The claim here, however, is made not upon feu-duties, but upon feu-duties and casualties. Now the terms of the statute are—lands, houses, feu-duties, or other heritable subjects. It does not specify casualties either alone or in conjunction with feu-duties. They cannot be held to come under "other heritable subjects." Nor can casualties be made under any circumstances the subject of a separate claim, even if they were, which might be possible, the subject of a separate estate. All the statute contemplated, therefore, as affording a qualification for a vote, was simply the annual feu-duty. On this ground alone I think the judgment should be adhered to. But then the claimant, if he meant to insist, ought to have substantiated his claim, whereas he has given us no information whatever on which we could give judgment in his favour.

Appeal dismissed.

Agent for Appellant—Party.
No appearance for Respondent.

COURT OF SESSION.

Tuesday, October 24.

FIRST DIVISION.

SPECIAL CASE—GEORGE LINDSAY & OTHERS (DR WELSH'S TRUSTEES).

Trust—Mutual Disposition and Settlement—Construction—Effect of reserved power of revocation, &c. Where a husband and wife had executed a mutual *mortis causa* trust-disposition and settlement, conveying to trustees their several estates for certain purposes, whereof some were corresponding or reciprocal, and some not, and containing a power "to us or the survivors of us" to nominate additional trustees, as also a reservation of "full power to us during our joint lives, or to the longest liver of us, even on deathbed, to alter, innovate or revoke these presents in whole or in part, as we or either of us may see cause." *Held* that in such deed the provisions are separable; those which are mutual or corresponding becoming matter of contract at the death of the first predeceaser, if not sooner, and irrevocable. Those which are not so being testamentary merely. And that the surviving wife was not entitled under the reserved power to alter and revoke to alter or revoke anything, except that which, as to her own estate, was testamentary merely. And, in particular, that she was not entitled to recall the nomination of trustees on her husband's estate and appoint others, or to recall the nomination of tutors and curators to her child.

The parties to this Special Case were—(1) George Lindsay and Others, the accepting and acting trustees and executors nominated and appointed under the mutual disposition and settlement of Dr and Mrs Welsh. (2) The said Mrs Welsh.

The more material portions of the said mutual trust-disposition and settlement, which was executed by Dr and Mrs Welsh on 15th April 1865, were as follows:—

"We, James Welsh, surgeon, Bombay Army, presently residing in Dalkeith, and Mrs Marion Douglas Lindsay or Welsh, spouses, being desirous so to settle our affairs as to prevent all disputes after our respective deaths, and having full confidence in the ability and integrity of the persons after named for executing the trust hereinafter created, do hereby nominate and appoint James Gray, banker in Dalkeith; George Lindsay, corn-merchant in Edinburgh; William Douglas, merchant in Glasgow; Thomas Cockburn, druggist in Dalkeith; and Henry Moffat, solicitor in the supreme courts of Scotland, Edinburgh, and the acceptors or acceptor, survivors and survivor of them, as trustees for the ends, uses, and purposes hereinafter written, and the heir of the last survivor, and such other persons or persons as may hereafter be nominated by us or the survivor of us, by any writing under our hands, or shall be assumed into the trust in virtue of the power hereinafter given (a majority of said trustees nominated or to be nominated or assumed as aforesaid, accepting and resident within Great Britain for the time, being always a quorum); but that in trust always, and for the ends, uses, and purposes after specified:—That is to say, I, the said James Welsh, do hereby give, grant, assign, convey, dispone, and make over to and in favour of the said James Gray, George Lindsay, William Douglas, Thomas Cockburn, and Henry Moffat, and the acceptors or acceptor, survivors and survivor of them, and to their or his assignees and disponees, but in trust always as after mentioned, all and sundry lands, heritages, and other heritable estate, ... as also all and sundry goods, gear, debts, sums of money, and whole moveable estate and effects now belonging, or which shall belong to me at the time of my death. . . . . But in trust always, and for the ends, uses, and purposes following, viz.:—*First*, for payment of all my just and lawful debts, deathbed and funeral expenses, and the expense of executing this trust. *Second*, I direct and appoint my said trustees or trustee to give to Mrs Marion Douglas Lindsay or Welsh, my said spouse, should she survive me, and so long as she shall remain my widow, the liferent, for her liferent use allenarly, during all the days of her lifetime, and so long as she shall remain my widow, of the whole residue of my heritable and moveable estate and effects above conveyed, after payment of the said debts, and the expenses of executing and managing this trust: declaring always, as it is hereby specially provided and declared, that my said widow shall be burdened with the maintenance, education, and upbringing of our children, if any, in a proper and suitable manner, until they shall be self-supporting, or able to be so; of all which my said trustees or trustee shall be the sole judges or judge. *Third*, Upon the death or second marriage of my said spouse, I direct and appoint my said trustees or trustee to expend all, or such part as they or he may think necessary, of the rents, interest, and annual produce of my trust-estate, in the proper upbringing, education, and maintenance of my said children, during their minority, ... *Fourth*, Upon the death or second marriage of my said spouse, and so soon thereafter as all of my children shall have arrived at majority, I direct and appoint my said trustees or trustee to convey, pay, and make over the said residue of my said heritable and moveable estate and effects to and in favour of my children lawfully procreated, equally amongst them, share and

share alike—declaring that the issue of such of said children as shall have predeceased said period of division shall be entitled to succeed, equally amongst them, to the share to which their deceased parent would have been entitled had he or she been then alive; and failing such issue, then the share of such predeceaser shall be divided equally amongst his or her surviving brothers and sisters. And *lastly*, failing all lawful issue of my body, then I direct and appoint my said trustees or trustee to convey and make over the residue of my said heritable and moveable estate and effects to and in favour of the children then surviving of Mrs Catherine Welsh or Cockburn, my sister, widow of Alexander Cockburn, draper in Dalkeith. . . . And on the other hand, I, the said Mrs Marion Douglas Lindsay or Welsh, do hereby give, grant, assign, dispone, convey, and make over to and in favour of the said James Gray, George Lindsay, William Douglas, Thomas Cockburn, and Henry Moffat, and to the acceptors or acceptor, survivors and survivor of them, and to their or his assignees and disponees, but in trust always as after mentioned, all and sundry lands, heritages, and other heritable estate. . . . . . As also all and sundry goods, gear, debts, and sums of money, and whole moveable estate and effects of every description, and wheresoever situated, now belonging, or which shall belong to me at the time of my death, ... but in trust always, and for the uses, ends, and purposes following, viz.:—*First*, For payment of all my just and lawful debts, death-bed and funeral expenses, and the expense of executing this trust; *Second*, I direct my said trustees or trustee to give to the said James Welsh, my husband, in case he shall survive me, the liferent, for his liferent use allenarly during all the days of his lifetime, of the whole residue of my heritable and moveable estate and effects above conveyed, after payment of the said debts, and the expenses of executing and managing this trust; *Third*, Upon the death of the said James Welsh, my husband, I direct and appoint my said trustees or trustee to expend all, or such part as they or he may think necessary of the rents, interest, and annual produce of my trust-estate in the proper upbringing, education, and maintenance of my said children during their minority, &c.; . . . *Fourth*, Upon the death of the said James Welsh, my husband, and so soon thereafter as all of my children shall have arrived at majority, I direct and appoint my said trustees or trustee to convey, pay, and make over the said residue of my said heritable and moveable estate and effects to and in favour of the children lawfully procreated of my body, equally amongst them share and share alike, declaring that the issue of such of said children as shall have predeceased said period of division shall be entitled to succeed, equally amongst them, to the share which would have fallen to their deceased parent had he or she been then alive; and failing such issue, then the share of such predeceaser shall fall and belong to and be divided equally amongst his or her surviving brothers and sisters. . . . . . and *lastly*, failing all such issue of my body, then I direct and appoint my said trustees or trustee to convey, dispone, and make over the residue of my said estate and effects, heritable and moveable, as follows: (*Then follow certain legacies and residuary legacy*). And we, the said James Welsh and Marion Douglas Lindsay or Welsh, hereby declare ourselves to be mutually satisfied with the liferent provisions above conceived in our favour respectively, and declare the same to be in full of all claim or demand which we or either of us could make against the said estates and effects, heritable and moveable, above conveyed, or against the goods in communion, at the decease of either of us, in any manner of way; and we nominate, constitute, and appoint the said James Gray, George Lindsay, William Douglas, Thomas Cockburn, and Henry Moffat, and such other person or persons as may be appointed or be assumed as trustees or trustee as aforesaid, and the acceptors or acceptor, survivors and survivor of them accepting, to be our sole executors or executor, and to be tutors and curators, or tutor and curator to such of our children as may be in minority at our decease, with all the powers conferred on tutors and curators by the law of Scotland; declaring that a majority of the surviving acceptors for the time shall be always a quorum of executors and tutors and curators, and that the last surviving acceptor shall be entitled to act as sole executor and tutor and curator, and that the whole office of executor, and the whole executry for the time, shall vest in the last surviving acceptor; (*here follow clauses affecting the powers and liabilities of the trustees*); and we commit to our trustees and executors and the said tutors and curators before named, or to be hereafter nominated or assumed as aforesaid, and the acceptors or acceptor, survivors and survivor, and their quorum, full power to assume into this trust, as trustees and executors and tutors and curators in succession to, or along with, and if surviving in succession to themselves, from time to time, such other person or persons as they may think proper, which trustees and executors and tutors and curators so assumed, and also any trustees and executors and tutors and curators to be hereafter nominated by us, or the longest liver of us, shall have the same powers, authorities, privileges, and exemptions in all respects, and be subject to the same directions as the trustees and executors and tutors and curators before named; and we provide that any trustee and executor, or tutor and curator, acting under these presents, may resign the said office of trustee and executor and tutor and curator at any time he sees proper, upon accounting for any actual intromissions had by him with the trust-estate and effects; . . . . and we reserve to ourselves, not only our own liferent of the heritable and moveable estates and effects above conveyed, but also full power to us, during our joint lives, or to the longest liver of us, even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as we, or either of us, may see cause."

The said Dr Welsh died at Bombay on 23d January 1867. He was survived by Mrs Welsh and one child. Mrs Welsh remained unmarried, and the child was still alive, though in minority, at the date of this Special Case. Dr and Mrs Welsh had not entered into any antenuptial marriage-contract.

Three of the trustees nominated, viz., George Lindsay, Thomas Cockburn, and Henry Moffat, accepted of the trust (the others named having declined), and thereafter made up the necessary titles to the property of the deceased Dr Welsh, and proceeded to administer the estate as directed in the trust-deed. Upon 1st August 1870, however, Mrs Welsh, the surviving spouse, in virtue of the clause of reservation contained in the conclusion of the trust-deed, executed a deed of al-

teration, revocation, and appointment, whereby she revoked and recalled the nomination and appointment of the said George Lindsay, Thomas Cockburn, and Henry Moffat, as trustees under the said mutual trust-disposition and settlement, "and the dispositions and conveyances therein contained, in so far as these are conceived in their favour, and also, in so far as I have power to do so, the nomination and appointment therein contained in their favour as executors and tutors and curators aforesaid;" and she nominated and appointed new trustees in their room and place. This deed was intimated to the trustees on 28th September 1870. The deed of revocation, alteration, &c., did not alter any of the trust purposes and provisions contained in the original mutual deed, but only the nomination of trustees, &c.

Mrs Welsh maintained that the above mentioned clause of reservation in the mutual deed gave her power to execute such a deed of revocation and new appointment, while the trustees held that the said clause of reservation applied to each of the truster's estates respectively, and did not give the survivor power to recall the nomination of trustees who had accepted of the trust, and had completed their title to the estate of the predeceaser.

Accordingly, it was agreed to lay the present special case before the Judges of the First Division. The following questions were stated for the opinion and judgment of the Court:—

"(1) Has Mrs Welsh (*the second party*) the power to recall the nomination of the said George Lindsay, Thomas Cockburn, and Henry Moffat, as trustees and executors under the said trust-disposition and settlement, and to appoint new trustees on the trust-estate of her deceased husband?

"(2) Is the *second party* entitled to revoke the nomination of the said George Lindsay, Thomas Cockburn, and Henry Moffat, as tutors and curators of her child?

"(3) Are the said *first parties* bound, upon the requisition of the new trustees and executors nominated and appointed by Mrs Welsh in said deed of alteration, revocation, and appointment, to execute a conveyance of the whole heritable and moveable estate of Dr Welsh now vested in them in favour of the said new trustees and executors nominated and appointed by Mrs Welsh under said deed of alteration, revocation, and appointment, upon the latter granting the former a full and absolute discharge of all their actings and intromissions with the estate, heritable and moveable, of Dr Welsh?"

Gordon, (D.-F.) and Marshall, for the trustees, contended that the settlement as a whole was not to be altered during the lifetime of both parties, except by mutual consent. After the death of either party, the survivor would have had no power to alter what would then have become an onerous mutual contract, had it not been for the clause of reservation contained at the end of the deed. But that clause must be read in connection with the provisions contained in the preceding portion of the deed, and looking to them it cannot be said to consist with a rational interpretation of this clause, and of the whole deed, to suppose that it gives to the survivor an absolute and unlimited right to interfere with the disposal of the predeceaser's estate.

Solicitor-General (Clark) and M'Laren, for Mrs Welsh, maintained that the power conferred upon the survivor in the clause of reservation was in general terms, and contained none of those limitations which it had been endeavoured to introduce from the rest of the deed. The surviving spouse might not indeed be entitled to use the power of revocation conferred in order to defeat the contract; but the revocation here made did not even attempt to do so, and was quite within the due exercise of the power reserved.

At advising—

Lord President—The deed which Mrs Welsh has executed, in exercise of her reserved power of revocation and alteration, recalls the nomination of trustees appointed by herself and her deceased husband, and appoints new trustees for the management, not only of her own, but of her husband's estate. The question which is now before us is, whether this revocation and nomination by her is effectual, so far as her husband's estate is concerned, to the effect specified in the questions appended to this Special Case. To the effect, namely, in the first place of revoking the original nomination of trustees and appointing new ones on Dr Welsh's estate. In the second place, of revoking the original nomination of tutors and curators to Dr and Mrs Welsh's child. And, in the third place, of obliging the original trustees to convey to those appointed by Mrs Welsh the estate of Dr Welsh at present vested in them. Now, the right of Mrs Welsh, or more properly the power reserved to her, depends upon a consideration of the clauses of the mutual settlement executed by Dr and Mrs Welsh on 15th April 1865, and I think that the general scope of the deed is also of great importance in determining what that power is. In this deed the husband settles his estate in the following way—he gives his wife the liferent of the estate for her liferent use allenarly. This liferent given to the wife is a bare liferent, and may be determined either by her death or second marriage. It is further burdened with the maintenance and upbringing of the children of the marriage, if any. Then the fee of the husband's estate is settled upon his children, and failing them upon certain other persons named, who are relations of his own.

On the other hand, Mrs Welsh conveys to the same trustees all her own means and estate, and directs them to give to her husband, should he survive her, the liferent, for his liferent use allenarly. On his death the income is to be used, in the first place, for the maintenance and upbringing of her children; and then, on the youngest attaining majority, the fee is to be given to them, and failing them to certain other legatees and residuary legatees, connections of her own. After the declaration of these trust purposes by the spouses, there follows this very important clause—"and we the said James Welsh and Marion Douglas Lindsay or Welsh, hereby declare ourselves to be mutually satisfied with the liferent provisions above conceived in our favour respectively, and declare the same to be in full of all claim or demand which we or either of us could make against the said estate and effects, heritable and moveable, above conveyed, or against the goods in communion at the decease of either of us, in any manner of way." Now, without inquiring into the question as to what might have been done during the joint life of the spouses towards altering or altogether annulling the deed, it must be apparent that in some respects, at any rate, it became binding and irrevocable after the death of the first deceaser. And this clause which I have just quoted is one at any rate which

has that effect. Whichever spouse survived was prevented by the existence of that clause from claiming his or her legal rights. The effect of it in fact was, that neither could have claimed any part of the fee of the other's estate. Upon this point the mutual settlement became a mutual contract, and irrevocable upon the death of the first deceaser. But it must be observed that the settlement upon the children are counter parts of each other, and I think we must assume that the husband's settlement upon the children was made in consideration of the corresponding settlement of the wife, and *vice versa.* I think, therefore, notwithstanding this reserved power of revocation, that on the death of the first deceaser these provisions came into operation as matters of mutual contract, and the children became vested in a right with which the surviving spouses could not interfere.

In a mutual settlement such as this it is not unusual to find that part of the deed contains matter of contract, while the other part is testamentary merely. Now, it does appear to me that part of this deed is purely testamentary, but that those parts which I have narrated are matters of contract. To proceed—Failing the children the fee of the husband's estate is settled on his own relations, and so with the wife's. These provisions are purely testamentary. Now, keeping the substance of the deed in view, there is no great difficulty in reading the clause of reservation consistently with the rights of parties as we see them settled in the previous part of the deed. This clause is as follows—"and we reserve to ourselves, not only our own liferent of the heritable and moveable estates and effects above conveyed"—that is to say, each spouse reserves to him or herself the liferent of his or her own estate. The expression is a joint expression, but the meaning is several. "But also full power to us during our joint lives, or to the longest liver of us, even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as we or either of us may see cause." That is, to alter, innovate, or revoke so much of this settlement as is revocable by each spouse. They might have altered or revoked the whole by a joint act during their joint lives; but when one of them had predeceased, and the deed had come into effect as a contract in some of its provisions, though remaining testamentary in others, the natural effect of that clause is to make that portion only revocable by the surviving spouse which as to that spouse is testamentary. Observe, too, how the words used consist with this interpretation. The power given to the spouses and the survivor is not a power conferred, it is one reserved. It is one which either could have exercised but for the existence of this deed. And when that power is one of revocation, it shows that the power to revoke applies to something which the revoker has already done. I have therefore no difficulty in defining the powers conferred by this clause of reservation; and it appears to me that the surviving spouse had not power reserved to her to interfere in any way with the distribution or administration of her husband's estate.

A difficulty has been raised in the first clause of the deed, which nominates new trustees to act for both parties. It nominates certain persons "and the acceptors or acceptor, survivors and survivor of them, as trustees for the ends, uses, and purposes hereinafter written, and the heir of the last survivor, and such other person or persons as may hereafter be nominated by us or the survivor of us, by any writing under our hands, or shall be assumed into the trust in virtue of the power hereinafter given," &c. Now, in the clauses of conveyance of the several estates of the spouses, the constitution of the trust is not in exactly the same terms. The conveyance in each case is to the persons named and their assignees or disponees, but not to any trustees to be afterwards named by the spouses, or the survivor of them. And it is said that this shows that it was contemplated that the constitution of the trust might be altered by the survivor, and that therefore the exercise of her reserved power here attempted by Mrs Welsh was perfectly legitimate. This is, however, rather a jump in reasoning. Power to name new trustees is not the same as power to revoke the original nomination of trustees, and appoint a totally new set. But I go farther than this—I think what is meant by the words "and to such other person or persons as may hereafter be nominated by us, or the survivor of us," is this, that if the spouses chose thereafter to name new trustees, they had power to do so. And that the survivor might also nominate and add new trustees; but that, in accordance with the view I take of the whole deed, only to his or her own individual estate.

I therefore propose to answer the first question in the negative, and the second and third follow as matter of course.

LORD ARDMILLAN—I concur with your Lordship in answering all these questions in the negative. The principal point is that adverted to by your Lordship, namely, the separability of the different provisions of the deed, some of which are mutual, and create a contract, and some of which do not come within that category. With regard to those provisions which are mutual, the surviving wife could make no alteration; she could in no way, for instance, affect her child's rights. Both spouses thus created certain rights affecting their estates, and at the same time created a trust for the protection of those rights. Now, if the widow could not alter the deed so as to affect those provisions which, being mutual, are subject of contract with the husband, neither could she revoke the trust reared for the protection of those rights and purposes. The trusts are just as separable as the purposes themselves.

LORDS DEAS and KINLOCH concurred.

Agents for Dr Welsh's Trustees—J. & H. Cairns, W.S.

Agents for Mrs Welsh—Millar, Allardice & Robson, W.S.

Tuesday, October 24.

NORTH BRITISH RAILWAY COMPANY *v.* BEXFIELD.

Process—Appeal under § 40 *of the Judicature Act—No Appearance for Respondent.* Action dismissed.

In this action of damages before the Sheriff-court of Glasgow, certain important preliminary pleas were taken by the defenders the Railway Company, and repelled by the Sheriff, who there-