acknowledgement with the purpose of contracting a marriage, unless such consent or acknowledgement is to be inferred as a presumption of law from the facts therein stated. (8) There were four children of the said William Ellis Wall and Sarah Ogg, namely, two daughters,—Sarah Wall, born on the 22d August 1862, at Glasgow, in Scotland, and Fanny Catherine Wall, born on the 6th May 1864, at Dalkeith, in Scotland; and two sons, —namely, William Ellis Wall, born on the 30th August 1866, at Dalkeith, in Scotland, and Edward William Wall, born on the 17th March 1868, at Exeter, in England, and the said William Ellis Wall, the father, and Sarah Ogg, then Sarah Wall, understood and believed that the said children were legitimate. (9) The said sons, who have respectively a claim to real estate in England, are the petitioners in this suit, by their guardian assigned, for a declaration of the validity of the marriage of their parents, and of their own legitimacy, under the 'Legitimacy Declaration Act, 1858,'"

The question on these facts is,—"Whether, according to the law of Scotland, which it is to be assumed governs the matter, the said William Ellis Wall and Sarah Ogg, after the removal of the hereinbeforementioned impediment to their marriage, and prior to the births of their said sons, or either and which of them, became married persons."

Argued for the petitioners—In this case habit and repute was proved, and when these facts were proved the law presumed marriage. The only question here was at what date must the marriage be held to have taken place. Clearly, at the date of the removal of the obstacle to the marriage on 19th February 1863. Therefore the question before the Court should be answered in the affirmative.

Argued for the respondents—Habit and repute was not a method of establishing, but of proving, a marriage, and the question was whether the presumption which habit and repute raised was one of law or of fact. It was a presumption of fact, because the contract of marriage was a civil contract, depending on consent, and whether consent was given or not was a question of fact. The presumption then being one of fact, were there any elements in this case to weaken the presumption? There was one element which destroyed the presumption altogether, and that was the fact that the cohabitation was begun and continued in the belief that the ceremony of 1862 was a marriage. That ceremony did not constitute a marriage, but the parties thought it did, and so when the bar to their marrying was removed they would not then interchange any consent to live together as man and wife. So the presumption, being one of fact, that after the removal of the bar consent was interchanged, had no room in this case. There was therefore no marriage by habit and repute, and the question should be answered in the negative.

Authorities—Ersk. i., 6, 6; Stair, i., 4, 6, and 4, 45, 19; I. Fraser, 142 and 203; *Lowrie* v. *Mercer*, May 28, 1840, 2 D. 953; *Campbell* v. *Campbell*, June 26, 1866, 4 Macph. 867, 5 Macph. (H. L.) 115; *Cunningham* v. *Cunningham*, 2 Dow 482; *Lapsly* v. *Grierson*, Nov. 19, 1845, 8 D. 34.

The Court returned the following answer to the question submitted:—

"*Edinburgh*, 16*th June* 1874.—The Lords of the First Division, &c., make answer and say that according to the law of Scotland, William Ellis Wall, in the said case mentioned, and the petitioner Sarah Ogg or Wall, after the removal of the impediment to their marriage, also in the said case mentioned, and before the birth of their eldest son William Ellis Wall, became married persons.

Counsel for the Petitioner—Dean of Faculty (Clark), and Watson. Agents—T. & R. B. Ranken, W.S.

Counsel for Respondents—Scott and Balfour. Agent—D. F. Bridgeford, S.S.C.

Friday, June 19.

FIRST DIVISION.

[Lord Shand, Ordinary.

THE DUKE OF DEVONSHIRE AND OTHERS, *v.* FLETCHER AND OTHERS.

Sale—Implement — Title—Trustee — Marriage-Contract.

By marriage-contract in the English form, the portion of the wife was settled in trust for payment out of interest of an annuity of £200 to her during the subsistence of the marriage, and of the remainder of the interest to the husband. On the death of either of the spouses, it was provided that the whole interest or proceeds of the fund should be paid to the survivor during his or her life. The deed provided that failing children one-half of the fund should be the property of the husband and the other half the property of the wife, to be disposed of by deeds *inter vivos* or *mortis causa* in the case of the husband, and by *mortis causa* deed in the case of the wife. The deed further contained powers to the trustees to change the investments and to purchase heritable property and to dispose of the same from time to time, all with the consent and direction of the husband and wife, subject, however, to the declaration that the lands to be perchased with any part of the trust-fund should, for the purposes of the settlement, be considered as money and personal estate, and should be subject in all respects to the same trust as the money laid out therein would have been subject to if the same had been so laid out and invested. There were no children of the marriage, and the husband disposed of his whole interest in the trust-fund in order to raise money. The trustees in the course of their management had invested the trust-funds in a certain heritable estate, and with the consent of the spouses they entered into a contract for the sale of this estate. In a question with the proposed purchaser as to implement of the contract and payment of the price,—*Held*, 1st, That the husband, notwithstanding that he had conveyed away his whole interest in the trust-estate, was in a position to give his consent to the sale, in terms of the marriage-contract; but, 2d, that as the trustees could not purge the estate of incumbrances, the buyer was not bound to implement the contract of sale.

This was an action of declarator, implement, and payment at the instance of His Grace the Duke of Devonshire and others, trustees under

the marriage-contract of Sir James John Randoll Mackenzie of Scatwell, Baronet, and the Right Honourable Anne Wentworth Fitzwilliam, against James Fletcher, Esq. of Rosehaugh, Ross-shire, and others.

The following narrative is taken from the note of the Lord Ordinary;—

"The pursuers, the surviving trustees under the settlement in the English form, dated 9th October 1838, entered into on the marriage of Sir James John Randoll Mackenzie and Lady Anne Wentworth Fitzwilliam, now Mackenzie, in April and May last 1872, with consent of these married persons hereinafter called Sir James and Lady Anne Mackenzie, entered into a contract of sale with the defender, Mr Fletcher of Rosehaugh, by which they sold to him the estate of Meikle Suddie in Ross-shire, held by them as trustees under the said marriage settlement, at the price of £16,500; and the object of the present action is to try the validity of certain objections which Mr Fletcher has stated to the right and title of the pursuers to convey the lands to him, and in the event of these objections being held to be unfounded, to have Mr Fletcher ordained to implement the contract of sale, and to pay the price of the lands on delivery of a disposition to be granted by the pursuers, as trustees foresaid, with consent of Sir James and Lady Anne Mackenzie.

"The marriage between the consenting pursuers took place in 1838. There has been no issue of the marriage, and Lady Anne Mackenzie is upwards of fifty-three years of age. By the marriage settlement the sum of £12,500, the portion to which Lady Anne Mackenzie was entitled as therein set forth, was settled in trust, for payment, in the first place, out of the interest and proceeds of the said fund, of a sum of £200 a-year to Lady Anne Mackenzie during the subsistence of the marriage, on her receipt, independent of her husband, and in the next for payment of the remainder of such interest or proceeds to Sir James Mackenzie and his assigns. On the death of either of the spouses, it was provided that the whole interest or proceeds of the fund should be paid to the survivor during his or her life. In regard to the capital of the fund, the deed provided that it should be held in trust for behoof of the child or children of the marriage, other than the heir of entail entitled to succeed to the entailed estates which belonged to Sir James Mackenzie. The deed further provides that, failing children, one-half the fund should be the property of Sir James Mackenzie, and the other half the property of Lady Anne, to be disposed of by deeds *inter vivos* or *mortis causa* in the case of Sir John Mackenzie, and by *mortis causa* deed in the case of Lady Anne Mackenzie, and failing such deeds, should devolve on their respective representatives.

"At the date of the marriage settlement the sum of £12,500 above mentioned was invested on mortgage on the estates of the Right Honourable Charles William Earl Fitzwilliam, Lady Anne Mackenzie's father. The marriage settlement, however, contained powers, in the terms aftermentioned, to change the investments, and to purchase heritable property, and to dispose of the same from time to time; all with the consent and direction of Sir James and Lady Anne Mackenzie, or the survivor of them, subject, however, to the declaration that the lands to be purchased with any part of the trust-fund should, for the purposes of the settlement, be considered as money and personal estate, and should be subject in all respects to the same trust as the money laid out therein would have been subject to if the same had not been so laid out and invested.

"Acting on the power thus given, the sum of £11,900, part of the said fund, was uplifted on the request of Sir James and Lady Anne Mackenzie, and was invested in the purchase of the lands of Strathgarve, in the county of Ross, and a conveyance of the lands was then granted in favour of the marriage-contract trustees, and the survivors or survivor of them, for the purposes of the marriage settlement. In 1856 the trustees, on the request of Sir James and Lady Anne Mackenzie, sold the lands of Strathgarve to Mr Murray of Touchadam and Polmaise at the price of £14,000; and that sum, along with the remaining portion of the original sum of £12,500, being £600, which had until then remained invested in mortgage on the Fitzwilliam estates, was at Martinmas 1856, on the request and requisition of Sir James and Lady Anne Mackenzie, employed in the purchase of the estate of Meikle Suddie and others above mentioned, which had previously belonged to Sir James Mackenzie. The title to these lands now stands in the persons of the marriage-settlement trustees, who have, however, lately sold the lands, at the desire and on the requisition of Sir James and Lady Anne Mackenzie, to the defender, at the price of £16,500. The pursuers allege (Cond. 33), and it is not disputed that they intend and undertake to invest the price derived from the sale of the said estate in their own names as surviving trustees under the said marriage settlement, and to hold the same, subject to the trusts in that deed, and to the burdens, charges, and attachments mentioned on record, and to be immediately referred to. The defender's objection to the pursuer's right and title to convey the lands to him arises from the fact that Sir James Mackenzie has granted to creditors various conveyances of his beneficial interest under the trust, and that diligence has been used against him of various kinds for the purpose of attaching his interest in the trust-estate. The defender maintains that in consequence of these deeds and diligences, Sir James Mackenzie has no longer any power to consent to sell the property, and that without such consent the pursuers have no power to change the investment of the trust-funds, and have therefore no power effectually either to sell or convey the estate to him.

"The clause in the marriage-contract on which this question arises is in the following terms:—'Provided always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said William Earl of Burlington, John Charles Dundas, William Hugh Viscount Melgund, and Alexander Mackenzie, and the survivors and survivor of them, and the executors and administrators of such survivors, and they and he are and is hereby authorised and required at any time or times, after the solemnisation of the said intended marriage, by and with the consent and direction in writing of the said James John Randoll Mackenzie, and Lady Anne Wentworth Fitzwilliam, during their joint lives, and after the decease of either of them, then with the consent and by the direction in writing of the survivor of them, to make sale of the stocks or funds, or to call in the securities which shall be then vested in the said trustees or trustee for the

time being, or any of them, or any part thereof, and by and with such consent and direction as last mentioned, to lay out and invest the monies to arise by any such calling in, sale, transfer, or disposition, in one or more purchase or purchases of freehold or copyhold messuage lands, tenements, and hereditaments, or both intermixed, in some convenient place or places in England or Wales, or in Scotland, to be conveyed, surrendered, and assured unto and to the use of the said William Earl of Burlington, John Charles Dundas, William Hugh Viscount Melgund, and Alexander Mackenzie, or the survivors or survivor of them, or the trustees or trustee for the time being of these presents, and their or his heirs and assigns for ever; which estate or estates so to be purchased shall again (by and with the like consent and direction in writing of the said James John Randoll Mackenzie and Lady Anne Wentworth Fitzwilliam during their joint lives, or of the survivor of them during his or her life, and after the decease of such survivor, then of the proper authority of the said William Earl of Burlington, John Charles Dundas, William Hugh Viscount Melgund, and Alexander Mackenzie, and the survivors or survivor of them, or his heirs) be resold to any person or persons who shall be willing to become the purchaser or purchasers thereof, and upon further trust to pay and apply the monies to arise by such sale or sales upon and for such and the same trusts, intents, and purposes as the monies wherewith such messuages, lands, tenements, and hereditaments were purchased were liable or subject to, or would have been liable or subject to in case such purchase or purchases had not been made.'

"The deeds and diligences which are the grounds of the defender's objection are enumerated in the condescendence, articles 13 to 26 inclusive, and referring to these articles the Lord Ordinary deems it sufficient here to notice, that besides conveyances by Sir James Mackenzie of his beneficial interest in the trust-fund held by the pursuers, they include every species of dilligence under which Sir James Mackenzie's beneficial interest under the trust can be attached, whether his right be real or personal. In article 22 it is stated that in September 1864 Sir James Mackenzie was adjudged bankrupt according to the law of England, and although he has obtained a personal discharge, it does not appear that he has been reinvested in the bankrupt estate. It has further to be explained, as stated in article 20 of the condescendence, that an agreement or arrangement was entered into in 1864 between the marriage settlement trustees and a number of Sir James Mackenzie's creditors under the deeds and diligences above referred to, by which it was arranged that the various arresting creditors should loose the arrestments used by them in the hands of the tenants of the estate of Meikle Suddie, and that the free rents of the estate should be applied in the first place in payment of the sum of £200 per annum secured to Lady Anne Mackenzie under the marriage-settlement, and the surplus in such manner as the trustees should direct, but subject to the rights of the creditors. Since that date the free rents of the property have been applied in payment of the said annual sum of £200 to Lady Anne Mackenzie, and the balance to the North British and Mercantile Insurance Company, creditors as holders of a bond and assignation in security, granted by Sir James Mackenzie, dated in May 1859, for £1200.

"The pursuers have called as defenders the whole of the parties interested as creditors of Sir James Mackenzie, under the various deeds and diligences above referred to for their interest, but none of these parties have appeared to state any defence to the action."

The pursuers pleaded—"(1) The pursuers are entitled to decree in terms of the declaratory conclusions of the summons, in respect that under and in virtue of their title, as surviving trustees foresaid, to the lands in question, they have the full and undoubted right to sell said lands with the consent required by the trust, and in respect that none of the bonds, decrees, debts, diligences, or other writs, enumerated in the conclusions of the summons affect or burden the said lands and estate of Meikle Suddie, or any part thereof, or the pursuers' title thereto. (2) In respect that the events under which the bond of corroboration and disposition in security mentioned in condescendence, article 13, could alone become operative, are now impossible, and also that the lands and estate of Meikle Suddie are sufficiently protected from any claim under the same by the bond of indemnity second libelled, the said bond and disposition cannot be founded on as affecting the said lands or the pursuers' right and title thereto. (3) The pursuers having implemented, or being willing to implement, their part of the contract of sale libelled, they are entitled to decree of implement against the said James Fletcher in terms of the conclusions of the summons. (4) Generally, the pursuers are entitled to decree, in terms of the conclusions of the summons; with expenses against the said James Fletcher, and also against the other parties called for their interest, in the event of their appearing and opposing the conclusions thereof."

The defender, Mr Fletcher, pleaded—"(1) The statements of the pursuers are not relevant or sufficient to support the conclusions of the summons as against the present defender. (2) The present defender having been all along ready and willing to implement his part of the said contract of sale on receiving from the pursuers implement of their part thereof, the present action, in so far as directed against him is unnecessary, and ought to be dismissed. (3) The pursuers are not entitled to decree against the present defender as concluded for, in respect their title to the said lands and estate sold to the defender is impaired or nullified by the various securities, bonds, inhibitions, arrestments, adjudications, agreements, adjudications of bankruptcy, trust-deeds, indentures, mortgages, and others, set forth in the summons and in the condescendence annexed thereto, or some of them. (4) Under the contract of sale libelled the defender is not bound to pay the price of the said lands or to accept a disposition thereof unless and until he is satisfied with the pursuers' title to dispone the same, and until the pursuers give clear searches completed in all the registers for the prescriptive period, and purge the record of the incumbrances thereby disclosed, and obtain discharges, releases, or restrictions of the said various securities, bonds, inhibitions, arrestments, adjudications, agreements, adjudications of bankruptcy, trust-deeds, indentures, and mortgages, in so far as they affect the said lands and estate, the pursuers' title thereto, or the rents thereof. (5) The pursuers being unable to implement their part of the said

contract of the sale, the defender ought to be assoilzied with expenses."

The Lord Ordinary pronounced this interlocutor:—

"*Edinburgh, 5th April* 1873.—The Lord Ordinary having considered the cause—Finds that, by the provisions of the settlement dated 9th October 1838, made upon the marriage of Sir James John Randoll Mackenzie of Scatwell, Baronet, and the Right Honourable Anne Wentworth Fitzwilliam, now Lady Anne Mackenzie, his wife, power was given to the trustees acting under that deed, with the consent and by the direction in writing of the said Sir James John Randoll Mackenzie and Lady Anne Wentworth Fitzwilliam or Mackenzie, to sell to any person or persons who should be willing to be the purchaser thereof, the lands and estate in which the trust-funds therein mentioned might be laid out or invested from time to time: Finds that the power thus given to the said Sir James John Randoll Mackenzie and Lady Anne Wentworth Fitzwilliam to grant their consent and direction in writing to the sale of such lands and estate, was of the nature of a trust which could not be conveyed away or alienated by any deed executed by them, or either of them, nor attached by the diligence of their creditors as a beneficial right belonging to them: Therefore repels the third plea in law stated by the defender, and the whole defences, and decerns in terms of the conclusions of the summons, excepting as to expenses; and in the special circumstances, and with reference to the concluding part of the subjoined note, Finds the defender, Mr Fletcher, entitled to expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and report: Further finds, decerns, and declares in absence against the whole other defenders in terms of the conclusions of the summons."

After giving the narrative already quoted his Lordship added:—"The argument of the defender, founded upon the clause in the marriage-settlement above quoted, is that the effect of the deeds granted by Sir James Mackenzie as above mentioned, and the diligences used by his creditors, have divested him of every power vested in him under the marriage settlement of dealing with the property in question. It is pleaded that as there can no longer be any children of the marriage, the pursuers, as trustees under the marriage settlement, hold the estate of Meikle Suddie to the extent of one-half directly for behoof of Sir James Mackenzie, who has also rights to the proceeds of the whole estate during his lifetime, after payment of the annual sum of £200 to Lady Anne Mackenzie, so long as she lives, and it is urged that as Sir James's consent to any conveyance by the trustees is necessary to its validity, he is disabled from giving such consent because his beneficial interest in the property has been transferred to his creditors. In answer to this argument, the pursuers, besides maintaining that the power or right of Sir James Mackenzie to require and consent to a change in the investment of the trust-funds is not of such a nature as to be affected by the deeds granted by him or the diligence used by creditors, have stated special grounds applicable to each particular deed or diligence, in virtue of which it is pleaded that Sir James's right to require and consent to the conveyance of the estate has been either conveyed or attached by diligence. The Lord Ordinary thinks it unnecessary to consider these special grounds in detail, for he is of opinion, on the general ground to be immediately stated, that the defender's pleas are not well founded.

"If it could be correctly represented that Sir James Mackenzie, in requiring that the estate should be sold, and consenting to the disposition, was dealing as a beneficiary with his beneficial right under the marriage settlement, it is clear he would have no right to do so after having granted the conveyances above referred to, and after the use of diligence by his creditors, for there appears to be no doubt that his beneficial interest has been conveyed and attached. But it appears to the Lord Ordinary that his requisition and consent in reference to the sale cannot be properly represented in this light. His act has been that of a trustee, not of a beneficiary, although no doubt he is a beneficiary under the trust. When the fund was originally settled, it was thought to be of importance by those who acted for the lady that a discretion *in the management* should be committed to Sir James and Lady Anne Mackenzie. Accordingly, although the trustees only were vested with the title to the fund, it was provided that the existing investments should only be changed from time to time, 'with the consent and direction in writing' of Sir James and Lady Anne Mackenzie, and after the death of either of them, 'then with the consent in writing, and by the direction of the survivor of them.' It appears to be the sound construction of the clauses of the marriage settlement on this subject that the management of the fund and the mode of its investment was devolved on the trustees, subject to this condition only, that no change should voluntarily be made, except with the approval in writing of the spouses, or the survivor of them. It does not appear to be the true construction of the marriage settlement that Sir James and Lady Anne Mackenzie could require the trustees to change the investment against their own views of what was best for the interests of the trust. Even, however, if the power were of this more extensive kind, it would be of the same nature as if limited to a veto against any change of investment. It is of the nature of a trust, the spouses being each a *sine qua non* on the question of a voluntary change of investment. They were constituted trustees under the deed to this limited effect, but, as such trustees, if they thought fit to accept the duty, they became entitled and bound to exercise their discretion when occasion should arise, and act accordingly. If it be assumed that a question as to the exercise of the power similar to the present had arisen after children of the marriage had come into existence, and when there was little or no prospect of either of the spouses having any beneficial interest in the capital of the fund, the nature of the power as a trust would be perhaps more apparent. The children in that case would be fairly entitled to have the benefit of their parents' exercise of discretion as controlling or guiding the trustees as holders of the fund. It cannot make a difference in the nature of the power that there has been no issue of the marriage. Each of the spouses is entitled to the benefit of the discretionary power to be used by the other as a trust, and, in the opinion of the Lord Ordinary, cannot be deprived of that benefit either by a conveyance by the other spouse of his or her beneficial interest under the trust, nor by the diligence of his or her creditors. The power is one of which, in the opinion of the

Lord Ordinary, the person possessing it cannot be divested either by conveyance or by the diligence of creditors, for the reason that it is a trust for the administration of the fund generally, and not a beneficial interest or right of property peculiar to the individual. The case might be different if the marriage had been dissolved, without issue, by the death of Lady Anne Mackenzie before her husband. In that case Sir James Mackenzie would have right to the liferent of the whole fund during his life, and to the fee of one-half, to be disposed of by deed *inter vivos* or *mortis causa*. But even in such circumstances the Lord Ordinary would be disposed to hold that the power in question remained as a trust, which the representatives of Lady Anne Mackenzie might require that Sir James Mackenzie should exercise, and could not be affected either by Sir James's deed conveying away his beneficial interest under the trust, or by the diligence of his creditors.

"None of the creditors having appeared, the Lord Ordinary has granted decree in absence against them. It was pleaded by the defender Mr Fletcher that a decree *in foro* against him, repelling his defence, would not preclude any of the creditors hereafter from raising the same question, and that he was entitled to be kept absolutely safe against this, and therefore was not bound to conclude the purchase. The Lord Ordinary cannot adopt this view. He is rather of opinion that, as the defender is in a position in which he has a title to plead on the debts and deeds above referred to, as standing in the way of the conveyance with the same force as the creditors themselves could do, that the present decision would be *res judicata* in any question hereafter with such creditors. And, in any view, it would be more difficult for any creditor who has not appeared in this action to take any objection hereafter, in a question with the defender, to the change of investment to be made. But however this may be, the Lord Ordinary is of opinion that the defender is not entitled to refuse to implement the contract of sale because of objections which may be taken by creditors, but which, on being now stated, in the opinion of the Court are not well founded. If such a plea were to receive effect, it would be sufficient for any purchaser to shew that a claim to the property, however unfounded, might be made by a third party, and to require a decree *in foro* against such party before he could be called on to implement his purchase.

"On these grounds, the Lord Ordinary has repelled the defences, and granted decree as concluded for. But in the circumstances, and having regard to the fact that the present question has arisen in consequence of the deeds and actings of Sir James Mackenzie, the Lord Ordinary is of opinion that the defender is fairly entitled to have the question which he has raised decided, as it might have been raised and decided in a suspension of a threatened charge, so as to clear the title of an apparent objection, and accordingly the Lord Ordinary has found the defender entitled to the expenses of obtaining this judgment."

The defender reclaimed.

At advising—

Lord President—The pursuers are the surviving and acting trustees under the marriage-settlement of Sir James and Lady Anne Mackenzie, which was executed on the 9th October 1838, and the portion of that settlement with which we have to do is that which deals with the fortune of Lady Anne Mackenzie, which amounted to £12,500, and was invested on mortage on the estate in England of Lord Fitzwilliam, her father.

The trustees invested this money first in the lands of Strathgarve. That purchase cost £11,900, and the balance of £600 was retained by the trustees. In 1856 these lands were sold for £14,000, and this sum, together with the balance in the hands of the trustees, was invested in the estate of Meikle Suddie. This estate the trustees have now sold to the defender Mr Fletcher, by contract of sale, for the price of £16,500. The fortune of Lady Anne has therefore improved in the hands of the trustees, especially if this sale is carried through. But Mr Fletcher objects to complete the sale on two grounds. In the first place, he says that the trustees can't give him a title, and, in the second place, that they can't purge the estate of certain burdens and diligences. These two defences require to be considered quite separately, but both of them depend in the first instance upon the nature of the trustees' title, and so we must look at the settlement of the £12,500 in the marriage-contract. The income of that sum was to be divided during the joint lives of the spouses in this way. Lady Mackenzie was entitled in the first place, out of the interest and proceeds of the said fund, to a sum of £200 a-year, and the remainder of the interest went to Sir James Mackenzie and his assigns. On the death of either of the spouses, it was provided that the whole interest and proceeds of the fund should be paid to the survivor during his or her life. In regard to the capital of the fund, the deed provided that it should be held in trust for behoof of the child or children of the marriage. There have been no children of the marriage, and the age of the parties makes it in the highest degree improbable that there should now be any children. In case of no children, the trustees are to hold the fund "as to and concerning one equal moiety or half part thereof, in trust for and for the benefit of such person or persons as the said James John Randoll Mackenzie, at any time or times during his life, by any deed or deeds, writing or writings, or by his last will and testament in writing, shall direct or appoint, and in default of such direction or appointment, or as to so much of the last-mentioned moiety and premises as shall not be completely or effectually disposed of, in trust for the next of kin of him, the said James John Randoll Mackenzie, living at the time of his death, but in exclusion of the said Lady Anne Wentworth Fitzwilliam, his intended wife; and as to and concerning the remaining moiety or equal half of the said last mentioned trust monies, in trust for and for the benefit of such person or persons as she, the said Lady Anne Wentworth Fitzwilliam, at any time or times during her life, by her last will and testament in writing, or any writing of appointment purporting to be or in the nature of a will, shall direct or appoint, and in default of such last-mentioned direction or appointment, upon trust for and for the benefit of such person or persons as would have been entitled to the clear surplus of the personal estate of the said Lady Anne Wentworth Fitzwilliam as her next of kin at her death, in case she had died unmarried and intestate." Now, under the deed so far the result is plain. The trust must be kept up during the life of the survivor of the spouses, and is now a subsisting

trust. But Sir James Mackenzie is entitled to dispose of one half of the fund, either by will or by deed *inter vivos*, and he has executed several deeds by which he has disposed of his whole interest both in the income and capital of the fund. It is not necessary to go into the details of these deeds, but there is no doubt that by every possible means he has made his interest in the trust a means of raising money. Then the marriage-settlement proceeds further to say that the trustees are "authorised and required at any time or times after the solemnization of the said intended marriage, by and with the consent and direction in writing of the said James John Randoll Mackenzie and Lady Anne Wentworth Fitzwilliam, during their joint lives, and after the decease of either of them, then with the consent and by the direction in writing of the survivor of them, to make sale of the stocks or funds, or to call in the securities which shall be then vested in the said trustees or trustee for the time being, or any of them, or any part thereof, and by and with such consent and direction as last mentioned, to lay out and invest the monies to arise by any such calling in, sale, transfer or disposition in one or more purchase or purchases of freehold or copyhold messuages, lands, tenements, and hereditaments, or both intermixed, in some convenient place or places in England or Wales or in Scotland." Then there is power to the trustees to re-sell, also with consent of the spouses or survivor. We have seen that the investment has been changed several times by the trustees, with the consent of the spouses.

In these circumstances, the first objection taken by the defender to the proposed conveyance of the lands of Meikle Suddie is, that it is necessary for both Sir James and Lady Anne Mackenzie to be consenting parties, and that Sir James is not in a position to give his consent, or to act in the matter at all, having given up his whole interest in the trust estate. That objection is not well founded. I do not, however, agree with the Lord Ordinary that the power given to Sir James and Lady Anne Mackenzie was of the nature of a trust. In the legal sense I cannot see anything in the nature of a trust about it. No doubt the power of regulating the investment of the fund by their consents was given to the spouses to secure that the trustees should not make or change an investment without the approval and acquiescence of the spouses, and in a popular sense—but only in a popular sense—that may be said to be a trust for the children. In the proper legal sense, however, it is not a trust; but a power of the nature of a veto. That power is not a transmissible power, and a creditor acquiring right to Sir James' interest in the estate does not acquire that power. Thus, I cannot think that this power has been extinguished, but that Sir James is as much in a position to give his consent as before he gave up his interest in the trust estate. I am therefore of opinion that the first objection is not a good one.

There remains an other objection which is much more formidable. The fourth plea in law for the defender is:—"Under the contract of sale libelled the defender is not bound to pay the price of the said lands or to accept a disposition thereof unless and until he is satisfied with the pursuers' title to dispone the same, and until the pursuers give clear searches completed in all the registers for the prescriptive period, and purge the record of the incumbrances thereby disclosed, and obtain discharges, releases, or restrictions of the said various securities, bonds, inhibitions, arrestments, adjudications, agreements, adjudications of bankruptcy trust-deeds, indentures, and mortgages, in so far as they affect the said lands and estate, the pursuers' title thereto, or the rents thereof."

There are undoubtedly a great many incumbrances which affect at least Sir James Mackenzie's right in the trust-estate, and the peculiarity of the case is that the trustees are not in a position to purge the estate of these incumbrances. It is plain that these incumbrances cannot be given effect to till after the death of the spouses. Till then they are only in the shape of securities, so the ordinary mode of dealing with incumbrances in case of a sale cannot be followed here. Even if these are incumbrances which a seller is bound to purge, the sellers in this case cannot purge them. Another course is often adopted, and it is this. The purchaser raises a multiplepoinding, and allows all parties interested to compete for the price. But that course is no more practicable here than the other, for the obvious reason that neither the trustees nor the purchaser are in a position to bring parties into the field. The question which thus comes before us is novel and peculiar, and is this, whether the defender is bound to take the estate with all the deeds and diligences standing, and take his chance as to their effect. The pursuers say that he is bound to do so, because they can shew that none of the deeds and incumbrances affect the lands, but only Sir James' *jus crediti* under the trust, and that none of the creditors can ever touch the lands in the hands of a purchaser. I question if the pursuers could make that clear, but looking to the state of these deeds and diligences, and especially in the absence of the security holders, I am not inclined to give an opinion on that point, but I certainly cannot say that they would not affect the property in the hands of a purchaser. I am therefore of opinion that we cannot decide in favour of the pursuer, and compel the defender to take the conveyance offered to him.

Lord Deas concurred.

Lord Ardmillan—Mr Fletcher is the purchaser of the estate of Meikle Suddie; and he has stated certain objections to the title offered to him, and he declines to complete the sale. The object of this action at the instance of the trustees of Sir James and Lady Anne Mackenzie is to meet these objections, and to obtain declarator of the validity and sufficiency of the title, and to enforce implement of the sale. Mr Fletcher resists the conclusions of the action, and maintains that he is not bound to accept the title offered, to which he contends that he has stated serious objections. We have had very ample and able arguments on these objections. I do not wish to express or indicate an opinion that the title offered is, in respect of any of these objections, clearly and incurably defective. It may ultimately be found that the objections are not well founded. For disposal of the present question it is, in my view, sufficient that the title offered is exposed to serious objection, whether insuperable or not. It cannot be denied that doubts, difficulty, embarrassment, and probable litigation must be the result of completing this sale by the acceptance of the title offered. The purchaser declines to accept a title which it subject to such

doubt and attended by such difficulty. I think he is entitled so to decline. He is not bound to incur the risk or expense of litigation. The fact that the validity and sufficiency of the title is open to serious doubt is enough to support his refusal.

I may refer to the case of *Dick* v. *Cuthbertson* in the House of Lords on 12th Dec. 1826, and in this Court on 30th Nov. 1830, and the cases of *Brown* v. *Cheyne*, 6th Dec. 1833, and *Dunlop* v. *Crawford*, 25th Jan. 1850, and I do so, not to support the defender's objections, but to illustrate the remark that, if there is serious doubt the purchaser may decline to accept the title offered. He has a right to a valid and unchallengeable title—he is not bound to enter on litigation.

As the points raised in regard to the effect of the diligence of creditors and of incumbrances created thereon, is not free from doubt, and as the purchaser declares he is not satisfied, I think that the Court ought not, in absence of the creditors, to interfere in the matter. The objection to the giving of consents by Sir James Mackenzie and Lady Anne Mackenzie is not, I think, equally formidable. On that point I agree with your Lordship. I do not think the power was a trust; it was simply a power, and if there were no other objection I think that the power could be well exercised. It is on the other objection that I rest my opinion, that this Court ought not to ordain the purchaser to accept the title offered.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Recal the said interlocutor; find that the defender is not bound to accept of a disposition, and pay the price of the lands sold, so long as securities and diligences affecting, or which may affect, Sir James Mackenzie's interest in the lands sold, remain undischarged; therefore assoilzie the defender (reclaimer) from the petitory conclusions of the summons; find it unnecessary to dispose of the other conclusions, and therefore *quoad ultra* dismiss the action, and decern; find the defender entitled to expenses, and remit to the Auditor to tax the amount thereof and to report."

Counsel for the Pursuer—Lee and Mackintosh. Agents—Mackenzie & Black, W.S.

Counsel for the Defenders—Watson and Asher. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Friday, June 19.

FIRST DIVISION.

SPECIAL CASE—MACKENZIE AND OTHERS.

Succession—Power to Dispose.

Circumstances in which *held* that a power to dispose of a fund by settlement had not been exercised by a testatrix.

Succession—Testament—Executor—Power to Dispose.

Question whether a power to dispose of a fund by settlement can be exercised by a testament containing a bare nomination of an executor.

This Special Case was brought in the following circumstances:—The late John Gillanders, heir of entail in possession of Highfield, and also proprietor of certain lands in fee-simple, all situated in the counties of Ross and Aberdeen, executed, on 26th November 1824, a general trust-disposition and settlement. By this deed Mr Gillanders conveyed to trustees his whole means and estate with the exception of all lands in the counties of Ross and Aberdeen then belonging to him under the fetters of entail, or in fee-simple. After directing payment to be made of his debts, &c., and of an annuity to his wife under their contract of marriage, dated 28th November 1801, and on the narrative, *inter alia*, that by the said marriage-contract, in virtue of powers under the deed of entail of Highfield, the truster had provided his younger children, if more than one, in the sum of £800, payable at their majorities or marriages, subject to a power of division, and failing division, equally among them, and had further bound himself and his heirs and successors to make payment to his said younger children of the additional sum of £1500 out of funds under the said marriage-contract, payable and divisible as aforesaid, and that in lieu of these provisions he granted the following provisions — the truster directed his trustees at the first Whitsunday or Martinmas after his death, either to stock out or appropriate out of the trust-funds invested at the date of the trust coming into operation, a sum of £2000, whereof the interest was to be paid half-yearly to the truster's daughter, the said now deceased Margaret Mackenzie Gillanders (named in the said general trust-disposition Margaret Gillanders), so long as she should remain unmarried; and in the event of her marriage, the trustees and their foresaids were appointed to lay out the said sum of £2000 on good security, to be taken in favour of the truster's said daughter Margaret in liferent, excluding her husband's *jus mariti*, and the lawful issue of her body in fee, but under the declaration that should she die unmarried or if married, without leaving lawful issue, that then and in that case, and in either event, she should have full power to dispose by settlement of any part of the said principal sum not exceeding £1000 sterling to and in favour of such person or persons, or for such purpose or purposes as she might think fit, it being expressly provided and declared that the remaining part of the said provision, and the whole of the provision in case the trustee's said daughter Margaret should not have disposed of any part thereof by settlement as aforesaid, should fall and revert to the said trustees and their foresaids, and be applied by them as after specified in the said trust-disposition.

After making a similar provision in favour of his other daughter Catherine Gillanders the truster declared that the said provisions in favour of his said daughters Margaret and Catherine, were in lieu and full satisfaction to them of their shares of said sums of £800 and £1500, all right to which they, by acceptance of the said provision under his trust deed, renounced and for ever discharged.

After all the purposes of the trust were accomplished and fulfilled, the truster directed his trustees to apply the residue of the trust estate in the payment and discharge of all debts affecting the said entailed estate of Highfield at or prior to the truster's disease, should any then exist, and on that being effected, to pay over the balance, if any, to the heir of entail in possession of the said estate for the time, provided he was also the truster's heir of line; but if the heir of entail of Highfield was