised an action with precisely the same conclusions.

Held, with regard to the sum of £4000, that she was in the same position as the elder daughter.

Held, by a majority (*diss.* Lord Deas), that, in regard to her mother's estate, the discharge had been granted and taken under essential error, the father believing that he had unlimited control over that estate, and communicating this belief to his daughter, who signed the discharge in reliance on her father's representations; whereas the true legal position of the parties (as now fixed by the judgment of the First Division, dated 18th March 1869), was, that the fee was, by the death of her mother, vested in the pursuer and her younger sister (the eldest sister having effectually renounced her rights), subject only to the father's liferent and power of division.

By antenuptial marriage-contract entered into in 1828 between the late James Anstruther, W.S., and his wife Marian Anstruther, Mr Anstruther bound himself to lay out the sum of £4000 at the sight of trustees, and to take the right "to himself and his promised spouse, and the survivor, in conjunct fee and liferent, for her the said Marian Anstruther's liferent use only, and to the child or children, one or more, of the said intended marriage, and the issue of the bodies of such child or children, whom failing, to the said James Anstruther's own heirs and assignees whomsoever in fee." It was declared that in the event of there being more than one child of the marriage, Mr Anstruther should have power "at any time of his life, and even on deathbed, to divide and proportion as he should think proper the above written provisions in their favour; and in case of his death without making such division, the said Marian Anstruther, if she should survive him, should have the same power while she continued unmarried; and, failing of any such division, the said provisions should belong to and be divided among the children equally, share and share alike." It was also provided that until the said provisions made in favour of the children should be paid, or become payable to them, the said James Anstruther bound and obliged himself to aliment and educate them in a manner suitable to their stations. And the said provisions were declared to be in full satisfaction of all bairn's part of gear, legitim, portion natural, executry, and everything else that they could ask or claim by and through the decease of the said James Anstruther, except what he might think fit to bestow of his goodwill only.

On the other hand, the said Marian Anstruther by the marriage-contract "assigns, dispones, and makes over to and in favour of the said James Anstruther and herself, and the survivor, in conjunct fee and liferent, and to the child or children, one or more, of the said intended marriage, whom failing to the said Marian Anstruther's own nearest heirs and assignees in fee, all and sundry goods, gear, debts, and sums of money, as well heritable as moveable, that were then belonging or resting owing to her, or that should pertain and be owing to her during the subsistence of the said marriage." It was declared, with reference to the provisions by Marian Anstruther, that in case there should be more than one child of the intended marriage "it shall be lawful to, and in the power of the said James Anstruther and Marian Anstruther, jointly during their joint lives, and to the survivor of them at any time of their lives, or even on deathbed, to divide and proportion the same among the said children as they shall think proper; and in case of their deaths without any such division, the same shall pertain and belong to them (the children) equally, share and share alike." It was also provided that if any child should die before the sum provided to him or her should be paid or become payable, leaving issue, such issue should have right to the same in the same manner as if their parent had received payment, or the same had become payable to him or her.

Mr and Mrs James Anstruther had three children, all daughters, Maria, married to Mr Smith Cuninghame in 1847; Annie Catherine, married to Mr Mercer in 1861, and Lucy Sarah.

At the date of Mrs Anstruther's marriage she was possessed of £8000, and subsequently succeeded to about £50,000.

By Mr and Mrs Smith Cuninghame's antenuptial contract, to which Mr and Mrs Anstruther were parties, the said James Anstruther and Marian Anstruther bound themselves to pay to trustees the sum of £5000 for payment of the interest to the spouses during their joint lives, and to the survivor of them, and after their death for payment of the principal to their children. The marriage-contract contains the following clause:—"And which said sum of £5000 is hereby declared to be, and the said Maria Anstruther hereby accepts of the same in full satisfaction of all legitim, portion natural, or bairn's part of gear, and of all claims whatsoever which she, the said Maria Anstruther, has in any manner of way, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th March 1828, and as the share or division hereby allotted to her of her said father and mother's property settled by said contract, all which claims are hereby settled accordingly, saving always and reserving to the said Maria Anstruther the goodwill of her said father and mother as accords."

Mrs Anstruther died in 1859. The second daughter of Mr and Mrs Anstruther, Annie Catherine, was married to Mr Mercer in 1861. Her marriage-contract, to which her father was a party (her mother being dead), contained a similar provision of £5000, and a similar clause of discharge.

In 1866 Mr Anstruther, on the occasion of his entering into a second marriage with Miss Anderson, executed a trust-disposition and settlement, in which he directed payment of £20,000 to his youngest daughter Lucy Sarah at the time of his death. It was declared that the said provision should be held and taken by her in full satisfaction of all claims she might have for bairns' part of gear, legitim, portion natural, or in any other manner of way by and through his death, or through the marriage-contract between him and the now deceased Marian Anstruther; and in token of the said Lucy Sarah Anstruther accepting of the foresaid provisions in full of all such claims, she subscribed the said trust-disposition and settlement. The deed further provided the sum of £30,000 for behoof of his second wife in liferent, and the children of the marriage in fee, whom failing his own nearest heirs and assignees. The residue

was destined to his wife, whom failing to his daughter Lucy. The deed expressly declared that in the event of any property whatsoever devolving on his own nearest heirs by the failure of the said Annabella Agnes Anderson either with or without children, the same should belong to his daughter Lucy and her heirs and assignees, whom he expressly nominated his heir, to the exclusion of Mrs Cuninghame and Mrs Mercer or their heirs or assignees, and that in no case whatever should they have any claim upon his means and estate, unless specially bequeathed to them.

Mr Anstruther died in 1867.

Mrs Smith Cuninghame and Mrs Mercer and their husbands brought separate actions against Mr Anstruther's trustees, and against Mrs Anstruther and Miss Lucy Anstruther. The conclusions of the summons in the two actions were the same—to have the trustees ordained to separate the funds of Mr Anstruther from those of his first wife, in order to have the latter divided equally among the children in terms of the marriage-contract; to have it declared that there never had been any valid apportionment, either of the £4000 provided by Mr Anstruther, or of Mrs Anstruther's estate, and that the pursuer was entitled to one-third of each of these funds, under deduction of the £5000 settled in her marriage-contract, and to have the pursuer's marriage-contract and Mr Anstruther's trust-deed reduced so far as they might be held to exclude the pursuer's claims.

The averments made by Mrs Smith Cunninghame in support of the reductive conclusions of her summons were, that at the date of her marriage she was only eighteen years of age, entirely ignorant of her legal rights, and relied on her father to protect her interests; that Mr Anstruther was under essential error as to his legal position, that he believed that he had the full and unlimited control of his wife's estate; while, in point of fact, he had only the power to apportion and divide the fee of the said estate among his children, in terms of the provisions of his marriage-contract; that he impressed this belief on his daughter, and that she was accordingly induced to sign the marriage-contract.

Mrs Mercer's averments were the same *mutatis mutandis*. After some procedure, which will be found, *ante*, vol. vi. p. 446, the First Division, on the 18th March 1869 (the Lord President absent, and Lord Deas dissenting) pronounced an interlocutor in both actions, finding *inter alia*, that the fee of the sum of £4000 provided by Mr Anstruther was vested in him, subject to a right of liferent by his wife in the event of her surviving him, and that the children had a right of succession which could not be gratuitously defeated; and, similarly, that the fee of Mrs Anstruther's estate was vested in her, subject to a liferent by her husband, in the event of his surviving her, and that the children had in regard to that estate a right of succession which could not be gratuitously defeated; and allowing the pursuer a proof of the averments in regard to the circumstances in which her marriage-contract was signed.

The proof was accordingly taken in Mrs Smith Cuninghame's case, and the case sent back to the debate roll. In consequence of a difference of opinion on the bench, the case was again heard before the First Division with three Judges of the Second Division.

The Dean of Faculty, Watson, and Shand, for the pursuers.—There never was any valid exercise of the powers of apportionment under the marriage-contract of James and Marian Anstruther. The provisions and declaration in the pursuers' marriage-contract could not be held to be such exercise, on several grounds. First, there was no separation of the estates of Mr and Mrs Anstruther. It was not stated out of which Mrs Smith Cuninghame's provision was to come, or whether it was to come from both, and in what proportions. Secondly, it was *ultra vires* to give one of the objects of the power a liferent only. Thirdly, there was no exhaustive apportionment. Taking the fund at its lowest estimate, there were several thousand pounds not distributed among the objects of the power. On that account the whole apportionment must fall, and the rule of equal division come in. Moreover, where such a power is vested as a trust, the Court will look very narrowly into the mode in which it is said to be exercised, to see that no benefit for himself has been obtained by the holder of the power. He cannot be allowed to exercise the trust in such a way as to transfer either to himself or to third parties a portion of the funds, the whole of which he was bound to divide among the members of a specified class. Such proceeding would be a legal fraud on the power, though the party may have acted *bona fide*.

Further, the discharge by Mrs Smith Cuninghame is not to be held a discharge of claims of succession, but only of legal claims which might form the subject of an action. It is to be noted that she does not discharge her claim for executry, though, even if she had done so, the renunciation would only operate in favour of the other children, and not of strangers. In any view of the case, as exactly similar renunciations were executed by her two sisters, the balance of Mrs Anstruther's estate must be held as carried by the destination in her marriage-contract, or otherwise as intestate succession to her. The trustees of Mr Anstruther have no assignation or other title to this balance.

The pursuers are entitled to have their marriage-contract reduced so far as it is adverse to their claims. The proof shows that Mr Anstruther considered himself the *dominus* of his wife's estate. This is the view consistently maintained by his trustees in this record. He was clearly of opinion that he could dispose of the funds settled by his marriage-contract as he pleased, and that any provisions he gave to his daughter were entirely within his own control. This opinion he impressed through Mrs Anstruther on his daughter the pursuer. A guardian cannot be allowed to benefit himself or his estate at the expense of his ward, by an error into which he fell himself and led his ward.

Lord Advocate, Solicitor-General, and Balfour, for the defenders,—The reduction is based on essential error, and on that alone, and the error is not one of fact, but of the meaning of a clause in a marriage-contract. Considering the matter the parties were transacting, the error was by no means a material one, if there was error at all. Was it an essential error for Mr James Anstruther to believe and represent that he and Mrs Anstruther, or one or other of them, had a full power of disposal of the funds of which their daughter was to get a part? It was no matter whether it was the father or mother who had the power, as the discharge is given to both parents. Would Mrs Smith Cuninghame have acted differently if she had known the exact state

of her rights? The theory of the pursuers would cut down almost any marriage-contract in which the daughter accepts a provision in lieu of legitim. According to them she could get a reduction of the contract on the ground that she was unaware of the law,—that supposing her father to leave moveable estate she would be entitled to a share of it.

Even supposing the pursuer's marriage-contract not good as a discharge, it subsists as a valid declaration by Mr and Mrs Anstruther that Mrs Smith Cuninghame's share was to be £5000, and no more. It was a valid apportionment as far as she was concerned. There was no necessity for specifying from which fund the £5000 was to come. The two funds were administered as one, and the sum was paid at once. There is nothing in our law to make it incumbent on the donee of a power of apportionment to dispose of the whole fund *per expressum.* Suppose two persons, and two only, interested in the fund, a share given to one with a declaration that he or she is to get no more, necessarily defines the share of the other beneficiary. He must take the balance, whether that is expressed or not. So if there be three objects of the power, and the shares of two of them declared, that of the third is declared also—it must be the balance. If the two elder daughters in this case had received each more than one third, and nothing had been said as to the share of the youngest daughter, the pursuers' contention necessarily leads to the result that, as the whole apportionment must be set aside, and the rule of equal division applied, the youngest daughter is entitled to call upon her sisters to refund what they have received in excess of their third.

The reservation of "goodwill" has nothing to do with the power. It refers to Mr Anstruther's own estate, with which he could deal as he pleased. The donee of a power of apportionment may exercise it when he chooses, but having once exercised it in the case of one of the objects of the power, by delivery of the deed of apportionment, it is irrevocable as far as that object. The only persons interested in the balance of the fund are the other objects. In any view, the deed, if not irrevocable, was at all events unrevoked in this instance. If Mr Anstruther had not married again, but had died after declaring the shares of his two elder daughters to be £5000 each, could the claim of the pursuer be sustained? In that case his youngest daughter Lucy would come upon her father's executor for the balance of her mother's estate, and if she chose to accept somewhat less than her right, the pursuer and Mrs Mercer could have no claim on that account. Mr Anstruther's trust-deed may have been a bad deed as regards Lucy, she might possibly have challenged it, but the pursuer, whose right is already ascertained, has no title or interest to do so. Lucy's is the only claim that now emerges under the first Mrs Anstruther's marriage-contract, and with her consent to take less than her legal rights the other parties have nothing to do.

The case was advised on the 19th July 1870.

The Court were unanimously of opinion that the pursuer had failed to establish sufficient grounds to support a reduction of her marriage-contract.

The question next arose, standing the discharge, what effect must be given to it in connection with the other circumstances of the case? On this there was much difference of opinion on the bench. The majority of the Court (the Lord President, and Lords Cowan, Deas and Benholme) considered that all claims on the part of the pursuer under the marriage-contract of her parents were effectually excluded by her discharge.

The proof in Mrs Mercer's case was delayed in consequence of various circumstances arising from her residence in the Mauritius. The result of the proof was to show that at the time of Mrs Mercer's marriage, Mr Anstruther, if he did not believe that he had the uncontrolled disposal of his wife's estate, at least was under the impression that he possessed the fee of the same, as well as of the £4000 provided by himself, subject only to a right of succession on the part of the children, and that he communicated this view to Mrs Mercer, who signed the discharge in the belief that her father could do what he pleased with both funds.

The DEAN of FACULTY and SHAND for Mr and Mrs Mercer.

The LORD ADVOCATE and BALFOUR for the defenders.

The argument for the pursuers mainly turned on the difference in the legal rights of parties produced by Mrs Anstruther's death. The defence was similar to that maintained in the former case.

The Court (*diss.* Lord Deas) were of opinion that the pursuer had succeeded in showing that the discharge had been granted and taken under essential error.

At advising—

The LORD PRESIDENT—It is necessary to have particular regard to the judgment in the case of Mrs Smith Cuninghame against the same defenders. The circumstances of the two cases are to a certain extent identical. As far as regards the sum of £4000, it is impossible to distinguish one case from the other. In regard to Mrs Anstruther's estate, the cardinal, though by no means the only point of difference, is, that Mrs Smith Cuninghame was married in her mother's lifetime, and Mrs Anstruther was a contracting party to her marriage-contract, whereas Mrs Mercer was married after her mother's death. During Mrs Anstruther's lifetime the fee was fully vested in her, subject only to a right of succession on the part of the children, which could not be gratuitously defeated. On her death the fee passed to her children then in life. The eldest daughter having effectually discharged her rights, stood in the same position as if she had predeceased her mother without issue. The fee vested in Mrs Mercer and her sister Lucy, subject only to their father's liferent and power of division. Thus at the date of her marriage, in 1861, Mrs Mercer stood in a very different position from that in which Mrs Smith Cuninghame stood at the date of her marriage in 1847; and Mr Anstruther stood in a very different position with regard to his wife's estate from that in which Mr and Mrs Anstruther stood in 1847. Over the £4000 he had, as before, a power of disposal, subject to the condition that he could not gratuitously defeat his children's right of succession. Their right was not a *jus crediti.* They were not creditors at all in competition with onerous creditors, but could only become postponed creditors at his decease. In short, their right was of the nature of a protected succession. But the fee of Mrs Anstruther's estate, which *stante matrimonio* was vested in her, passed on her death to her daughters Annie and Lucy. Mr Anstruther was a mere liferenter with a power of apportionment. He could not encroach to the smallest extent on the fund to provide for a second marriage. It is doubtful whether he even possessed an absolute right of ad-

ministration. He could take nothing from one daughter without giving it to the other. It is established by the evidence in this case that in the communications made to Mrs Mercer at the time of her marriage, neither father nor daughter understood the nature of their legal rights. I am satisfied that Mr Anstruther was impressed with the belief that he possessed a fee in his wife's estate, and that the children had nothing more than a protected succession. He believed that he had the same right over his wife's estate as he had over the £4000. He lived and died in this belief. If any evidence beyond the correspondence, conversation, and settlement of Mr Anstruther was needed, it is to be found in the terms of the discharge in Mrs Mercer's marriage-contract. It is copied from that in Mrs Smith Cuninghame's marriage-contract. While the expressions are quite appropriate in that case, they are notably inapplicable here. Mrs Smith Cuninghame had nothing but a contingent claim against her father or mother, but Mrs Mercer had much more than a contingent claim. She had a fee jointly with her sister Lucy. Nothing can be supposed more anomalous and unsuitable than for a liferenter, even with a power of division, to take a discharge of the fee. If he wishes to acquire the fee, it must be done by a conveyance. Every word bears clear impress of the belief that he was fiar. This entirely erroneous, though I have no doubt honest belief, he impressed on his daughter, who reposed full confidence in him. The law agents consulted seem to have been aware to some extent that the question was at least doubtful, but, for a reason to which I shall presently advert, they did nothing to remove the error from the mind of either father or daughter. It was a grave and important error in the subject matter of the contract. It has been argued that it was one in law. I am not aware that an error *in essentialibus* must necessarily be an error in fact. A common ground of reduction of a contract is where the pursuer alleges that he was excusably ignorant of his legal rights; see the cases of *Dickson* v. *Halbert*, February 17, 1854, 16 D. 586; *Johnston* v. *Johnston*, March 11, 1857, 19 D. 706; aff. February 10, 1860, 22 D. (H. L.) 3; *Purdon*, December 19, 1856, 19 D. 206. If, then, an error in law is a good ground of reduction, the remedy ought not to be barred merely on account of the difficulty of determining what are the legal rights of parties. Such a course would be as embarrassing in practice as indefensible in theory. A scale of difficulty would be necessary. If the error had been on a point of law on which there is no room for doubt, it would have been difficult to hold that a practitioner like Mr Anstruther could have been honest in his belief. Another argument of the defenders is that the error caused no real injury to Mrs Mercer. If she had been ever so much aware of her legal rights, they say she would still have been at the mercy of her father; he could have given her a much less share than £5000. This is based on a fallacy. It assumes that Mr Anstruther's object was to limit Mrs Mercer in any event to £5000. But if he had known that the only effect of the limitation was to vest absolutely the whole remainder in Lucy, and that he could not devote any part of it to his own purposes, is it certain that he would have taken that course? The argument further assumes that Mrs Mercer would have preferred to take £5000 paid down rather than trust her father, notwithstanding his refusal to deal fairly and liberally with her. Unfortunately this assumption seems to have strongly impressed the law agents. They seem to have thought it of no use to inform either party of the true state of matters. They thought that they saw that Mr Anstruther was determined to have his own way, and that if she had refused, he would have cut her off with a smaller portion.

The result is, that the residue is to be divided between Mrs Mercer and Lucy, deducting the £5000 paid to Mrs Mercer, and the £20,000 paid to Lucy. I am not prepared to say that this division must be set aside. There is no incompetency in exercising a power of division by instalments. If, then, the holder of the power dies after partial exercise, what he has done will receive effect. On what principle the division of the residue is to proceed, whether it should be equal, or on the principle of redressing inequality, I give no opinion at present. It is unadvisable to proceed further. The trustees must give in an account of their intromissions with the fund. Though Mr Anstruther had in part the complete disposal of his wife's estate, it was on no title of ownership, but accidentally, because he was liferenter. I am of opinion that the pursuers are entitled to have the discharge reduced, to the effect of enabling Mrs Mercer to claim a share in her mother's estate. The discharge stands good as regards the £4000, and as a discharge of legitim.

It is contended by the defenders that, even if the clause, as a discharge, be reduced, it is still good as an exercise of the power of apportionment, as a full and final determination of her share, since that requires no consent on her part. Without dealing with the question whether the exercise of a power of division may or may not be reduced on the ground of essential error, I am of opinion that the clause implies a bilateral contract, which must stand or fall as a whole. If the clause is set aside as a discharge, I doubt whether it forms a title to enable the defenders to claim the residue. Mr Anstruther's trustees cannot be allowed to maintain a plea which would have involved fraud on his part. He was bound to keep the funds intact and separate from his own property. If it shall be found that he immixed the funds, the trustees must make a definite separation of Mrs Anstruther's estate as it stood at her death in 1859.

The summons has been framed on the assumption that Mrs Smith Cuninghame is not debarred from claiming a share, and therefore concludes for a tripartite division. It may be that some amendment will be necessary.

Lords Cowan, Benholme, Neaves, Ardmillan, and Kinloch, concurred.

Lord Deas—Mr and Mrs Mercer are seeking to reduce the discharge in their marriage-contract. The action was brought into Court at the same time as Mr and Mrs Smith Cuninghame's action. The summons in the two actions is *verbatim* the same, the condescendence all but the same, and the pleas in law the same. The difference in the circumstances of the two cases is twofold. By the death of Mrs Anstruther in 1859 the amount of her estate was fixed. Mr Anstruther had no longer a power to spend or encroach on the funds. Secondly, Mrs Mercer's right, which was previously contingent, became an absolute right of such share of the funds as her father should assign her.

The question comes to be, whether, consistently

with the judgment in the former case, the discharge can be reduced? The only ground of reduction in both cases is essential error. The first question is, whether the alleged error is proved to exist? second, whether, if proved, it has the effect of enabling them to reduce the discharge? First, then, as to the matter of fact, the averments in the two cases are almost *verbatim* the same. In the former case the Court was of opinion that it was not proved that Mr Anstruther was under the error alleged. That Mr Anstruther changed his mind is neither averred or proved. Nor can it be said that there is any additional evidence which we had not in the former case, unless it be Mrs Mercer's recollections of what her father said. According to my view, nothing more than a power of division was claimed by him and his wife in 1847, and nothing more was claimed by him in 1861. It was no new idea he had to communicate to Mrs Mercer. He could have had no object in misrepresenting her position to her. In any view, he could have limited her position to much less than £5000. He knew that it was the men of business he had to satisfy, and they were satisfied that Mrs Mercer was not renouncing any right to which she was entitled under her father and mother's marriage-contract. It would be most dangerous to set aside solemn contracts on vague reminiscences. Beyond these, there is no other evidence which was not before us in the former case; and I do not think that the allegation is proved in this case, more than in the other, that Mr Anstruther believed that he had the power of absolute disposal over his wife's estate, or that those acting for Mrs Mercer so believed. What the lady herself believed is of comparatively little importance. It is now said that they were all under a different error, viz., that Mr Anstruther was the fiar of his wife's estate, subject to a protected succession on the part of the children. This is not averred on record, and moreover it is an error inconsistent with the existence of that alleged. Mr Anstruther could not believe himself at the same time absolute owner, and a limited fiar under the most onerous of contracts. But assuming that he took this view, he must have held the same view in 1847; and if it is a good ground of reduction in this case, it was also in the case of Smith Cuninghame. Whatever was the nature of the error, it cannot be the ground of reduction unless it can be shown to have given rise to the contract. Mrs Mercer had no power of exacting payment. Mr Anstruther might by unilateral deed have limited her to a much less sum; and all that she says is, *Quomodo constat*, that if Mr Anstruther had known that he was liferenter and not fiar, he would have restricted her to £5000?

An important feature in this case is that the deed sought to be reduced is an *inter vivos* deed, which came into operation at its date. For five years this deed stood on the public records, and no challenge was made. Even Mr Anstruther's second marriage was allowed to pass, and not till he was dead was the challenge made, when Mrs Anstruther could no longer execute such deeds as would rectify the error. If, notwithstanding lapse of time and the death of one of the parties, a deed standing on the public records can be reduced on grounds like the present, I think it follows, not only that Miss Lucy Anstruther might have challenged her discharge with equal success, but that Mr Anstruther, if he had been alive, would have had the authority of your Lordships for reducing his own marriage-contract.

Agents for Pursuers in both actions—Hamilton, Kinnear, & Beatson, W.S.

Agents for Defenders—A. & A. Campbell, W.S.

Thursday, March 7.

ERSKINE *v.* GLENDINNING.

Lease—Offer and Acceptance—Formal Deed embodying Contract. Circumstances in which it was found that a valid contract of lease had been constituted by offer and acceptance, though the latter did not exactly meet the former in form of words, and that the addition of the words, "subject to lease drawn out in due form," did not import a condition into the acceptance, that being a thing the landlord was entitled to insist upon, under any circumstances, if the contract, as embodied in the missives, was validly entered into.

In this action the pursuer, Mr Erskine, residing in Dalbeattie, sought to have it found and declared that by a certain letter of offer, addressed by the defender Mr Glendinning, also residing there, to him, and which letter of offer was in the following or similar terms:—"*Dalbeattie, May 18th*, 1870.—Mr Erskine, Sir,—I hereby offer to take a lease of the Wilmington corn and flour-mills and pigs'-houses and boilings, &c., for the period of ten years, entry at Whitsunday first, at the yearly rent of £80 sterling. (Signed) THOMAS GLENDINNING." And by a certain letter of acceptance, addressed by the pursuer to the defender, and which letter of acceptance was in the following or similar terms:—"*Dalbeattie*, 24 *May* 1870.—Mr Thos. Glendinning, Sir,—I beg to accept of your offer for my mill, subject to lease drawn out in due form.—I am, Sir, yours truly, JAMES ERSKINE;"—there was constituted a valid contract of lease between the pursuer and defender, and that the defender thereby became the pursuer's tenant in the corn and flour-mill and machinery therein in Dalbeattie belonging to the pursuer, and known as Wilmington Corn and Flour-Mills, with the pig houses, boiling-house, and piece of ground on which the said pig-houses and boiling-house are situated, and whole pertinents connected therewith; and that for a period of ten years from and after the 26th day of May 1870, at a yearly rent of £80 sterling.

The defender's offer had been written and delivered upon Saturday, 21st May, but had been antedated to the 18th, in consequence of its being exchanged for another offer, in which there were some errors, and which was put in on the 18th, the last day for receiving offers according to the pursuer's advertisement. The pursuer averred that he had verbally accepted the offer upon receiving it on Saturday the 21st, but the date of his written acceptance was Tuesday, 24th May. This letter was sent to the defender by messenger, as alleged by the pursuer, on the evening of the 24th, though the defender denied receiving it till the 25th. When produced in Court, the date had been altered by erasure into 25th. Upon 24th May the defender wrote, withdrawing his offer, and posted it to the pursuer, who only lived about 200 yards from the post-office, as the defender deponed, in time for the early morning delivery of the 25th;