

March 29. 1825. Lordships will be applied to the state of the cause at that time; and therefore, by affirming this decision, your Lordships will not preclude Lord Stair from raising any other question. I would, therefore, humbly propose to your Lordships to affirm the interlocutor pronounced by the Court of Session.

No. 12. MARY and ELIZABETH TURNBULLS, Appellants.—*Abercromby*:

JOHN TAWSE, W. S. surviving Trustee of Mrs ELIZABETH ANNE HAY or TURNBULL, Respondent.

Trust—Fee or Spes Successionis.—A mother who was vested in the fee of certain subjects, having conveyed them to trustees for the purpose, inter alia, of paying a specific sum of debt, an annuity to herself, and conveying the free residue to her children nominatim, on which infestment followed; and having thereafter executed a supplementary trust-deed, authorizing the trustees to dispose of the subjects for a larger debt than that specified in the first deed;—Held, (reversing the judgment of the Court of Session, and affirming that of the Lord Ordinary), That she was not entitled to execute the second deed, and that her children were entitled to have it reduced.

April 15. 1825.

2D DIVISION.
Lord Cringletie.

THE late Colin Campbell bequeathed a legacy of L. 500 to his niece, Mrs Hay, wife of James Hay, exclusive of his jus mariti, for behoof of herself and children. With this money Mrs Hay purchased certain tenements in Edinburgh, the titles of which she took to herself in liferent and her children in fee. She had an only daughter, Elizabeth Anne, who married John Turnbull, merchant in Edinburgh; and on occasion of their marriage, Mrs Hay, on the 3d of August 1773, granted a disposition of the above subjects 'to and in favour of myself in liferent, during all the days of my lifetime, for my liferent use allenary, exclusive of the said James Hay, my husband, his jus mariti, and unaffected by his debts and deeds, and to Elizabeth Anne Hay, my daughter, and her heirs and assignees whatsoever, in fee, heritably and irredeemably, all and whole,' &c. On the same day a contract of marriage was executed between Mrs Turnbull and her husband, by which, after certain provisions had been made in her favour, Mrs Turnbull disposed the subjects 'to and in favour of herself and the said John Turnbull, her future husband, in liferent, for the liferent use of the longest liver of them two, and to the child or children of the marriage in fee; whom failing, to the heirs and assignees of the said Elizabeth Anne Hay, all and whole, &c.; but providing and declaring always, that the rents, maills, and duties thereof, shall neither be subject to the said John Turnbull's jus mariti, nor diligence, nor affectable

‘ by his debts, but shall remain secured as a peculium or fund’ April 15. 1825.
 ‘ for answering the said Elizabeth Anne Hay’s annuity, exclusive
 ‘ of the L.20 before specified, in the event of her surviving her
 ‘ said husband, and for the behoof of the issue of this marriage,
 ‘ agreeable to the legacy and appointment of the before-mentioned
 ‘ sum of L.500 bequeathed to the said Margaret Campbell, alias
 ‘ Hay, and her children, by Colin Campbell, Esq. deceased, by
 ‘ which legacy the whole heritable subjects above specified were
 ‘ purchased by her.’

Of this marriage there was a son, Alexander, and two daughters, (the appellants), Mary and Elizabeth. In 1779, Mrs Turnbull sold the subjects, and with the price purchased other property in Portobello. The disposition which she obtained to this property, dated 28th May 1779, proceeded on the narrative, that ‘ Elizabeth Anne Hay, alias Turnbull, spouse of John
 ‘ Turnbull, merchant in Edinburgh, for herself, and in name
 ‘ and behalf of the children procreated betwixt her said husband and her, did, of the date of these presents, out of their
 ‘ own proper funds, being part of the price of certain subjects in
 ‘ Canal-street, belonging to her, exclusive of her husband’s jus
 ‘ mariti, and unaffectable by her husband’s debts and deeds,
 ‘ make payment to me,’ &c.; and the dispositive clause was to
 and ‘ in favour of Elizabeth Anne Hay, alias Turnbull, and the
 ‘ said John Turnbull, in liferent, for the liferent use of the longest
 ‘ liver of them two, and to the said Alexander, Mary, and Elizabeth
 ‘ Jane Turnbull, and their heirs, executors, and successors,
 ‘ in fee; whom failing, to the heirs and assignees of the said
 ‘ Elizabeth Anne Hay, alias Turnbull, heritably and irredeemably,
 ‘ declaring that the same should remain as a peculium or
 ‘ fund for answering the said Elizabeth Anne Hay’s annuity, and
 ‘ for behoof of the children of the said marriage, agreeable to the
 ‘ legacy and appointment of the before-mentioned sum of L.500
 ‘ bequeathed to the said Margaret Campbell, alias Hay, and her
 ‘ children, by Colin Campbell, Esq. deceased, with which legacy
 ‘ the heritable subjects in Canal-street had been bought, all as
 ‘ specified in said contract of marriage;’ but it was farther provided and declared, ‘ That although the fee of the said lands and
 ‘ others is provided to the said Alexander, Mary, and Elizabeth
 ‘ Turnbolls, yet, notwithstanding thereof, it shall be lawful to,
 ‘ and in the power of, the said Elizabeth Anne Hay, alias Turnbull,
 ‘ exclusive of the jus mariti or administration of her said
 ‘ husband, and unaffectable by his debts and deeds, and without
 ‘ the consent of her said children, to burden, feu, and dispose of

April 15. 1825. ' the said lands and others.' On this disposition infestment was taken in terms of it.

About the year 1804 Mr and Mrs Turnbull got involved in pecuniary difficulties, chiefly in consequence of the conduct of their son Alexander; and with the view of extricating themselves, Mrs Turnbull, with consent of her husband, on the 18th of April 1804, executed a trust-deed in favour of the respondent, John Tawse, writer to the signet, and certain other gentlemen, who were now dead. That deed proceeded on the narrative and consideration, ' that the expense incurred in the education ' of our son Alexander Turnbull, and in relieving him from ' embarrassments, in which he had imprudently involved him- ' self subsequent to his apprenticeship, and his having com- ' menced business on his own account, have, with other unfore- ' seen misfortunes, rendered the contracting of debt by us un- ' avoidable; and also considering, that from the infirm and ' valetudinary state of me, the said John Turnbull, I am unable ' to pay that attention to our affairs which their situation re- ' quires; from these considerations, and in order that the debts ' due by us may be speedily discharged at the least possible ex- ' pense, and that the residue of the property belonging to me, the ' said Mrs Elizabeth Anne Hay, may be effectually secured to ' me and my said husband, under the declaration after-mention- ' ed, and the longest liver of us in liferent, and to our daughters ' after-named in fee, our said son having already received much ' more than his proportion of the property and effects belonging ' to us, we have resolved, after full deliberation and mature ' consideration, to grant the trust-right and disposition under- ' written, in favour of the persons after-named, in whom we have ' entire confidence, and who, at our earnest request and soli- ' citation, have agreed to accept.' She therefore disposed the property to the trustees, with the most ample powers of sale, feuing, &c. and bound herself, her heirs and successors, to warrant and ratify their acts; ' but declaring always, as it is ' hereby provided and declared, that these presents are grant- ' ed in trust, for the uses and purposes, and with and under the ' conditions, provisions, and declarations after expressed.' And then it proceeded to set forth these purposes:—' That is to say, in ' the first place, for the payment of the expense of executing this ' trust, and of all debts and sums of money, whether heritably ' secured or otherwise, which shall have been contracted, resting ' and owing by me, the said Elizabeth Anne Hay, preceding the ' date hereof; and particularly, without prejudice of the forsaidd'

April 15. 1825.

‘generality, the several sums of money advanced and paid to
 ‘me, or for my behoof, by the said John Tawse, for the purpose
 ‘of relieving the said subjects of the arrears of feu-duty, and
 ‘paying certain other debts, and satisfying the claims of several
 ‘importunate creditors, amounting in whole, at the date hereof,
 ‘conform to an account to be subscribed by us as relative
 ‘hereto, to the sum of L. 258. 16s. sterling, and of the lawful
 ‘interest thereof from the date hereof until the same shall be
 ‘satisfied and paid.’ ‘In the second place, for payment to us,
 ‘the said Elizabeth Anne Hay and John Turnbull, and longest
 ‘liver of us; with and under the conditions and declarations
 ‘after expressed, of such an annual sum, in half-yearly pay-
 ‘ments, as the rents and feu-duties of the property hereby con-
 ‘veyed shall enable the before-named trustees to afford, after
 ‘payment of the debts due by us preceding the date hereof, or
 ‘the interest of the said debts, until the principal sums can be
 ‘satisfied and paid from the proceeds of the sales of the property
 ‘herein before conveyed.’ ‘Providing always, that in case I,
 ‘the said Mrs Elizabeth Anne Hay, should consider it for my
 ‘interest to possess the Tower at Portobello, part of the subjects
 ‘before-disposed, or to let the same and draw the rents thereof,
 ‘I shall, notwithstanding these presents, have full liberty so to
 ‘do, providing there shall be a sufficient fund arising from the
 ‘other subjects hereby conveyed, for payment of my said debts,
 ‘and answering the other purposes of this trust, but not other-
 ‘wise.’ ‘And it is hereby also provided and declared, that
 ‘whatever annual sum can be afforded to be paid to us aforesaid,
 ‘from the surplus of the said rents and feu-duties, shall neither
 ‘be subject to the jus mariti of me, the said John Turnbull, or
 ‘be affectable by my debts or deeds, or the diligence of my cre-
 ‘ditors; and the rents of the said Tower, and the said annual
 ‘sum, whatever it may be, shall be paid to me, the said Eliza-
 ‘beth Anne Hay, during my life, upon my own receipt, without
 ‘the consent of my said husband.’ There was then a provision
 for appropriating the free residue, after the death of Mr and
 Mrs Turnbull, for the support of their daughters, the appel-
 lants. The third purpose of the trust was thus expressed:—‘In
 ‘the third place, after the death of the longest liver of us, the
 ‘said Mrs Elizabeth Anne Hay and John Turnbull, our said
 ‘trustees, survivors or survivor of them, are hereby authorized
 ‘and empowered, with all convenient dispatch, to dispoise and
 ‘convey the free residue of the property herein before disposed,
 ‘or to pay and apply the proceeds thereof, to the use and behoof

April 15. 1825. ‘ of the said Alexander Turnbull, our son, and Mary and Eliza-
 ‘ beth Jane Turnbull, our daughters, in such shares and propor-
 ‘ tions as shall be directed by me, the said Mrs Elizabeth Anne
 ‘ Hay, by any writing under my hand; and in the event of my
 ‘ not executing any deed or writing to that effect, then to the
 ‘ said Mary and Elizabeth Jane Turnbull, our two daughters,
 ‘ equally and proportionally between them, share and share
 ‘ alike, and to the survivor of them, and the lawful issue of such
 ‘ of them as may die previous to the period of division; that is
 ‘ to say, the lawful issue of any of my said daughters shall draw
 ‘ the share which their mother would have been entitled to re-
 ‘ ceive, had she survived the period when the property hereby
 ‘ conveyed becomes divisible betwixt them; whom all failing, to
 ‘ the said Alexander Turnbull, their brother, and the heirs of
 ‘ his body; whom all failing, to my own nearest heirs or assig-
 ‘ nees whomsoever. And although the said Alexander Turnbull
 ‘ has already received more than his proportion of the property
 ‘ belonging to me the said Mrs Elizabeth Anne Hay, and is
 ‘ only here called to the succession of the residue, failing my
 ‘ said daughters and their issue, yet nevertheless I hereby autho-
 ‘ rize and empower the before-named trustees, in case no deed
 ‘ shall be executed by me making any farther provision to my
 ‘ said son, to pay to him, out of the residue and reversion of the
 ‘ said subjects, the sum of L.20 sterling, at the first term of
 ‘ Whitsunday or Martinmas that shall happen after the death of
 ‘ the longest liver of us, the said Elizabeth Anne Hay and John
 ‘ Turnbull, and that in full of all that he can ask or claim, by
 ‘ or through the decease of either of us, in any manner of way:
 ‘ And upon the residue, after deduction of the whole expense of
 ‘ executing this trust, being applied in manner before-mentioned,
 ‘ then the said trustees shall be exonerated of this trust, and my
 ‘ said children and foresaids shall be obliged to grant all deeds
 ‘ necessary for that purpose.’ There was no provision for any
 reconveyance of the subjects to Mrs Turnbull, either in liferent
 or fee, or that the trustees should denude during their lives, or
 be exonerated by them.

On this deed infestment was taken, and the trustees entered into possession.

Thereafter the trustees, having paid debts or advanced sums to a much larger amount than were covered by the above deed, obtained on the 26th of May 1806 a new deed, called a supplementary trust-deed. This deed proceeded on the narrative of the execution of the former one, and ‘ that the chief purpose of

April 15. 1825.

‘ our granting the foresaid trust-disposition was for the payment
 ‘ of certain debts contracted by me, the said Mrs Elizabeth Anne
 ‘ Hay, and my husband, which debts arose principally from the
 ‘ extravagance of our son, Alexander Turnbull, and other causes
 ‘ unnecessary to be herein detailed: And as it is still the earnest
 ‘ desire of me, the said Mrs Elizabeth Anne Hay, that these
 ‘ debts, so far as approved of by me, should be paid by my said
 ‘ trustees; therefore, and in order to remove every doubt which
 ‘ might be otherwise entertained with respect to the power of
 ‘ my said trustees, under the above-mentioned trust-deed, to dis-
 ‘ charge the debts due by me and my said husband with safety to
 ‘ all parties, we have by these presents,’ &c. (then followed a con-
 ‘ veyance of the property). ‘ But declaring always, as it is here-
 ‘ by provided and declared, that these presents are granted in
 ‘ trust, for payment of such debts due by me, the said Mrs Eli-
 ‘ zabeth Anne Hay, and my said husband, as have already been
 ‘ paid by my said trustees, or may hereafter be attested by me,
 ‘ and paid by them, and contracted for the purpose of extricat-
 ‘ ing me from difficulties occasioned by the imprudence of our
 ‘ said son, and for the necessary support of my family; and par-
 ‘ ticularly, for payment to the said John Tawse, his heirs and
 ‘ successors, of the sum of L.825. 17s. 2d., being the amount of
 ‘ the sums advanced and paid by him on my account preced-
 ‘ ing the 1st day of April last, conform to an account thereof
 ‘ subscribed by me and my said husband of the date hereof, as
 ‘ relative hereto, with the legal interest of the said sum from the
 ‘ said 1st day of April last, and in time coming during the not-
 ‘ payment; and also in trust for the uses and purposes, and with
 ‘ the powers and under the provisions, conditions, and declara-
 ‘ tions contained in the trust-deed formerly executed.’ And it
 was farther declared, ‘ That whereas, by the former trust-deed,
 ‘ an option is reserved to me, the said Mrs Elizabeth Anne Hay,
 ‘ to possess the Tower of Portobello, part of the premises thereby
 ‘ conveyed, if I should so incline, the option so reserved to me
 ‘ by the said prior trust-deed is hereby renounced in favour of the
 ‘ said trustees, with liberty to them to set, sell, and dispose of the
 ‘ said Tower, in the same manner as the other subjects thereby
 ‘ conveyed.’ On this deed infestment was taken. Large ad-
 vances, it was alleged, were on the faith of these deeds made by
 the trustees for the support of Mrs Turnbull and her daughters,
 and for payment of debts exigible from the property. In 1819,
 the trustees, having advertised the subjects for sale, the appel-
 lants and their mother presented a bill of suspension and inter-

April 15. 1825.

dict, which was refused by the Lord Ordinary and the Court on the 26th of November of that year. An action of reduction of the supplementary trust-deed was then instituted by the appellants and their mother, on the head, first, of fraud, (but which was not afterwards insisted in); and, secondly, ‘ Because the right of the said Elizabeth Anne Hay to the said subjects was merely fiduciary; in which subjects she had no patrimonial interest beyond her own liferent, and she had no right nor title to alienate or dispoise the same to the prejudice of the pursuers, her children: Because, whatever right was in the person of the said Elizabeth Anne Hay to the said subjects, whether real or fiduciary, had been already irrevocably conveyed to the said defenders, in trust, for behoof of the said pursuers, exclusive of the jus mariti of the said John Turnbull, and of his debts and deeds, as well as of the debts and deeds of the said Elizabeth Anne Hay, by and in virtue of a previous deed of trust executed by the said Elizabeth Anne Hay, to and in favour of the said defenders, dated the 18th day of April 1804, and of an instrument of sasine following thereon, dated the 9th day of October, and recorded in the Particular Register of Sasines for the shire of Edinburgh the 19th day of November 1804: By which absolute deed of trust it was specially provided and declared, that the said subjects should remain in the defenders’ hands “ as a fund for answering the purposes provided in the contract of marriage between the said John Turnbull and her,” and should be transmitted to the pursuers, the children of the marriage, unburdened with every debt of the said Elizabeth Anne Hay and of her husband; and which absolute and irrevocable deeds, granted in pursuance of the obligation contained in said contract of marriage, the said Elizabeth Anne Hay had no right, by any subsequent deed, and particularly by the supplementary deed under challenge, to alter, innovate, defeat, or frustrate the object and effect of.’

On hearing parties, Lord Cringletie, Ordinary, pronounced this interlocutor on the 19th of January 1820:—‘ The Lord Ordinary having heard parties’ procurators on the grounds of reduction and defences, finds, that by antenuptial contract of marriage, entered into between the pursuer Mrs Turnbull, and her late husband John Turnbull, merchant in Edinburgh, she alienated and dispoised certain houses belonging to her in Bristo and Canal-streets of Edinburgh, to and in favour of herself and the said John Turnbull, her future husband, for the liferent use of the longest liver of them two, and to the child or children of

April 15. 1825.

‘ the marriage in fee; whom failing, the heirs and assignees of
 ‘ the said Elizabeth Anne Hay, *i. e.* Mrs Turnbull herself; and
 ‘ the jus mariti of the said John Turnbull, in so far as related to
 ‘ these subjects, was anxiously excluded. Finds, that after the
 ‘ said couple had a son, named Alexander, and two daughters,
 ‘ Mary and Elizabeth Jane, the said Mrs Turnbull sold these
 ‘ houses, and with the price thereof purchased property in the
 ‘ village of Portobello; and as this was understood to be a sur-
 ‘ rogatum for the other which had been sold, the disposition bore
 ‘ that in its narrative, and conveyed the subject to Mrs Turnbull
 ‘ and her husband in liferent, for the liferent use of the longest
 ‘ liver of them two, and to the said Alexander, Mary, and Eli-
 ‘ zabeth Jane Turnbolls, and their heirs, successors, and assign-
 ‘ nees, in fee; and this disposition also excluded the jus mariti
 ‘ of the said John Turnbull in the receipt and administration of
 ‘ the rents, and contained a power to the said Mrs Turnbull, ex-
 ‘ clusive of the jus mariti, and without consent of her said chil-
 ‘ dren, to burden, feu, and dispose of the said lands and others.
 ‘ Finds, that she and her husband, having got into pecuniary em-
 ‘ barrassment, took the resolution to extricate themselves there-
 ‘ from, by paying off their debts, and to secure the free residue
 ‘ to their children; and accordingly, on the 18th of April 1804,
 ‘ they executed a trust-deed in favour of the defenders, the nar-
 ‘ rative of which details the difficulties in which they had been
 ‘ involved, and mentions, that from these considerations, and “ in
 ‘ order that the debts due by us may be speedily discharged
 ‘ at the least possible expense, and the residue of the property
 ‘ belonging to me the said Elizabeth Anne Hay, (*i. e.* Turnbull),
 ‘ may be effectually secured to me and my said husband, under
 ‘ the declaration after-mentioned, and the longest liver of us, in
 ‘ liferent, and to our daughters after-named in fee, our said son
 ‘ having already received much more than his proportion of the
 ‘ property and effects belonging to us, we have resolved, after
 ‘ full deliberation and mature consideration, to grant the trust-
 ‘ right and disposition underwritten.” Finds, that accordingly
 ‘ Mrs Turnbull conveyed her whole property to the defenders,
 ‘ with full power to feu, sell, and dispose thereof, either by public
 ‘ or private sale, but under trust always, 1st, For payment of the
 ‘ expense of executing the trust, and of all debts and sums of
 ‘ money, whether heritably secured or otherwise, which shall
 ‘ have been contracted by me the said Elizabeth Anne Hay
 ‘ preceding the date hereof; and particularly a debt due to the
 ‘ defender John Tawse of L. 258. 16s. : 2dly, The trustees were

April 15. 1825. ‘ to pay to Mrs Turnbull, exclusive of her husband’s right, such
‘ surplus as could be afforded of the rents and feu-duties of her
‘ property for her maintenance; and, 3dly, After the death of
‘ the longest liver of the said Mrs Turnbull and her husband,
‘ the trustees were taken bound “ to dispone and convey the free
‘ residue of the property herein before disponed, or to pay and
‘ apply the proceeds thereof, to the use and behoof of the said
‘ Alexander Turnbull our son, and Mary and Elizabeth Jane
‘ Turnbull, our daughters, in such shares and proportions as
‘ shall be directed by me the said Mrs Elizabeth Anne Hay by
‘ any writing under my hand;” and failing such writing, then
‘ to the two daughters equally between them. Finds, that the
‘ trustees, defenders, were infest on said disposition, conform to
‘ instrument of sasine, dated 9th October, and registered 19th
‘ November 1804; and therefore, as this trust was executed for
‘ payment of debts contracted at its date, after the discharge of
‘ which the residue was to belong to the said Mrs Turnbull and
‘ her husband in liferent, and to their children nominatim in fee;
‘ and as their mother did not reserve to herself any power of
‘ contracting other or further debts, the fee of the residue was
‘ vested in the trustees for behoof of the children, and could not
‘ be injured or impaired without their consent. Finds, that by
‘ the death of the said Alexander Turnbull without heirs of his
‘ body, the right of the fee belongs to his two sisters the pur-
‘ suers; and therefore finds, that the second deed of trust in
‘ favour of the defenders, now under reduction, with all that has
‘ followed thereon, are void and null, in so far as the same are
‘ inconsistent with the former trust, and injurious to the pur-
‘ suers, Mary Gordon and Elizabeth Jane Turnbull; and re-
‘ duces, decerns, and declares accordingly. But in so far as this
‘ action proceeds at the instance of the said Mrs Turnbull her-
‘ self, assoilzies the defenders therefrom, in respect that although
‘ she libels that the deed under reduction was fraudulently elicited
‘ from her, yet her Counsel has not denied that she has
‘ received large advances of money from said trustees since the
‘ date thereof in 1806, and has thereby ratified the same: and
‘ decerns, reserving to the defenders to operate payment of what
‘ may be due to them on the first trust out of the trust-estate,
‘ and the surplus due on the second trust out of the liferent of
‘ the said Mrs Turnbull.’ Against this judgment the trustees
lodged a representation; but the Lord Ordinary refused it, and
observed in a note, ‘ The Lord Ordinary has no doubt that the
‘ intentions of the representers were pure; and, by the settled

April 15. 1825.

‘ accounts, every act of theirs has been approved by Mrs Turn-
 ‘ bull; but he must be pardoned for observing, that their con-
 ‘ duct has excited his utmost surprise. In 1804 Mrs Turnbull’s
 ‘ debts and her husband’s amounted to L. 258, and for payment
 ‘ of that the trust was created which is the basis of this action of
 ‘ reduction. Instead of paying off that debt, the representers
 ‘ have allowed it to arise to no less than L. 1888. 10s. 7d. How
 ‘ they could have accepted of the trust, and executed it in that
 ‘ way, must excite wonder in every one. Instead of paying off
 ‘ the small debt, they enlarged it eight-fold.’ A second repre-
 sentation was also refused by his Lordship, who explained, that
 his interlocutor proceeded ‘ entirely on the point of law,’ and
 that any claim the trustees might have under the first deed was
 reserved entire.

The trustees then reclaimed to the Court.

Lord Craigie observed,—I differ in opinion from the Lord
 Ordinary. By the original deed granted by the grandmother
 the fee was vested in Mrs Turnbull, and by the marriage-contract
 the subjects were taken to her in liferent, and to the children nasci-
 turis in fee. This clearly constituted Mrs Turnbull the fiar.
 Then the property in Portobello was purchased with the price of
 the subjects of which she held the fee. By the disposition, no
 doubt, to this property, there is *ex figuro verborum* a liferent only
 in favour of Mrs Turnbull, and a fee in the children *nominatim*;
 but then this is qualified with a declaration, that she shall have
 power to feu and dispone the property. Therefore it is plain
 that the fee was truly and substantially in Mrs Turnbull. Such
 was the state of matters when she executed the trust-deed of
 1804. Now, unless the fee was expressly taken out of her by
 that deed, and transferred to the children, she must remain fiar.
 It is true that the intention seems to have been, to constitute her
 a liferenter and the children the fiars. But this, it will be re-
 collected, is merely a trust-deed, intended for the benefit of the
 granter, and not an absolute conveyance; and it will be observed,
 that there is a clause which necessarily imports that she was fiar.
 No doubt after her death the children were to have right to the
 fee; but that merely gave them a *spes successionis*. As the fee
 therefore remained in Mrs Turnbull, she had power to grant the
 supplementary deed, and consequently the interlocutor must be
 altered.

Lord Glenlee.—The trust-deed of 1804 vested the fee in the
 trustees, and not in the children. Under that deed they had a
 mere *spes successionis*. The second deed was a most expedient

April 15. 1825. one under the circumstances of the family. Even although it had not been granted, the trustees could not have been bound to denude till relieved of their advances authorized by Mrs Turnbull. But the present parties are her representatives, and could not insist on their conveying to them till they relieved the trustees; and as the action, so far as Mrs Turnbull is concerned, has been dismissed, and she has acquiesced, her representatives cannot stand in a better situation.

Lord Bannatyne thought the interlocutor right. By the deed of 1804 a fee was constituted in favour of the children, and therefore their mother could not grant the subsequent deed.

Lords Justice-Clerk and *Robertson* concurred with *Lords Craigie* and *Glenlee*; and the Court therefore, on the 7th of February 1822, altered, sustained the defences, and found the trustees entitled to expenses, payable out of the trust-funds. Against this judgment the appellants having reclaimed, and the Judges (with the exception of *Lord Bannatyne*, who now thought the *Lord Ordinary* wrong) having remained of their former opinions, the Court, on advising the petition with answers, adhered on the 12th of November 1822.*

The appellants, Mary and Elizabeth Turnbolls, appealed.

Appellants.—The terms of the deed executed by the grandmother and mother of the appellants, prove that the different properties acquired by them were intended as a provision for the children of the marriage between Mr and Mrs Turnbull. The jus mariti and debts of the former are specially excluded from affecting the estate, and the fee is destined to the children, first, nascituris, and, secondly, nominatim. Thus, Mrs Turnbull, in the disposition of the trust-subjects, is stated, ‘for herself, and in name ‘and behalf of the children procreated betwixt her said husband ‘and her,’ to have made payment of the price. Again, the disposition is to Mrs Turnbull and her husband in liferent, ‘and ‘to Alexander, Mary, and Elizabeth Jane Turnbull, in fee;’ and a declaration is particularly introduced, that the subjects are to remain as a ‘fund for behoof of the children.’ These anxious stipulations sufficiently evince the nature and intention of the parties. There can be no doubt that the interest of the children of the marriage was directly contemplated by the granter of the deeds, in pursuance of the provisions in the contract of marriage, and the settlement by Mrs Hay. The appel-

* See 2. Shaw and Dunlop, No. 1.

April 15. 1825.

lants do not dispute that a power of administration was vested in Mrs Turnbull. Under the contract of marriage, this power arose from the doctrine of the Scottish law that a fee cannot be in pendente; therefore, although there was a direct conveyance of the property then settled to the children of the marriage nascituris, the power of alienation was in the parent. But still the children of the marriage had a jus crediti vested in them, which could not be gratuitously disappointed. The jus crediti of the heir of the marriage confers a corresponding obligation upon the father, which he is bound to implement; and therefore, although from the principle already stated he has the power of administration, yet he has no right to disappoint the jus crediti of the heir. Accordingly, a gratuitous disposition may be reduced; and although a deed granted for onerous considerations is good to the party in whose favour it is conceived, yet the granter remains liable to repair whatever damage the heir of the marriage thereby receives. Thus, if a special subject is conveyed to a person in liferent, and his children nascituris in fee, the father, in virtue of the power of administration possessed by him, may dispoise it; but as he has no right to do so, any separate estate which he may have is responsible for the value received.

But, on the other hand, a proprietor who dispoises to himself in liferent, and his children nominatim in fee, creates in them an absolute right of which he cannot deprive them. This he may do either directly by a deed in their favour, or through the intervention of trustees. Where a trust-disposition of land is executed in favour of certain trustees, and is delivered and completed by infeftment and registration, and if that trust-deed be not revocable or alterable, parties favoured by the purposes of the trust have a jus quæsitum, which cannot be taken away from them at the pleasure of the granter of the trust afterwards expressed, but which it is the right and the duty of the trustees to give full effect to.

The appellants admit, that trusts may be made revocable, or alterable, either at the pleasure of the granter or his heirs, or at the pleasure of the granter only. In the first of these cases, parties favoured by the purposes of the trust have no right on which they can rely, until something has been done in their favour by the trustee, and under the trust, which has been allowed by the granter and his heirs to operate. In the latter, they can have no such reliance till the power of revocation has expired by the death of the granter.

April 15. 1825. But where trusts are granted without any power of revocation or alteration, and these trusts completed by delivery, infestment, and registration, there emerges a duty in the trustees to execute the purposes of the trust, and a right in those persons in whose favour these purposes are expressed, which is wholly independent of the pleasure of the original granter.

Respondent.—The doctrine laid down by the appellants regarding the nature and legal effect of trusts, is stated in terms by far too broad and unqualified; and if the notions expressed by them were correct, very serious doubts might be entertained of the soundness of many decisions pronounced by the Court. A trust may be so constituted as to produce all the effects which the appellants ascribe to trusts generally, wherever infestment and registration have followed; but the true doctrine regarding trusts in general is widely different from that laid down by the appellants. If the deed of trust declares totidem verbis, or by its particular structure indicates clearly, that the granter intends to put an end to his own right and powers, and to vest a jus quæsitum irrevocably in those who are favoured by the deed, undoubtedly a Court of law would be bound to give it that effect. But unless the granter's intention to this purpose be made perfectly clear, either by express declaration, or by the particular structure of the deed he has executed, the respondent denies that the trust, though followed by infestment and registration, can have that effect, either according to sound principle, or the decisions of the Court. In all such cases it is held to be a question of fair construction, depending on the different clauses of the deed, and principally on the considerations which led to its execution, and the chief object which the trustor thereby had in view, how far he is to be considered as divested of all right and power over his property, and to what extent, whether absolutely, or only sub modo, a jus quæsitum can be insisted on by those who are favoured in the deed.

If this rule of fair interpretation, which is founded on the presumed views and intention of the granter, were not allowed to operate, a great degree of injustice would be the consequence. Men might be stript of their property, as an effect of their own spontaneous deeds, although they never had any such effect in contemplation; and the grantees under such deeds would acquire rights, without either compact or onerous consideration, which they might hold as absolute and indefeasible, although that probably would have been the very last thing the granter

would have conceded, if the question had been directly put to him when he constituted the trust. April 15. 1825.

There is another principle or rule of law which enters deeply into the present question; namely, that which is uniformly applied in construing grants from parents to children, which are viewed in a quite different light from those granted to strangers. Where the disponee is a stranger, the law considers him to have purchased the right; the presumption being, that the owner would not convey away his property to a stranger without an onerous consideration. Care, therefore, must be taken in the deed of conveyance, that the expressions do not in any respect go beyond the intention, as effect would be given to it against the granter in terminis. But a deed granted by a parent to his child, although expressed in the same terms, will not, by any means, have the same effect; for although a fee should be conferred per expressum on the child, the deed may be so construed that he have no fee at all, and instead of a vested right *de præsenti*, have nothing more than a mere hope of succession.

Such being the established rules applied in the interpretation of trust-deeds, and of deeds by parents in favour of their children, whether granted in the shape of trust-deeds or otherwise, it is to be considered what ought to be held the just import and effect of the deeds of trust now in question.

It is to be remembered, then, in the first place, that Mrs Turnbull originally was the undoubted absolute proprietor of the subjects, both of those that were first purchased in Bristo-street and Canal-street, and those that were substituted in their place by purchase at Portobello. By the title-deeds of these respective subjects, she unquestionably had power to dispose of them as she thought fit; and previously to the constitution of the first trust, the appellants could not pretend to have any right in the subjects by which they could prevent her. Neither was she under any personal obligation to confer the property on them; nor is it alleged that she received any onerous consideration to induce her to do so. The disposition by her mother, Mrs Margaret Hay, to her, in 1773, as well as her own marriage-contract with Mr Turnbull in the same year, and the disposition of the Portobello subjects in 1779, do all of them import an absolute unqualified fee in Mrs Turnbull.

Now, it is a consequence of this absolute right in Mrs Turnbull, that the first trust-deed in 1804, upon which alone the appellants found their claim, was and could be nothing else, in as far as regards them, than a voluntary gratuitous deed on the

April 15. 1825. part of their mother, and a deed which, in legal construction, could import only a mere destination, by way of family settlement, so as to give the children the hope of succession, as an eventual provision of the residue to them. This is fortified by attending to the object and terms of the trust. This object was payment of the granter's debts, and not the disposition of the property to the appellants; and accordingly, the only right declared in their favour is one to the residue, not to the subjects themselves.

The House of Lords ordered and adjudged, ' that the interlocutors of the 7th February and 12th November 1822, and the 25th January 1823, complained of, be reversed; and the Lords find, That the second deed of trust in favour of the respondent, now under reduction, and all that has followed thereon, in so far as the same are inconsistent with the trust-deed of the 18th April 1805, and injurious to the interest of the appellants, Mary Gordon Turnbull and Elizabeth Jane Turnbull, under the former trust-deed, are null and void; and reduce, decern, and declare accordingly: but in so far as the action proceeded at the instance of Mrs Turnbull, assoilzie the respondent therefrom, and decern.'

LORD GIFFORD.—My Lords, In this case of *Turnbull v. Tawse*, Mary Gordon Turnbull, and Elizabeth Jane Turnbull, daughters of John Turnbull, and William Jameson, husband of Elizabeth Jane Turnbull, are the appellants; and John Tawse, surviving trustee appointed by Mrs Hay, the widow of John Turnbull, is the respondent. This is an action brought by Mary Gordon Turnbull and Elizabeth Jane Turnbull, and their mother Mrs Elizabeth Anne Hay, for the purpose of reducing a trust-deed which had been executed by Mrs Hay in the year 1806, on the ground that the deed was inconsistent with a former trust-deed of 1804 by the same persons.

My Lords,—The circumstances out of which this action arose I will shortly state to your Lordships. It appears that in the year 1773 a settlement was made, upon the marriage of Mrs Elizabeth Anne Hay with Mr John Turnbull, of certain lands, of which Mrs Hay's mother was at the time possessed in liferent; and the disposition was made in favour of Mrs Elizabeth Anne Turnbull and John Turnbull, her husband, in liferent, for the liferent use of the longest liver of them, and to the child or children of the marriage, whom failing, to the heirs and assignees of Mrs Turnbull; but exclusive of the *jus mariti* of her intended husband, the limitation to the children being to the children in fee. As there could be no doubt that Mrs Turnbull was absolute fiar of the subjects by the deed of 1773, in the year 1779 she sold the same, and laid out the price in the purchase of other sub-

April 15. 1825.

jects in the village of Portobello, consisting chiefly of feuing ground, now lying in the centre of the village. This took place in the year 1779; and there being children of the marriage then existing, they were, with propriety, included in the destination of the subjects, but in such manner as to preserve the rights of their mother qua fier perfectly entire. Accordingly a conveyance of those lands was taken in favour of Mrs Hay, alias Turnbull, and her husband, 'in liferent, for the liferent use of the longest liver of them two, and to the children, and their heirs and successors, in fee.' If the instrument had stopped there, there would have been no difficulty; but it proceeds; 'whom failing, to the heirs and assignees of Elizabeth Jane Hay.' So far as this conveyance regarded the children, it is stated that it was a mere destination of succession, not the immediate conveyance of a fee. This point was not left to depend upon mere legal construction, for the disposition contained a clause whereby it was expressly provided and declared, that although the fee of the said lands and others is provided to the daughters, yet notwithstanding thereof it shall be competent and lawful to and in the power of Mrs Hay, by herself alone, exclusive of the jus mariti or administration of her husband, and unaffectable by his debts or deeds, and without the consent of her children, to burden, feu, and dispose of the said lands and others.

My Lords,—In this state matters remained till the year 1804. It appears that at that time considerable debts had been incurred by Mr and Mrs Turnbull, principally, as it seems, to relieve the son Alexander from embarrassments; but at that time a trust-deed was executed by Mrs Turnbull, to which trust-deed it will be necessary for me to call your Lordships' attention, because on the construction of that instrument the question your Lordships will have to decide mainly depends.

My Lords,—That deed recites, that 'considering that the expense incurred in the education of our son, Alexander Turnbull, and in relieving him from embarrassments in which he had imprudently involved himself subsequent to his apprenticeship, and his having commenced business on his own account, have, with other unforeseen misfortunes, rendered the contracting of debt by us unavoidable; and also considering, that from the infirm and valetudinary state of me, the said John Turnbull, I am unable to pay that attention to our own affairs which their situation requires; from these considerations, and in order that the debts due by us may be speedily discharged at the least possible expense, and that the residue of the property belonging to me, the said Mrs Elizabeth Anne Hay, may be effectually secured to me and my said husband under the declaration after-mentioned, and the longest liver of us in liferent, and to our daughters after narrated in fee, our said son having already received much more than his proportion of the property and effects belonging to us,—we have resolved, after full deliberation and mature consideration, to grant the trust right and

April 15. 1825. 'disposition underwritten in favour of the persons after-named; in whom we have entire confidence, and who, at our earnest request and solicitation, have agreed to accept.' Therefore they disposed these lands at Portobello to those trustees on certain trusts, which are after expressed; in the first place, 'for the payment of the expense of executing the same, and of all debts, whether heritably secured or otherwise resting owing by Mrs Elizabeth Anne Hay, preceding the date thereof, and particularly, without prejudice of the foresaid generality, the several sums of money advanced and paid to me, or for my behoof, by the said John Tawse,' who is one of the trustees, 'for the purposes of relieving the said subjects of the arrears of feu-duty, and paying the claims of several importunate creditors, amounting in the whole, at the date hereof, conform to account to be subscribed by us as relative hereto, to the sum of L.258. 16s. sterling, and of the lawful interest thereof from the date hereof until the same shall be satisfied and paid.' In the second place, 'for payment to the said Elizabeth Anne Hay and John Turnbull, and the longest liver of us, with and under the conditions and declarations after expressed, of such an annual sum, in half-yearly payments, as the rents and feu-duties of the property hereby conveyed shall enable the before named trustees to afford, after payment of the debts due by us preceding the date hereof, or the interest of the said debts, until the principal sums can be satisfied and paid.' And then there is a proviso, 'that in case Mrs Hay shall consider it for her interest to possess the Tower at Portobello, part of the subjects thereby disposed, or to let the same and draw the rents thereof, she shall, notwithstanding these presents, have full liberty to do so, provided there shall be a sufficient fund arising from the other subjects hereby conveyed for payment of my said debts, and answering the other purposes of this trust, but no otherways.'

Then it is also provided and declared, 'that whatever annual sum can be afforded to be paid us as aforesaid from the surplus of the rents and feu-duties, shall neither be subject to the jus mariti of the said John Turnbull, or be affectable by any of my debts or deeds, or the diligence of my creditors; and the rents of the Tower, and the annual sum, whatever it may be, shall be paid to me, the said Elizabeth Anne Hay, during my life, upon my own receipt, without the consent of my husband.' Then it is provided, that although the liferent of the surplus rent and feu-duties is provided to Mr Turnbull after the death of his wife, he should be bound and obliged to aliment and maintain the daughters in a proper and suitable manner. Then, in the third place, 'After the death of the longest liver of us, the said Elizabeth Anne Hay and John Turnbull, our trustees, and the survivors or survivor of them, are hereby authorized and empowered, with all convenient dispatch, to dispose and convey the free residue of the property herein before disposed, or to pay and apply the proceeds thereof to the use and behalf of Alexander Turnbull, our son,

April 15. 1825.

‘ and Mary and Elizabeth Jane Turnbull, our daughters, in such
 ‘ shares and portions as shall be directed by me, Mrs Elizabeth Anne
 ‘ Hay, by any writing under my hand; and in the event of my not
 ‘ executing any deed or writing to that effect, then to our two
 ‘ daughters equally and proportionally between them, share and share
 ‘ alike, and to the survivor of them, and to the lawful issue of such
 ‘ of them as may die previous to the period of division.’ It then states,
 that Alexander Turnbull, the son, had received ‘ much more than his
 ‘ proportion of the property belonging to me, Mrs Elizabeth Anne
 ‘ Hay, and is only here called to the succession of the residue, failing
 ‘ my daughters and their issue; yet, nevertheless, I hereby authorize
 ‘ and empower the before-named trustees, in case no deed shall be
 ‘ executed by me making any further provision to my son, to pay to
 ‘ him, out of the residue and reversion of the subjects, the sum of
 ‘ L. 20 sterling at the term of Whitsunday or Martinmas that shall
 ‘ first happen after the death of us, Elizabeth Anne Hay and John
 ‘ Turnbull, and that in full of all that he can ask or claim by or
 ‘ through the decease of either of us in any manner of way; and upon
 ‘ the residue, after deduction of the whole expense of executing this
 ‘ trust, being applied in manner before-mentioned, then the trustees
 ‘ shall be exonerated of this trust, and my children and foresaids shall
 ‘ be obliged to grant all deeds necessary for that purpose.’

My Lords,—After the execution of that deed in the year 1804, a second trust-deed—a supplementary trust-deed as it is called—was executed by Mrs Turnbull; and the question in this case for your Lordships’ consideration will be, whether, after the execution of the first trust-deed, it was competent to Mrs Turnbull to execute this supplementary trust-deed, or at least to make any provision in it inconsistent with the first?

This second trust-deed recites the first trust-deed, and states also, that, by virtue of the precept of sasine therein contained, the trustees were infest the 19th November 1804; ‘ that the chief purpose of our
 ‘ granting the foresaid trust-disposition was for the payment of certain
 ‘ debts contracted by me, Mrs Elizabeth Anne Hay, and my husband,
 ‘ which debts arose principally from the extravagance of our son, Alex-
 ‘ ander Turnbull, and other causes unnecessary to be herein detailed;
 ‘ and as it is still the earnest desire of me, the said Mrs Elizabeth
 ‘ Anne Hay, that these debts, so far as approved of by me, should be
 ‘ paid by my said trustees, therefore, in order to remove every doubt
 ‘ which might be otherwise entertained with respect to the power of
 ‘ my said trustees, under the above-mentioned trust-deed, to discharge
 ‘ the debts due by me and my husband with safety to all parties, we
 ‘ have by these presents, with joint consent, and taking burden as
 ‘ aforesaid, but always in supplement of the foresaid trust-deed, and
 ‘ without prejudice thereto, given, granted, alienated, and disposed
 ‘ to and in favours’ of the trustees, the subjects which were contained
 in these trust-deeds. Then she also makes over certain household

April 15. 1825. furniture and other articles, ' which furniture was lately attached by
 ' the creditors of my said husband by diligence and sequestration, and
 ' has been purchased by my trustees from the creditors at a valuation
 ' for my behoof; but declaring always, as it is hereby provided and
 ' declared, that these presents are granted in trust for payment of
 ' such debts due by me, Mrs Elizabeth Anne Hay, and my husband,
 ' as have already been paid by my trustees, or may hereafter be
 ' attested by me, and paid by them, and contracted for the purpose of
 ' extricating me from difficulties occasioned by the imprudence of our
 ' son, and for the necessary support of my family; and particularly for
 ' payment to John Tawse,' (who is one of the trustees), ' his heirs and
 ' successors, of the sum of L. 825. 17s. 2d. sterling, being the amount
 ' of the sums advanced and paid by him on my account preceding the
 ' 1st of April last, conform to an account thereof subscribed by me
 ' and my husband of the date hereof as relative hereto, with the legal
 ' interest of the said sum from the 1st of April last, and in time coming
 ' during the not-payment; and also in trust for the uses and purposes,
 ' and with the powers, and under the provisions, considerations, and de-
 ' clarations contained in the trust-deed formerly executed by us above-
 ' mentioned, with this exception.' She then recites a power, which
 had been conveyed to her by the original trust-deed of 1804, to
 possess the Tower of Portobello; but she thereby renounces that
 power in favour of the trustees.

My Lords,—An action was brought in the year 1816 by Mrs Turn-
 bull and her two daughters, her son being dead, to reduce this second
 instrument, so far as it was inconsistent with the trust; and the cause
 coming on before my Lord Cringletie, the Lord Ordinary, his Lord-
 ship pronounced this judgment:—(Here his Lordship read the inter-
 locutor). The effect, therefore, your Lordships perceive, of this inter-
 locutor was, to reduce the second trust-deed, in so far as it was incon-
 sistent with the provisions of the first, the Lord Ordinary being of
 opinion that under the first the residue was vested in the trustees for
 behoof of the children. (His Lordship then took notice of the suc-
 cessive representations which were presented, and of the answers
 thereto, and read the interlocutors of the Lord Ordinary refusing the
 same).

My Lords,—Against this interlocutor the trustees reclaimed to the
 Inner-House; and on the 7th of February 1822 the first interlocutor was
 pronounced which has been appealed from, which is in these terms:—
 (Having read it, his Lordship proceeded), My Lords, this interlocutor
 was subsequently adhered to by another interlocutor of the 12th of
 November 1822, and by another interlocutor of the 28th of January
 1823.

My Lords,—Against these interlocutors this appeal is brought to
 your Lordships; and the question which has been discussed below,
 and discussed at your Lordships' Bar, is upon the effect of this first
 trust-deed. Now, my Lords, I may perhaps state to your Lordships,

April 15. 1825.

that it is admitted not only at the Bar, but admitted distinctly in the respondents' case, that this is mainly a question arising altogether upon the construction of this first deed; but I will read to your Lordships the admissions made by the respondents in pages 6. and 7. of their case. They say that the appellants maintain, 'that where a trust-
' disposition of lands is executed in favour of trustees, and is delivered
' and completed by infestment and registration, then, if the trust-deed
' be not revocable or alterable in its express terms, parties who are
' favoured by the purposes of the trust have a jus quæsitum which
' cannot be taken away from them at the pleasure of the granters of
' the trust afterwards expressed; but to which jus quæsitum, on the
' contrary, it is the right and duty of the trustees to give full effect:
' in other words, that when such trusts are constituted, there emerges
' a right and duty in the trustees to see the purposes of the trust
' accomplished, and a right in the persons in whose favour the pur-
' poses of the trust are expressed, which is wholly independent of the
' original granter.'

In answer to this argument the respondents say, 'that the doctrine
' laid down by the appellants, regarding the nature and legal effects of
' trusts, was stated in terms by far too broad and unqualified; and that
' if the notions expressed by them were correct, very serious doubts
' might be entertained of the soundness of many decisions pronounced
' by the Court.' Then they state that they agree, 'That a trust
' might be so constituted as to produce all the effects which the appel-
' lants ascribe to trusts generally, wherever infestment and registra-
' tion have followed, the respondent had no occasion to dispute.
' But he submitted, that the true doctrine regarding trusts in general
' was widely different from that laid down by the appellants. If the
' deed of trust declares totidem verbis, or by its particular structure
' indicates clearly, that the granter intends to put an end to his own
' right and power, and to vest a jus quæsitum irrevocably in those who
' are favoured by the deed, undoubtedly a Court of law would be
' bound to give it that effect. But unless the granter's intention to this
' purpose be made perfectly clear, either by express declaration, or
' by the particular structure of the deed he has executed, the respon-
' dent denied that the trust, though followed by infestment and regis-
' tration, could have that effect, either according to sound principle or
' the decisions of the Court. In all such cases it is held to be a ques-
' tion of fair construction, depending on the different clauses of the
' deed, and principally on the considerations which led to its execution,
' and the chief object which the truster had in view, how far he is to
' be considered as divested of all right and power over his property,
' and to what extent, whether absolutely or only sub modo, a jus quæ-
' situm can be insisted on by those who are favoured in the deed.'

And I do not find, on looking through the reporter's notes, which contain a tolerably accurate account of the grounds upon which the Judges have proceeded in the Court below; I do not find the law thus

April 15. 1825. stated by the respondents is at all disputed by the learned Judges who have decided this case. It was also admitted, and I apprehend cannot be disputed on the cases cited, that if this disposition had been a disposition by Mrs Turnbull to herself and the children nominatim, that would have vested the fee in the children : but it is said; this being a mere trust-deed, the effect of these trusts is not the same as if it had been a disposition to the children immediately ; but that, looking at the whole structure of this trust, the Judges seem to have been of opinion that the fee was not so parted with by Mrs Turnbull ; that the trustees were trustees for the benefit of the children, but that there still remained in her that fee to be disposed of by her ; and therefore it was competent for her to execute this second trust-deed. And it would be far from me, after the difference which has existed in the opinion of the Court below upon that point, and more particularly when I observe this case has been a second time under the consideration of the Second Division of the Court of Session, it would be far from me to say, that this is not a question of considerable nicety and difficulty.

Several of the Judges seem to have been of opinion, that in the original trust-deed they collect an intention on the part of Mrs Turnbull to reserve to herself a right over these subjects ; and one of the Judges particularly lays great stress upon the epithet, ' free residue,' which is used in that deed, as implying that all that was intended to be reserved for the daughters, (who were the survivors of the children), was the residue of this property, after discharging all the debts and encumbrances during the lifetime of Mrs Turnbull. My Lords, undoubtedly, if that could be collected from this first instrument, I should agree in the conclusion which the Judges have drawn ; but looking at this first deed, it appears to me to have been most anxiously framed for this purpose, in the first place, certainly for the payment of the debts, which was a part of the considerations which they had anxiously in view ; but after the discharge of those debts, it appears to me to have been the intention of Mr and Mrs Turnbull clearly to endeavour, if they could, and as far as they could, to preserve the residue of the property for themselves for their lives, and their children after their deaths ; and that the free residue, which they declare to be for the benefit of the children, is that residue which would remain after discharging the purposes of the trust-deed.

Now what were those purposes ? They were the payment of the debts then due ; and the language of the instrument in that respect cannot admit of any doubt in my opinion ; because, in looking to one part of this trust-deed, it expressly refers to the debts which were due previous to the date of that trust-deed ; and it was for the satisfaction of those debts the trustees had power to sell. After those debts were satisfied, the residue of the property is expressly required by the deed to be effectually secured to Mr and Mrs Turnbull in liferent, and the children nominatim. Now, if, as it then

April 15. 1825.

stood, Mrs Turnbull could have done this by an immediate disposition to the children, it appears to me that still more could she do so by means of a trust executed in this way. Of the fee she clearly divested herself, and it was vested in the trustees.

That being so, let us look at the subsequent instrument executed by her and her husband. It is an instrument, reciting that this is 'in supplement of the aforesaid trust,' and stating also that it is to be without prejudice to that trust-deed; 'therefore, in order to remove every doubt which might be otherwise entertained with respect to the power of my trustees, under the above-mentioned trust-deed, to discharge the said debts due by me and my husband with safety to all parties, we have by these presents, with joint consent, and taking burden as aforesaid, but always in supplement of the foresaid trust-deed, and without prejudice thereto, given, granted, alienated, and disposed, as we hereby give, grant, alienate, and dispo, to and in favour of' the trustees, for the payment of those other debts. The question, as I have already stated, comes back then to this, What was the effect of the first trust-deed? For, if that trust-deed absolutely divested her of the fee upon the trusts of that settlement, and if there is nothing to be collected from that instrument to shew that she intended to reserve to herself that disposition which she exercised under the second deed, then the first must be held a valid trust-disposition, giving the property to Mrs Turnbull for her life, and giving to the children a vested interest,—if I may use an English phrase,—a vested interest in the residue which remained after payment of the debts. I observe the Lord Justice-Clerk states, that in the first instance he had doubted upon the circumstances; but that he was quite clear that, at the time the first trust-deed was executed by Mrs Turnbull, she was absolute fiar of the subject, and might dispose of it in any way she thought proper; that her right to burden, sell, and dispose of it, was clear and undoubted; but the question was, whether, after she executed the first deed in 1804, she had the full right of disposition of that which she previously had enjoyed? and I have before stated, more than once, in that which I have had the honour to address to your Lordships, that the Lord Justice-Clerk, and the other Judges, were clearly of opinion, that if she had vested the fee nominatim in the children by immediate disposition, that would have been a good disposition by her; but the difficulty they had was, whether in the fair construction of this trust-deed, and the intention of the parties, to be collected from that instrument, she did not intend to reserve to herself the disposition over this property,—admitting that if that was not to be collected from that instrument, the fee would be well vested in the trustees, and that it was not competent to her afterwards to alter the disposition of that trust-deed.

My Lords, I have very anxiously considered this case when it was argued before your Lordships shortly before the holidays, and more

April 15. 1825. particularly on account of the opinions expressed by the learned Judges, shewing that this was a case of considerable difficulty and considerable nicety; but, after the best consideration I have been able to give this case in the course of the argument and since, it does appear to me, that under the first trust-deed the fee is well vested in the trustees, but vested in them in trust for Mrs Turnbull and her husband for life, giving a vested interest in the children in fee in the residue, and subject to the other trusts of that trust-deed. That being my view of the case, (the view taken by the Lord Ordinary), I feel it my duty to state to your Lordships, that, in my humble judgment, the interlocutors which have been pronounced by the Court of Session on the 7th of February and the 12th of November 1822, and the 25th of January 1823, ought to be reversed to that extent; and that your Lordships should reverse these interlocutors, finding that the first deed of trust in favour of the respondent, now under reduction, and all that has followed thereon, in so far as the same are inconsistent with the trust-deed of the 18th of April 1804, and injurious to the interest of the appellants, Mary Gordon Turnbull, and Elizabeth Jane Turnbull, under the former trust-deed, are null and void, and reduce, decern, and declare accordingly; but, in so far as the action proceeded at the instance of Mrs Turnbull, assoilzie the respondent therefrom, and decern. I ought to state to your Lordships, that no appeal is brought by Mrs Turnbull against the interlocutors in question,—the appeal is brought by the children; undoubtedly the second trust-deed is a good trust-deed as against Mrs Turnbull, as far as affects the Tower of Portobello, and the furniture she conveyed, and as far as it is not inconsistent in other respects with the original trust-deed, and the interests of the children; and therefore, my Lords, I should propose to this House to take care, in the decision you pronounce, not to affect that second trust-deed any further than it is inconsistent with the original deed in favour of the children. The judgment I have read to your Lordships will, I apprehend, leave the second trust-deed untouched, so far as it is not inconsistent with the first; will leave that deed whole and entire and unaffected, for the purposes for which it was intended by Mrs Turnbull, in respect of that property over which she had a power of disposition reserved to her by the original trust-deed. For these reasons I should humbly propose to your Lordships this should be the finding of the House.

Appellants' Authorities.—3. Ersk. 8. 38.; Gordon, Jan. 2. 1771, (15,579.); Coners against Nelson, 1781, (not rep.); Seton, March 6. 1793, (4219.)

Respondent's Authorities.—Lockhart, Feb. 19. 1819, (F. C.); Campbell, Jan. 14. 1801, (No. 11. Adjudication); 3. Ersk. 8. 35.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.