

[3d April 1838.]

Mrs. AGNES FORLONG, Widow of Lieutenant Colonel JOHN TAYLOR, and now Spouse of LAWRENCE ALFRED JOSEPH, Esq., Appellants and Respondents.—*Sir William Follett—A. M'Niel.*

Dr. JAMES HOSSACK and others, Executors of Lieutenant Colonel TAYLOR, Respondents and Appellants.—*Spankie—Andrews.*

Husband and Wife—Clause.—Construction of a marriage-contract between an officer whose widow was entitled to the benefits of an annuity from the Bombay Military Fund, and which he bound himself to secure to his wife in case of surviving him, under which it was held (in part affirming and in part reversing the judgment of the Court of Session) that on a partial diminution of the amount of the annuity, and notwithstanding her second marriage, his estate was liable in payment to his widow of an annuity equal in amount to that which was originally payable from the fund.

LIEUTENANT Colonel John Taylor, in the East India Company's Service, was an original subscriber to the Bombay Military Fund, which was formed in 1816, "to provide for the families of officers left, by their death, destitute of an adequate maintenance, and to assist officers unprovided with aid, by the regulations of the service, or from their own resources, under such circumstances of urgent sickness as renders a voyage to England necessary for the preservation of their lives, and to afford such further aid as the funds shall admit, in cases of less urgent necessity."

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Certain annual sums were to be paid by the subscribers, and the following provisions were made:

“ Art. 1. The widows, legitimate children, and descendants of subscribers who were married on or before the 1st of November 1816, and the widows and legitimate children of subscribers who were married subsequent to that date, provided they are of unmixed European blood, though born in other quarters of the world, (four removes from Asiatic or African, being considered as European blood,) shall be entitled to receive the following annuities.

“ 2. The annuity however payable to the widows of subscribers is, in all cases, to be subject to a deduction equal to the amount of Lord Clive's pension.”

A table was then introduced, “ shewing the amount of pension to widows during their widowhood,” and containing this specification.

	Full pension.	Deducted amount of Lord Clive's pension.	Net pension payable by the military fund.
—			
“ Widow of a colonel or lieutenant-colonel commandant - - -	£ s. d. 456 5 0	£ s. d. 114 1 3	£ s. d. 342 3 9
Widow of a lieutenant-colonel or member of medical board - - -	365 0 0	91 5 0	217 15 0
Widow of a major, superintending surgeon, senior chaplain, and chaplain above ten years standing (if subscribing in this class) - - -	273 15 0	68 8 9	205 6 3”

But it was provided, that “if a widow who is an annuitant on the fund should marry, her annuity shall cease during her coverture, but in case of her again becoming a widow she shall then be entitled to receive the annuity formerly granted to her. If also her second husband be a subscriber, it shall remain at the option of the widow to claim the annuity due to the rank of her first or second husband, but she shall receive no more than one annuity.”

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It was also conditioned, that “should the fund, however, at any period, fall short of the demands upon it, so that the annual income will not defray the amount of the annuities and other claims, then it shall be in the power of the directors to make a proportional deduction from the annuity of each annuitant, and from the payments to other claimants above the rank of subaltern, until the state of the fund shall afford the means of complete payment, when, if a surplus income exists, the arrears shall be made good from the amount of surplus, but not otherwise.”

In 1822, Colonel Taylor (who then held the rank of major) was in Scotland, and had paid his addresses to the appellant, Miss Agnes Forlong, daughter of Wm. Forlong, Esq., of Wellshot. The latter gentleman on the 2d of July of that year, addressed to Colonel Taylor this letter:

“My dear Sir,—We have had now two communings on money matters, preparatory to an important business proposed by you. I mentioned that if possible I would rather not advance any money yearly, though, if it was absolutely necessary for the

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“ support and comfort of my daughter when in India,
 “ I would do so, even though it should narrow my
 “ own income, and be also contrary to my inclination.
 “ I therefore say that if you make a point of this, I
 “ will agree to honour her draft on me from India for
 “ 150*l.* sterling annually (first payment to commence
 “ in three months after her arrival there, and to con-
 “ tinue to be paid to her so long as I live). At my
 “ death she will be entitled to receive the interest of
 “ 500*l.* more; the principal sum of 3,500*l.* will then
 “ be under the management of trustees, to belong and
 “ be the property of herself and her family only. I
 “ mentioned also that Mrs. Forlong having some money
 “ of her own, may very probably make a considerable
 “ addition to her and her children, but I will advance
 “ no part of her fortune to you or her except what I
 “ have mentioned of a yearly annuity. You mentioned
 “ something of your own situation, and of your having
 “ from five to six thousand sterling in India, and that
 “ you would bind my daughter in 500*l.* a year of well
 “ secured property in case of your death. Pray what
 “ property will you leave and secure to children
 “ (if you should have any) in that event? I suppose
 “ all your funds. But I ask this last question from
 “ what you mentioned in our last conference, re-
 “ specting your intentions of allowing your sister 100*l.*
 “ a year during your stay in Scotland. I have
 “ been very candid with you, and I expect the same
 “ candour from you in answer to this, as I wish to
 “ show your answer to my family, as our two con-
 “ ferences took place after dining, when on such an
 “ important business they should have been after
 “ breakfast.”

Colonel Taylor returned this answer on the following day.

“ My dear Mr. Forlong.—I have received your letter
 “ of yesterday, and am not sorry that you have thus
 “ given me an opportunity of explaining myself to you
 “ on money matters, for though with me it is a
 “ secondary consideration, I judged it but proper to
 “ ascertain the point, well knowing the strong inclina-
 “ tion many fathers have to leave all their property to
 “ the male branches of their family. Long ere I had
 “ any serious intention of paying my addresses to your
 “ daughter, or you by your kind hospitality and atten-
 “ tion had inspired me with the presumptuous hope of
 “ aspiring to her favour, I was given to understand she
 “ would have a fortune of 4,000*l.*; that, added to my
 “ own funds, at least 6,000*l.*, and my full pay as
 “ a lieutenant colonel, would, in the event of ill health
 “ compelling me to leave India before I succeed to a
 “ regiment, enable us to live respectably. I say
 “ nothing of what may be done in the meanwhile by
 “ accumulation in India, for no man in my opinion
 “ should marry without providing the means of living
 “ somewhat in the same sphere of life to which both
 “ parties have been accustomed. These being my
 “ notions, I confess I am somewhat disappointed to find
 “ it otherwise. However, I have already said that money
 “ with me is a secondary object, and I am willing to
 “ have her fortune settled as you propose, with the
 “ exception of the concluding line, viz., ‘ to belong
 “ ‘ and be the property of herself and family only,’
 “ and for this good reason, that you would not add
 “ to her annual income, in case of my death, one
 “ farthing.

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“ I shall endeavour to explain this to you on paper ;
 “ and farther to elucidate the subject, I take the
 “ liberty of sending you the East India Register,
 “ wherein you will find at page 336 that the widow
 “ of a major is entitled to receive from the military
 “ fund, of which I am an original subscriber, the sum
 “ annually of - - - £273 10 0
 “ Add half that sum secured from my own }
 “ funds - - - - } 136 15 0
 ————
 £410 5 0
 ————
 “ A lieutenant colonel's widow to the }
 “ sum of - - - - } £365 0 0
 “ Add half, as above stated - - - 182 10 0
 ————
 £547 10 0
 ————
 “ A colonel's widow to the sum of - £456 5 0
 “ Add half that sum, as above stated - 228 2 6
 ————
 £634 7 6
 ————

“ All this I can do from my present funds, and the
 “ remainder of what fortune I may die possessed of
 “ shall be left to my children, if I have any, save and
 “ except the sum of at least 100*l.* a year to my sister
 “ Helen, should she survive me. In either of the two
 “ latter cases above mentioned, it will require more
 “ than the sum you mention to make up the addition
 “ to the annuity, and therefore you will be surprised,
 “ I hope not offended, at my objection, but it looks ill
 “ for a man to die and leave his widow nothing, when
 “ it is well known he has money to dispose of.

“ Do not, however, misunderstand me, for I am
 “ perfectly willing that every farthing you or Mrs. For-
 “ long may leave your daughter shall be at her own free
 “ disposal, provided you do not bind me down to any
 “ settlement, in addition to the Military Fund, as it
 “ would only injure me without in the smallest degree
 “ benefiting your daughter. Let the money you settle
 “ on her be at her own disposal and I am satisfied.”

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A contract of marriage was executed, which, after reciting the intention of the parties to marry, proceeded thus:—“ In contemplation of which marriage, the said
 “ John Taylor hereby binds and obliges himself, his
 “ heirs and successors, to do and perform all and what-
 “ ever may be necessary and incumbent upon him as a
 “ subscriber to the Bombay Military Fund, to secure
 “ to his promised wife, in the event of his predeceasing
 “ her, the benefit of the pension or annuity payable
 “ from the said fund to the widow of a subscriber,
 “ according to the rank he holds or shall hold in the
 “ Company's army for the time; and failing thereof,
 “ or in case the said pension or annuity, from what-
 “ ever cause, shall not be available to his promised
 “ wife in the event foresaid, saving and excepting
 “ only through her right to and possession of such
 “ separate funds as, by the rules and regulations of
 “ the said fund, would exclude her from all benefit
 “ thereby, then the said John Taylor binds and obliges
 “ himself, his heirs and successors, to make payment
 “ to the said Agnes Forlong, his promised wife, in the
 “ event of her surviving him, of a clear yearly jointure
 “ or annuity equal to the pension that has hitherto
 “ been paid or shall be payable from the said fund
 “ to the widow of a subscriber holding the same

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“ rank in the army which now belongs or shall belong
 “ to the said John Taylor at the time of his death, and
 “ that at two terms in the year, Whitsunday and Mar-
 “ tinmas, by equal portions, beginning the first term's
 “ payment of the said jointure or annuity at the first
 “ term of Martinmas or Whitsunday that may happen
 “ after the said John Taylor's death, and so on there-
 “ after half-yearly during her life, with the lawful
 “ interest; and declaring that in the event, and so
 “ long as the said Agnes Forlong shall draw and
 “ receive from the said Military Fund a pension or
 “ annuity equal to the pension that has hitherto been
 “ paid or that shall be payable therefrom to the widow
 “ of a subscriber holding the same rank which now
 “ belongs or shall belong to the said John Taylor at
 “ the time of his death, or would have been entitled
 “ to draw and receive such pension and annuity had
 “ she not possessed such separate funds as, by the
 “ rules and regulations of the said fund, exclude her
 “ from all benefit thereby, as is before provided, the
 “ personal obligation hereby undertaken by him shall
 “ be suspended aye and while she is provided as afore-
 “ said from the said fund, or has lost the benefit of
 “ the fund from the cause above referred to; and for
 “ a provision or jointure in favour of his promised
 “ wife in the event of her surviving him, the said John
 “ Taylor hereby assigns to the said Agnes Forlong,
 “ the benefit of the pension or yearly annuity to which
 “ she may be entitled as his widow from the said fund
 “ as aforesaid, and also the benefit of the pension or
 “ annuity payable from any other fund to the widow
 “ of an officer of his the said John Taylor's rank in
 “ the service of the said Honourable East India Com-

“ pany, and that agreeably to the rules and regula-
 “ tions of the said fund or funds respectively, and
 “ likewise all rights, title, and interest in the provision
 “ secured on the said Agnes Forlong, by her father,
 “ as after mentioned, renouncing, as the said John
 “ Taylor hereby for ever renounces, his jus mariti
 “ therein, and in all and every subject, means, and
 “ estate, real or personal, which the said Agnes
 “ Forlong may conquest, acquire, or succeed to in
 “ any manner of way during the subsistence of the
 “ said marriage, the administration and management
 “ whereof shall belong to the said Agnes Forlong
 “ exclusively. And farther, the said John Taylor
 “ hereby binds and obliges himself and his foresaids,
 “ to make payment to the said Agnes Forlong, in the
 “ event of her surviving him, of a reasonable sum
 “ for interim aliment for the period that may inter-
 “ vene between the day of his death and the first
 “ term at which her jointure or annuity may become
 “ payable, and which provision shall be a corresponding
 “ proportion of the yearly jointure or annuity to which
 “ she shall have right at the dissolution of the mar-
 “ riage, for the time that may elapse thereafter, till
 “ the first term of payment thereof arrives.” There
 then followed certain provisions for children: “ And
 “ which provisions, conceived in favour of the said
 “ Agnes Forlong, and the child or children of the said
 “ marriage respectively, shall be accepted of, and
 “ she, with consent of her said father, hereby accepts
 “ thereof for herself and her said children, in full
 “ satisfaction of all and every thing which she or her
 “ said children could by law claim, ask, or demand
 “ in any manner of way by and through the said John

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“ Taylor’s death, or which her executors or nearest
 “ of kin could ask or demand, in the event of the
 “ said Agnes Forlong’s predeceasing him.”

On the other hand, Mr. Forlong came under the following obligations: He bound himself, “ during
 “ the term of his natural life, to make payment to
 “ the said Agnes Forlong and John Taylor, upon their
 “ joint receipt, or upon the receipt of the survivor of
 “ them, or upon the receipt of their or of the survivor’s
 “ lawful attorney or attorneys (the said William Forlong
 “ being always in life), of a free yearly annuity of 150l.
 “ sterling, payable in Glasgow at two terms in the year,
 “ and declaring that, on the death of the said William
 “ Forlong, the foresaid annuity of 150l. sterling, pay-
 “ able as aforesaid, shall absolutely cease and deter-
 “ mine for ever. And the said William Forlong binds
 “ and obliges himself, his heirs and successors, to
 “ make payment to the trustees hereafter named, and
 “ to the survivor of them, at the first term of Whit-
 “ sunday or Martinmas which shall occur after his
 “ death, of the sum of 3,500l. sterling, provided Mary
 “ Forlong, his wife, shall have then predeceased him,
 “ but if the said Mary Forlong shall be then in life,
 “ then only to make payment of the sum of 3,000l.
 “ sterling, and the remaining 500l. sterling at the first
 “ term of Whitsunday or Martinmas which may happen
 “ after her death.” Certain stipulations were then
 made unnecessary to be noticed, and trustees appointed;
 and it was declared, “ that the said provisions shall be
 “ accepted of, and are hereby accepted, in full satis-
 “ faction to her of all and every thing which the
 “ said Agnes Forlong or her husband, or her heirs,
 “ executors, and successors, could claim, ask, or de-

“ mand in name of bairns part of gear, legitim,
 “ portion natural, executry, or otherwise in any manner
 “ of way, from the said William Forlong during his
 “ life, or from his heirs and successors, by and through
 “ his death, his own good will allenary excepted.”

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The marriage took place, and the parties proceeded to India, where Major Taylor rose to the rank of Lieutenant Colonel, and died in 1828, leaving his widow and one child surviving. By a testament he appointed the respondents to be his executors, and directed his funds to be secured for behoof of his child, whom failing, to certain other parties; and he stated, “ no provision
 “ is herein made for my wife, Agnes Forlong, she
 “ being already amply provided for by the marriage
 “ contract signed and sealed at Wellshot House in
 “ August 1822.” The deduction in respect of Lord Clive's pension having been made by the directors of the Bombay Fund, the respondents declined for some time to make up the amount, but ultimately did so. Thereafter, in consequence of a failure of funds, the directors caused a reduction to be made on all the annuities, by which the sum payable to the widow of a Lieutenant Colonel was reduced to 250*l.*, and after deducting Lord Clive's pension, 158*l.* 15*s.* The appellant having insisted that the executors were bound to pay her the difference, so as to make up her annuity to the original amount, and to do so without deduction of Lord Clive's pension, and in the event of her second marriage to continue to pay the same, and they having refused to comply, she brought an action before the Court of Session to have decree pronounced to the above effect.

In defence it was maintained, that, according to a

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sound construction of the contract, the obligation undertaken by Colonel Taylor was merely to pay up the rates and comply with the other conditions of the Bombay Military Fund, so as to secure the annuity, (of whatever amount it might be) to the appellant, and subject to all the rules as to its duration.

The Lord Ordinary, on 11th July 1838, pronounced this interlocutor: “ Finds, that upon a just construction
“ of the marriage contract libelled, the pursuer is
“ entitled (except in the special case therein expressly
“ excepted) to a free yearly jointure or annuity out of
“ the funds and estate of her late husband, of such an
“ amount as, along with what she may draw from the
“ Bombay Military Fund, shall make up an annual
“ allowance of 365*l.*, and that for all the days of her
“ natural life, and whether she shall or shall not enter
“ into any second or other marriage; and therefore
“ repels the defences, and declares and decerns in terms
“ of the conclusions of the libel; finds expenses due.”
“ Note.—There is some difficulty in this case, from
“ the consideration that the amount of provision from
“ the Military Fund must have been known to be liable
“ to fluctuation, and the pursuer would clearly have
“ had the benefit if the rates had been raised instead
“ of lowered subsequent to her husband’s decease.
“ But considering the plain equity and expediency
“ (and consequent presumption of intention) of ren-
“ dering the conventional jointure of a widow (for
“ which she had conveyed a large tocher, and renounced
“ her legal right,) in some measure fixed and secure,
“ the Lord Ordinary can put no other construction
“ upon the very broad words of the subsidiary obliga-
“ tion of the husband, in all cases ‘ where the pension

“ ‘ shall not be available from any cause whatever,’ to
 “ make up the deficiency, than that they entitle her
 “ to have it at all times made up to the sum which the
 “ fund either yielded or might have yielded at the
 “ period of the husband’s death. If it had not this
 “ meaning, it is difficult to understand why it was at
 “ all introduced, and it is obvious that if not so guarded
 “ the provision might fluctuate in the most distressing
 “ manner or substantially fail altogether, without the
 “ widow having any resource whatever. Take even
 “ the case first contemplated for a recourse on the
 “ husband’s estate, and which the defenders represent
 “ as most favourable for their construction of the whole
 “ clause, viz., the case of the widow having no claim on
 “ the fund, in consequence of the husband’s having
 “ forfeited all right to it before his death, by neglecting
 “ to do what was necessary to keep it up, withholding
 “ his termly contributions, or otherwise. Suppose that
 “ in this way the husband had ceased to have any
 “ interest in the fund ten years before his death, what
 “ would then have been the claim of the widow on his
 “ private estate? Would it have been for a fixed
 “ and invariable jointure or life annuity of the same
 “ amount as she would have drawn the first year of
 “ her widowhood from the fund, if she had had right
 “ to it? Or to an annuity fluctuating with every
 “ variation in the state or regulations of a foreign
 “ fund, out of which she was never actually to receive
 “ any thing, and with which her husband had had no
 “ connexion for years? Even in that case the Lord
 “ Ordinary would decide for the fixed annuity, and
 “ would hold that the fund was only to be looked at
 “ as the army list was to be looked at, viz., in order to

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“ ascertain by the one what rank was held by the
 “ husband at his death, and by the other what was
 “ the amount then payable to the widow of such an
 “ officer from the fund. Those things it would be
 “ necessary to ascertain, because they were the elements
 “ by which the amount of the life annuity out of the
 “ husband's estate was directed by the contract to be
 “ fixed. But, except for that purpose, the parties had
 “ nothing to do with the fund, nor with its past or
 “ future fluctuations. In the case that had occurred,
 “ the widow was to be provided wholly and entirely
 “ by a jointure out of the husband's estate, and it was
 “ only to settle its amount that a fund with which he
 “ had once been connected was referred to. But that
 “ amount being once settled a right for all the rest
 “ of her life was a right to her jointure out of property
 “ in Britain, and nothing could be more contrary to
 “ the nature and object of such a provision than to
 “ suppose that it was to vary with the variations of a
 “ foreign institution in which none of the parties had
 “ any interest, and that the husband's representatives
 “ were to send out to Bombay every six months,
 “ before they could know with what jointure his estate
 “ was chargeable.

“ But the actual case is much stronger, for the
 “ contract expressly provides that the widow shall have
 “ recourse for a jointure to the husband's estate, not
 “ only if he fail to do all that depended on him to give
 “ her right to the fund, but if ‘ from any cause what-
 “ ‘ soever, the said pension shall not be available to
 “ ‘ her.’ Now, what pension is it that is here spoken
 “ of, and what is meant by its not being available?
 “ ‘ To the Lord Ordinary it appears plain that it is the

“ pension payable to the pursuer at the time of her
 “ husband’s death, and that it ceases to be available
 “ when more than one half of it is withheld.

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“ The defenders seemed chiefly to rely on the clause
 “ in the contract, by which the pension from the fund
 “ is made over, ‘ agreeably to the rules and regulations
 “ ‘ of the said fund;’ and on the allegation that it was
 “ in accordance with one of those regulations that its
 “ amount had been recently abridged. Now, the
 “ Lord Ordinary is of opinion, that the rules and
 “ regulations here referred to, mean only the rules as
 “ to the mode and manner of payment,—the certificate
 “ to be produced,—the agents to be applied to, &c.,
 “ and not conditions of restriction or forfeiture of the
 “ pension itself; and he thinks this construction is
 “ confirmed by that which, at all events, furnishes a
 “ conclusive answer to the whole defence, viz., that the
 “ clause binding the husband to provide a jointure
 “ if the pension shall from any cause cease to be
 “ available, is qualified by one anxious and express
 “ exception, which would be altogether unmeaning
 “ and unnecessary, if the pension had been understood
 “ to be given under the peril of those rules and
 “ regulations, which imported a contingent forfeiture
 “ or restriction. The exception is, that in spite of the
 “ broad and general words already quoted, the husband
 “ shall not be liable for a jointure, in the case of the
 “ pension not being available to the widow, ‘ through
 “ ‘ her right to and possession of such separate funds
 “ ‘ as by the rules and regulations of the said fund
 “ ‘ would exclude her from all benefit thereby;’ and
 “ it is anxiously provided, that ‘ saving and excepting ’
 “ ‘ that case only,’ he shall be liable for jointure

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“ whenever, from whatever cause, the pension shall not
 “ be available. Now, it is utterly impossible to explain
 “ or account for the introduction of these words, except
 “ upon one of two suppositions, both equally conclusive
 “ in the pursuer's favour; either, first, that the rules and
 “ regulations referred to in the clause assigning the
 “ pension did not mean rules and regulations of this
 “ description at all; or that they were all meant to be
 “ superseded (except in the case specially excepted)
 “ by the important, and the Lord Ordinary will
 “ add, most just and necessary, clause, binding the
 “ husband to supply, from his own estate, what
 “ might from any cause be actually deficient in the
 “ provision.

“ The defenders seemed also to maintain that the
 “ pension, though diminished in amount, was in
 “ point of fact, still available to the pursuer; that it
 “ had not been evicted, as they expressed it; and that
 “ though compensation might be due for a total priva-
 “ tion it was not for a partial. To the Lord Ordinary,
 “ however, this seems quite untenable, considering the
 “ onerous and favourable nature of the claim especially.
 “ Suppose that, instead of being reduced from 365*l.* to
 “ 158*l.*, it was reduced to 5*l.* or 5*s.*, do the defenders
 “ really maintain, that in that case the husband's
 “ estate is to pay nothing, while it would have been
 “ chargeable with a jointure of 365*l.* if the 5*s.* also
 “ had failed, and was reduced to nothing? If the Lord
 “ Ordinary be right in thinking that the obligation
 “ truly was to secure an annuity equal to the pension
 “ as at the husband's death, then it is plain that the
 “ obligation became prestable whenever any part of
 “ that was withheld, or when her provision was

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“ diminished, whether by a third or a half, or the
“ whole.

“ It is needless to say any thing as to Lord Clive's
“ fund, from which it is admitted the pursuer never
“ received any thing, and to which it is obvious that
“ she never was entitled.

“ The argument that the pursuer must forfeit all
“ claim on her late husband's estate, as well as on the
“ fund, if she should ever marry again, is of course
“ sufficiently answered, if the Lord Ordinary is right
“ in holding that the clause relied on by the pursuer
“ supersedes, and was intended to protect her against,
“ all forfeiting regulations, except that which is specially
“ excepted. But the terms in which the obligation to
“ grant a jointure is conceived, seem to have been
“ intended specially to exclude this particular case.
“ For, while the regulations expressly bear that the
“ widows shall enjoy their pensions ‘during their widow-
“ hood, and not otherwise,’ the jointure to be provided
“ to the pursuer is expressly covenanted to be paid
“ half-yearly ‘during her life.’”

The respondents having presented a reclaiming note to the Second Division of the Court, their Lordships appointed the parties to prepare cases, which having been done, they directed the papers to be laid before the other Judges for their opinion, whether or not the interlocutor of the Lord Ordinary ought to be adhered to.

The following opinions were thereafter delivered by their Lordships:—

Lord President and Lord Gillies.—We are of opinion that the interlocutor of the Lord Ordinary is well founded, and ought to be adhered to; and as we en-

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tirely agree in the views taken by the Lord Ordinary in his note, we do not think it necessary to assign any other reason for our opinion.

Lord Fullerton.—I think the judgment of the Lord Ordinary right; and in the main, I concur in the reasonings by which the interlocutor is supported.

But, in addition, I may be permitted to express a doubt, whether one consideration, supposed to create the chief difficulty of the case, has not been somewhat hastily assumed. I see no ground for holding, that the rates of provision from the Military Fund were known to be subject to rise or fall. In the first place, even according to the “regulations of the fund,” founded on by the defenders, I see no provision for, or allusion to, any rise of the rates; and, secondly, I think it quite clear from the previous correspondence of the parties, that the only information held by the lady’s father on the subject of the Military Fund and its regulations, was that given in the East India Register of 1822, in which there is not a word of the power of the directors to reduce the rates. On the contrary, the sums there specified, are described “as the annuities which the widows are entitled to receive;” those annuities being subject, indeed, to certain conditions and deductions, but in other respects dependent only on the rank held by officers at their death. And it is to be observed, that those specified annuities are not only generally referred to, but are proved by the correspondence to have formed the data on which various other pecuniary calculations entering into the contract were framed.

Considering that this was information communicated by Colonel Taylor, one of the contracting parties, and evidently acted on by the other, I hold myself entitled

to look to it in canvassing those disputed or ambiguous passages of the contract, on which the defenders now endeavour to fix a construction, decidedly unfavourable to the party to whom those representations were made.

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Keeping this in view, I think both the letter and the spirit of the contract are in favour of the pursuer's claims.

By the leading clause, Colonel Taylor binds himself to perform whatever may be necessary for him, "as a subscriber to the fund," to secure to the lady, on his predecease, "the benefit of the pension or annuity payable from the said fund to the widow of a subscriber according to the rank he holds or shall hold at the time." And he afterwards assigns that pension or annuity to the lady, which assignation, however, was no more than a mere form; as, if the subscriptions were paid, the annuity must have taken effect in her favour without it. If the matter had rested there, she probably might have been held to confine her claims to the benefit of the Military Fund, subject to all the hazards attending it. But it is needless to inquire into this, because, by the contract, there is expressly super-added a personal obligation on the part of Colonel Taylor; and the whole question turns on the meaning of that obligation.

By it, failing his performance of what is incumbent on him as a subscriber, "or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife," saving and excepting one case, (which it is unnecessary here to notice,) he binds himself to pay to the lady "a jointure or annuity equal to the pension that has hitherto been paid or shall be

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“ payable from the said fund to the widow of a sub-
“ scriber holding the same rank in the army which
“ now belongs or shall belong to the said John Taylor
“ at the time of his death.”

The first question here regards the contingency on which the personal obligation is to be called into operation, viz., whether it comprehends the case of the deficiency of the Military Fund? Now, upon this, I cannot entertain a doubt. The parties, in the passage immediately preceding, had been dealing with the “ pension or annuity payable from the fund to the widow of a subscriber according to the rank he holds or shall hold in the company’s army.” In construing a marriage contract, a deed intended to regulate the pecuniary interests of parties, it would be absurd to suppose, that those expressions bore reference merely to the source from which the annuity was payable, and not to its actual amount; and, accordingly, it is proved in this case by the previous correspondence, that the East India Register was sent to the lady’s father for the very purpose of showing what the amount of that pension or annuity was. The “ said pension or annuity,” then, I hold to mean, in sound construction, that pension or annuity which, according to the husband’s representation, was payable from the fund, viz., a certain amount in pounds, shillings, and pence; and there is the less difficulty in this, because there is no dispute that at the time his representation was true. It seems to me to follow, that “ such pension or annuity ” ceases to be “ available,” when the party by whom it is due cannot pay it. The term “ available ” includes the two conditions, of the title of the creditor on the one hand, and the capacity of the

debtor to pay on the other; and cannot remain applicable where only one of the conditions exists. It would be rather startling to maintain expressly, what is done by implication here, on the part of the defender, that a widow's right to an annuity from an insurance office or benefit society must, in a question with her husband's representatives, who are subsidiarily bound, be held to be "available" to her, merely because she has a right to make the demand, and independently altogether of the consideration how far the society or insurance office is enabled to meet it.

The only other point then to be inquired into is the extent of the personal obligation come under by the husband. He is bound to pay a jointure or annuity, equal to the pension "that as hitherto been paid, or "shall be payable," &c. And it is here that, in my opinion, the only difficulty lies; because the words may admit of the inference, that the parties had in view the possible fluctuations of the rates of allowance from the fund.

But, in the first place, that inference is not absolutely necessary. It may merely be a tautological form of expression, suited in the tense to the double or alternative form of the conclusion of the sentence, in which reference is made to the rank "which now belongs or "shall belong to the said John Taylor at the time of "his death;" according to which view, the future or contingent form of expression would merely apply to the change of rate which might arise from the husband attaining before his death a higher rank than that which he then held. At all events, and even admitting the expression to be dubious, I am bound to adopt that one of the two constructions which is most consistent

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with what I consider to be the only admissible presumption, viz., that the parties contemplated no other fluctuation of the amount of the annuities than that which arose from the gradations of military rank.

But, secondly, I rather think, that even on a stricter examination of the terms employed, the clause in question is quite consistent with the claim now made by the pursuer. For here, too, the defender's argument will be found to assume a particular sense of the term "payable," viz., that which the Military Fund does or can pay. But that is not the only sense, nor is it the most usual sense; certainly not that which must be adopted in construing a subsidiary obligation of this kind. Its most ordinary, and, as I think, its legitimate meaning is, what the debtor ought to pay, in other words, that which is due. Now, in this sense, the original annuity is still payable. The clause in the regulations referred to by the defenders does not authorize the directors to wipe off the debt, but only to oblige the annuitants to accept a dividend under an express reservation of their claims, if the funds of the institution ever afford a surplus. It provides, that if the "fund falls short, the directors shall have the power to make a proportionable deduction from the annuity of each annuitant, until the state of the fund shall afford the means to complete payment, when, if a surplus income exists, the arrears shall be made good from the surplus but no otherwise."

It does not appear to me that, even by this clause, the annuities, as originally fixed, have absolutely ceased to be "payable." Therefore, even if it could be shown, which it is not, that the marriage contract was framed in the knowledge and contemplation of that clause of

the regulations, I should rather think that the words "which shall be payable," must be held not to limit the personal obligation to that which, independently altogether of such obligation, the widow could get from the fund, but to bind the husband to make good the annuity, which, though continuing "payable" or "due," the Military Fund might be at the time unable to pay.

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From the great difference of opinion which has arisen on this case, it would be presumptuous to deny its difficulty. But, upon the fullest consideration which I have been able to bestow on it, I cannot help thinking, that unless an unusually rigorous interpretation should be adopted in construing this marriage contract, the claims of the widow must be sustained.

Lord Jeffrey.—I entirely concur in this opinion. I do not think I had any other variation in view than that which might arise from the husband's advancement in military rank. I have nothing material to add, except that the clause in the contract which contemplates the temporary suspension of the widow's available right to the fund, and makes her claim on her husband's estate defeasible on the revival of such available right, taken along with the clause in the regulations, entitling the widows, whose allowances have been restricted, to "complete payment" out of any surplus that may afterwards accrue, appears to me to afford a strong confirmation of the view adopted in the preceding opinion, and in my original interlocutor.

Lord Cockburn.—I am of opinion that the interlocutor of the Lord Ordinary ought to be reversed.

I can see nothing in the contract, as it actually stands, except an obligation by the husband to keep up

FORLONG . his interest in the Military Fund, and an assignation to
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 ——— " jointure" is expressly declared to consist of "the
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 " may be entitled, as his widow, from the said fund,
 " &c., agreeably to the rules and regulations." There
 is no guarantee that the fund shall produce any par-
 ticular annuity. On the contrary, when he anticipates
 that it may not be available to her, and engages to
 provide a substitute, he only binds himself to pay
 her a yearly sum " equal to the pension that has
 " been paid or shall be payable from the said fund
 " to the widow of a subscriber holding the same rank
 " in the army which now belongs or shall belong to the
 " said John Taylor at the time of his death." These
 last words were plainly not intended to fix, and do
 not, in fair construction, import that the annuity
 which the fund might happen to afford at his demise
 should, in all time coming, be kept up out of his estate.
 They merely import that she should receive the
 pension, whatever it might periodically be, due to
 the widows of those holding the same rank which
 her husband held when he died. There is no obli-
 gation to make up deficiencies below this as a fixed
 sum. The only failure that he provides for is a total
 one; and, accordingly, the only substitute created is,
 not that any deficiency shall be supplied, but that
 the widow shall receive out of his estate " a pension
 " equal to what shall be payable from the said fund."
 It was surely not meant that he should pay her a
 sum equal to what she got from the fund.

I hold, therefore, that the parties had a source of

income liable to variation in their view, or at least that, though they may not have thought of this at all (which is not improbable), the deed they executed implies it, and that, though unfortunate results may be stated as arising out of partial or nearly total failures of the fund, it is not the business of a Court to correct this. Arrangements by assignments of property liable to change in its productiveness, such as shares in the public stocks, are not uncommon, and similar results are incident to them all. The Military Fund might possibly have risen instead of fallen, and the widow have got the benefit of this rise.

I am further of opinion, that her losing the military pension, by entering into a second marriage, was not an event for which her husband's estate must provide. I am aware that he makes his "property responsible if the pension shall become unavailable, from whatever cause, saving and excepting only through her right to and possession of such separate funds as, by the rules and regulations of the said fund, exclude her from all benefit thereby." But I do not think that these words can reach the case in which the fund is made unavailable by the act of the wife herself. There are many acts of hers, besides contracting a second marriage, by which she may deprive herself of the benefit of it. She may decline to claim or may omit the periodical certificates or affidavits. Can it be maintained that her late husband's property and heirs are to suffer by such proceedings, whereby she, having the full benefit of the fund, chooses to forego it? It would require very unequivocal words indeed to sanction such a result—a result which I am the more inclined to

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resist, from the extreme improbability that it was ever intended to enable the widow to marry a second time at the expense of her first husband, and to reach his property by voluntarily quitting her hold on a prior equivalent provided by him. The Military Fund has not proved unavailable from any cause, but she has renounced it.

Lords Corehouse and Moncreiff.—The interlocutor of the Lord Ordinary finds, that, “upon a just construction of the marriage contract libelled, the pursuer is entitled (except in the case therein expressly excepted) to a free yearly jointure or annuity out of the funds and estate of her late husband, of such an amount as, along with what she may draw from the Bombay Military Fund, shall make up an annual allowance of 365*l.*,” and that for her life, whether she marries again or not. The question proposed for our opinion is, whether the interlocutor ought to be adhered to.

We have read the marriage contract carefully. We do not find that there is expressed in it any obligation for a specific annuity of 365*l.*, to proceed either from the Bombay Fund or from any other source. The contract appears to be framed on a different principle.

The funds brought by the lady are secured in a certain manner for her own benefit; and it was of course foreseen, that, if she should be left a widow, she would in all events enjoy the benefits of those provisions.

The husband, however, in consideration of the marriage, and any other benefits given to him by the contract, came under a clear and definite obligation in favour of his wife, which, though it ought to be fairly and liberally interpreted in her favour, cannot be

changed into any thing different from what it is, according to the plain terms employed to express it.

It is very clear that the marriage contract does not bear any express obligation for the specific annuity assumed in the interlocutor. But it is supposed, that, on considerations of equity and expediency, it should be presumed that the intention was to make it fixed and secure. We are of opinion that it was intended to make the annuity fixed and secure, so far as that was consistent with the nature of the only obligation undertaken, or which there is any indication of an intention on the part of the husband to undertake. But we cannot discover any ground in the provisions of the deed for presuming that there was any intention, in the one party or the other, that the annuity should be warranted or guaranteed to be of any fixed amount.

The obligation is simple and clear,—“to do and perform all and whatever may be necessary and incumbent upon him, as a subscriber to the Bombay Military Fund, to secure to his promised wife, in the event of his predeceasing her, the benefit of the pension or annuity payable from the said fund to the widow of a subscriber, according to the rank which he holds or shall hold in the company’s army for the time.” This is the main and leading obligation. It binds to a specific duty, but to no precise sum of annuity to be secured by means of it. If the duty be fulfilled, it manifestly rests on the contingency of the amount payable by the rules of the fund what the annuity shall be. But, if the right against that annuity fund be made secure, that seems to us to be fulfilment of the obligation, so far at least as the above quoted words go.

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But the clause of the contract proceeds: — “ and
 “ failing thereof, or in case the said pension or annuity,
 “ from whatever cause, shall not be available to his
 “ promised wife, in the event foresaid (her surviving),”
 saving and excepting the case of her being excluded
 from the fund in consequence of the possession of
 separate funds, “ then the said John Taylor binds and
 “ obliges himself,” &c. to pay to his wife surviving him
 “ a clear yearly jointure or annuity, equal to the pen-
 “ sion that has hitherto been paid or shall be payable
 “ from the said fund to the widow of a subscriber
 “ holding the same rank in the army which now be-
 “ longs or shall belong to the said John Taylor at the
 “ time of his death,” &c. In a subsequent clause,
 the contract farther declares that, for a provision to
 his promised wife, Major Taylor assigns to her “ the
 “ benefit of the pension or yearly annuity to which she
 “ may be entitled, as his widow, from the said fund,
 “ and also the benefit of the pension or annuity pay-
 “ able from any other fund to the widow of an officer
 “ of his the said John Taylor's rank in the service of
 “ the said Honourable East India Company, and that
 “ agreeably to the rules and regulations of the said
 “ fund or funds respectively.”

Taking all these clauses together, it appears to us
 that the only obligation undertaken is to do the acts
 necessary for securing the widow's right to the pension
 or annuity which, according to the rules and regula-
 tions of the Bombay Military Fund, should be payable
 to the widow of an officer holding the rank which
 Major Taylor should last have held preceding his
 death; with a further guarantee, that if that pension,

whatever its amount might be according to those rules, should from any cause, except one event, become unavailable, that is, cease to be payable, his representatives should be bound to make good an equal annuity according to the same rules.

The clause which is thought to sanction a different construction is that beginning with the words, “and failing thereof, or in case the said pension or annuity from whatever cause, shall not be available to his promised wife.” There are here two things; 1st, “and failing thereof.” Failing what? Clearly it is, failing Major Taylor’s doing and performing what was necessary to secure the pension “payable from the said fund” according to his rank. So far the matter is clear, and can admit of no doubt. It is his failing to pay the subscriptions, and comply with any other rules of the institution affecting him. But if he did do and perform all that was necessary, there was no failure in this point; and his engagement being fulfilled, the alternative provided on such failure could not come into operation, whatever might be the amount of the pension payable according to the state and existing rules of the fund. But, 2d, there is another case supposed,—“or in case the said pension or annuity, from whatever cause, shall not be available” to the wife. We may not exactly see all the events contemplated, in which the pension might not be available in the meaning of the clause, notwithstanding that Major Taylor had done all that was necessary for securing it. If it be held to be clear, that the words cover the event of the widow marrying a second husband, by which, according to the rules, she is said to forfeit the benefit for the time, there is at least one clear case in which

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the words have a precise and very appropriate operation: and we are of opinion that this is the sound construction. But the first question here stands quite independent of any such difficulty as to the events contemplated. "Shall not be available." In case what shall not be available? The words are express:—"In case the said pension or annuity" shall not be available. Whatever may be the causes contemplated, the thing supposed to become unavailable is the pension payable to the widow of an officer of such rank by the rules of the society, and nothing else. There is not one word of provision as to the amount of such pension; and, therefore, whenever the pension payable to the widows of other officers of the same rank was equally available to the wife under this contract, it seems to us very clear, that the case of the pension being unavailable had not taken place, whatever might be the amount thereof.

It must be observed, that the deed contains no determination of the pension as fixed in the amount at any particular time, or at the death of Major Taylor. We understand the principle of the fund to be different, and that the pensions may rise or fall after the officer's death, according to circumstances. And the obligation of this contract is framed accordingly in perfectly indefinite terms. In the first binding words there is nothing said of the time of Major Taylor's death; and in the penal or alternative obligation, on failure, or the pension not being available, while the thing to be done is again simply to secure "a jointure or annuity equal to the pension that has hitherto been paid, or shall be payable, from the said fund," there is still no reference to any fixed time at which the amount of

such pension shall be definitely determined. The words in the first clause, "for the time," and those at the end of the last, "at the time of his death," evidently refer, not at all to the payment or the emergence of the annuity, but solely to the rank which Major Taylor might hold in the army. It is an annuity equal to the pension which has been or shall be payable to the widow of a subscriber "holding the same rank in the " army which now belongs or shall belong to the said " John Taylor at the time of his death." His rank could not vary after his death, and therefore it is defined. But the pension described is that only which might be payable to the widows of subscribers of the same rank; and if in their case it varied in amount, we are of opinion that the pursuer gets all that was provided for her, and all that she could not have got if Major Taylor had failed to secure the pension, if she receives the pension which is payable to the widows of other subscribers according to the rules of the society.

We are, however, of opinion, that the event of the pursuer entering into a second marriage, (which we understand has taken place,) whereby, by the rules of the fund, she forfeits, under certain qualifications, the benefit of the pension, must be held to be a case in which the pension has become unavailable in the sense of the contract, and the obligation to pay an equal annuity takes effect. We are of this opinion, because this is a case in which, without any reference to amount, the pension has become unavailable altogether, from a certain cause, which must be presumed to have been contemplated; and because, although this arises from a certain rule of the fund, the special exception

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introduced immediately after the supposition of the pension, from whatever cause, becoming unavailable, viz., “ saving and excepting only through her right to “ and possession of such separate funds as by the rules “ and regulations of the said fund would exclude her “ from all benefit thereby,” renders the inference inevitable, that, while that was a case in itself, if not excepted, comprehended in the meaning of the pension not being available, the other case, of its becoming unavailable by a second marriage, was also comprehended, and, not being excepted, must bring the alternative engagement into operation. But we are of opinion that the annuity to be paid as long as the exclusion from the fund continues, can be no more than the amount of the pension payable to other widows of officers of the same rank who have not incurred the forfeiture.

We are, therefore, of opinion, that the interlocutor of the Lord Ordinary ought not to be adhered to, but ought so far to be altered as to find, that the annuity payable cannot be greater in amount than the pension from time to time payable from the Bombay Military Fund to the widow of an officer of the same rank.

Lord Mackenzie.—I concur in the above opinion of Lords Corehouse and Moncreiff.

Lord Balgray.—I concur in the above opinion, so far as regards the first point, that there is no obligation created by the contract for a specific annuity; but I concur with the opinion of Lord Cockburn as to the point regarding a second marriage.¹

¹ Lords Justice Clerk and Meadowbank were for adhering. Lord Glenlee concurred as to the second marriage, but was inclined to alter quoad ultra, while Lord Medwyn was for altering in toto.

The Court, on 24th November 1836, pronounced this interlocutor: "The Lords having resumed consideration of this case, with the opinions of the consulted judges, Find that the defenders, as executors of the deceased Colonel Taylor, are bound to make up any deficiency in the pension or annuity payable to the pursuer from the Bombay Military Fund, arising in consequence of her second marriage. Quoad ultra, alter the interlocutor complained of; sustain the other defences, and assoilzie the defenders, but find no expenses due, and decern."¹

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Mrs. Taylor (now Mrs. Joseph) presented an appeal against this judgment, except in so far as it found the executors of Colonel Taylor bound to make up the deficiency in her pension arising in consequence of her second marriage. The executors entered a cross appeal against the judgment upon that point.²

LORD CHANCELLOR.—My Lords, there is a case which was heard before your Lordships yesterday, and the previous day of sitting, in which I was desirous of taking an opportunity of minutely examining the reasons given by the learned Judges of the Court of Session in support of the various views which they have taken upon the subject of this cause, there having been a great difference of opinion delivered by those learned Judges. Upon one point they divided ten to three, and on the other they divided seven to six.

¹ 15 S., D., & B. 126.

² As the arguments of the parties, and the views enforced by them, are fully brought out in the opinions of the Judges, it is unnecessary to give any further detailed statement of them.

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My Lords, the case arose upon a marriage contract between Major Taylor and Miss Agnes Forlong. It appears that the intended husband, Major Taylor, being an officer in the service of the East India Company, had been a subscriber to what is called the Bombay Fund, the object of which is to secure to the widows of officers subscribing, a certain annual payment during their widowhood. My Lords, there were produced, and commented upon, at your Lordships bar, several letters which passed before the execution of the contract. There was also produced, and commented upon, the will of the husband made at a time considerably subsequent to the date of the contract. My Lords, I apprehend, according to the strict rules of evidence, those documents ought to be entirely rejected; rejected so far as they might be supposed to be produced for the purpose of putting any construction upon the instrument itself. The marriage contract must speak for itself; the rights of the parties must be ascertained from the language of that marriage contract, and not from any thing which may have passed before, and still less from any thing which may have passed afterwards; at the same time it is certainly within the rules of evidence, and therefore may legitimately be looked into to see what were the circumstances existing at the time the marriage contract took place. The marriage contract speaks of a certain pension. Now, what that pension was, and what knowledge the parties had of that pension, are subjects as to which these documents may be looked at for the purpose of explaining the intention in the marriage contract itself, every court of justice having a right to have all the information which was in the possession of the parties contracting to place itself

in the situation of the parties for the purpose of putting a construction upon the instrument to which they have become parties.

My Lords, it appears that in the correspondence between the father of the lady and the intended husband, he stated the title which, by having become a subscriber, belonged to him in the pension in question, and he referred to the East India Register as containing the particulars of that annuity. My Lords, I refer to that, because it appears that there are some provisions in the regulations themselves which were not to be found in the Register to which the intended husband referred in his letter. He says, “ I shall endeavour to explain this “ to you on paper ; and farther to elucidate the subject, “ I take the liberty of sending you the East India “ Register, wherein you will find, at page 336, that “ the widow of a major ” (the rank he then held) “ is “ entitled to receive from the Military Fund, of which “ I am an original subscriber, the sum of 273*l.* 10*s.* “ annually ; a lieutenant-colonel’s widow ” (which was the rank he held at the time of his death) “ the sum “ of 365*l.*”

Now, the Register to which he referred, and which must therefore have been part of the subject matter under the cognizance of the parties when they entered into the contract, contained these provisions, “ The “ widows and legitimate children of deceased officers, “ whose income may not exceed one half of the specified “ pension, shall be entitled to receive the following “ annuities ; viz., widows during their widowhood, and “ not otherwise, of a lieutenant-colonel, 365*l.*” It then states, under the head of deductions, “ First, the amount “ received from Lord Clive’s Fund ; secondly, all in-

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“ come above half the amount of the pensions.” My Lords, with that information with respect to those pensions to widows before them, the parties entered into the contract. Now, it appears that the pension to which the widow of this officer would, according to the regulations, have been entitled, has been subject to three different descriptions of deduction, one, indeed, suspending the payment altogether. She has married a second husband—the pension, by the regulations of the Bombay Pension Fund, is only during widowhood—she, therefore, has during the period of her second marriage, and so long as that may continue, no right to receive any pension from the Military Fund. It also appears that the amount of what she would be entitled otherwise to, is not now to be paid to the extent to which it would be payable at the time the marriage took place, the fund having failed to produce sufficient to keep up the payment. There has been a diminution in the annual payment to each annuitant. There is also another ground on which a deduction has been made by the regulations. According to the Register which was before the parties, there is a deduction for the amount received from Lord Clive’s Fund, by the regulations themselves; it is not so expressed—it is expressed the annuity is payable to widows of subscribers, in all cases to be subject to deduction equal to the amount of Lord Clive’s Fund. It appears by the regulations respecting what is called Lord Clive’s pension, if the husband leaves property to a certain amount, 3,000*l.*, the widow is not entitled to participate in the benefit of that fund; so that, in the case of this particular lady, she never received any benefit from Lord Clive’s Fund; but still, it appears, that the amount which she

would have been entitled to receive from Lord Clive's Fund is, according to the regulations of the Bombay Fund, deducted from what she would otherwise have been entitled to receive from that fund.

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My Lords, these three grounds of deduction are the points in question between the parties in this cause; she claiming against her husband's estate under the provisions of the marriage contract, which I shall presently state to have made good to her, an annual sum equal to 365*l.*, to which, according to the regulations of the Bombay Fund, she would have been entitled, if those grounds of deduction had not taken place.

My Lords, the first question is, whether having for the present, at least during second coverture, lost the benefit to arise from the pension from the Bombay Fund, she is entitled to come upon the husband's estate for the purpose of having that loss made good; secondly, whether the husband's estate is liable to make good the deficiency which has arisen in the amount of payment to which widows are now entitled out of the Bombay Fund; and, thirdly, whether she is entitled to have made good to her the amount of the deduction for Lord Clive's Fund, the benefit of which she has not received, he having died possessed of property more than 3,000*l.*

Now, my Lords, the contract itself provides for the several events in which the widow is entitled to claim against her husband's estate, in these words: " In contemplation of which marriage, the said John Taylor
" hereby binds and obliges himself, his heirs and
" successors, to do and perform all and whatever may
" be necessary and incumbent upon him as a subscriber
" to the Bombay Military Fund to secure to his pro-

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“ mised wife, in the event of his predeceasing her, the
 “ benefit of the pension or annuity payable from the
 “ said fund to the widow of a subscriber, according to
 “ the rank he holds or shall hold in the Company’s
 “ army for the time; and failing thereof, in case the
 “ said pension or annuity, from whatever cause, shall
 “ not be available to his promised wife, in the event
 “ aforesaid, saving and excepting only through her
 “ right to and possession of such separate funds as
 “ by the rules and regulations of the fund would exclude
 “ her from all benefit thereby, then the said John
 “ Taylor binds and obliges himself, his heirs and suc-
 “ cessors, to make payment to the said Agnes Forlong,
 “ his promised wife, in the event of her surviving him,
 “ of a clear yearly jointure or annuity equal to the
 “ pension that has hitherto been paid or shall be pay-
 “ able from the said fund to the widow of a subscriber
 “ holding the same rank in the army which now belongs
 “ or shall belong to the said John Taylor at the time of
 “ his death, and that at two specified times, and so on
 “ thereafter half-yearly during her life.”

Now, my Lords, it was before the parties, that the pension was to be received only during widowhood. Of that the parties were fully aware, because the regulations as contained in the East India Register so informed them, for they state in very distinct terms that widows shall be entitled to receive the following annuities:—
 “ widows during their widowhood, and not otherwise.”
 It is contended, on the part of the husband’s estate, that the charge upon the husband’s estate is not to make good the loss which she has sustained by her second marriage. My Lords, the parties were of course competent to provide that, notwithstanding the second marriage, not-

withstanding the loss ensuing from that second marriage, she should be entitled to receive a corresponding annuity from her husband's estate during her life;—and the husband has so contracted. She was perfectly well aware that that which was to be lost was the pension during widowhood;—and that he contracted to supply. He has in terms said, she shall have the pension during life. He has contracted, that in whatever event which shall deprive his intended wife of the benefit of the annuity, excepting one cause, which is not the cause that has happened, he will pay an annuity to her for her life equal to the annuity which she would have received from the Bombay Fund.

My Lords, this really appears to me so perfectly free from all doubt, that the only difficulty I feel is, how to understand that any real question should be considered as resting upon this part of the case. I find that below it has been supposed there was a right to depart from the plain and obvious meaning of these terms, because the act which has caused the loss of the annuity from the Bombay Fund was the act of the wife herself; but if the parties have so contracted, there can be no reason why the contract should not be carried into effect; the parties—having before them the difference between the pension payable during widowhood and a payment during life—having thought fit to contract that if the one should fail from any cause, except a cause which is not now in question, it should be made good. It is unnecessary to bring home to the parties the knowledge of that which was likely to happen. It must be taken that they were contracting for that which might possibly happen; the fair inference, therefore, is that they were intending to be provided against the particular

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event which has happened. It is not necessary to go so far as that; it is quite sufficient if the terms of the contract are such as to carry to the widow the right to have made up to her that annuity which she lost by an event having happened which is provided against in the marriage contract, there being in that marriage contract an exception of one cause, and one cause only, which should prevent the husband's estate being liable, namely, the possession of property of a certain amount, so as to deprive her of the right on the Bombay Fund.

My Lords, upon this subject there appears to have been a difference of opinion among the Learned Judges below, ten of the Learned Judges being in favour of the right of the widow, and three against her right—because the act which deprived her of that annuity was her own act, that she could not claim it as against her husband's estate, and therefore, she was not entitled; but I do not see any reason to entertain any doubt of her right to have that loss compensated out of the husband's estate.

My Lords, the next point is, how far her husband's estate is liable to make up the loss which has arisen from the failure of the fund; that is, the partial failure of the fund, it appearing that the fund has not been equal to the keeping up the payments to the amount expected. There has been a deduction of a certain amount from the annuity which she seeks to have made up from the husband's estate.

My Lords, the language of the undertaking certainly is not so clear upon this point as it might have been; but still I submit, upon the point of the contract, there is quite sufficient, taking the whole of it together, to

come. to a very satisfactory conclusion as to what were the intentions of the parties. The language is, “and failing thereof,”—that is, in case the husband shall not do that which was necessary to keep up his title to the pension, by annual payments—“and failing thereof, or in case the said pension or annuity, from whatever cause, shall not be available to his promised wife in the event foresaid, saving and excepting only through her right to and possession of such separate funds as by the rules and regulations of the said fund would exclude from all benefit thereby, then the said John Taylor binds and obliges himself, his heirs and successors, to make payment to the said Agness Forlong, his promised wife, in the event of her surviving him, of a clear yearly jointure or annuity equal to the pension that has hitherto been paid or shall be payable from the said Fund to the widow of a subscriber holding the same rank in the army which now belongs or shall belong to the said John Taylor at the time of his death, and that at two terms in the year, Whitsunday and Martinmas, by equal portions; beginning the first term’s payment of the said jointure or annuity at the first term of Martinmas or Whitsunday that may happen after the said John Taylor’s death, and so on thereafter half-yearly during her life.”

Now, my Lords, stopping there for the present, though there is another part which throws light upon the meaning of the parties in this particular clause; it is an undertaking in case of the pension or annuity, from whatever cause, not being available to his promised wife. It is not disputed, indeed it is admitted throughout, that if the annuity had wholly failed, if the fund

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had so failed as to have produced nothing, then the event would have arisen in which the liability to make good would have attached to the husband's estate, because there the pension would have been unavailing; but it is said that these words refer to its being unavailing to the full extent, and cannot be construed to refer to its being unavailing only in part. My Lords, if the clause stood by itself, if there were no other words which would act in putting a construction upon it, I should not have thought that a reasonable construction, for though these words do not fully express the intention contended for on the part of the widow, yet, when we look to what the husband is to do in case the fund is unavailing, it clearly means that what is unavailing he undertakes to supply. Now what does he undertake to supply? He undertakes to supply, in case of the fund being unavailing, an annuity equal to the pension that has hitherto been paid or shall be payable from the said fund to the widow of a subscriber holding the same rank in the army which the said John Taylor then held or should hold at the time of his death for her life. When, therefore, you look to his undertaking—what he is to do, the deficiency he is to make good—it is but reasonable to consider the earlier part of the clause in which the word “un-
 “ availing ” occurs as intending to describe a failure, the amount and extent of which is by his contract to be supplied.

My Lords, it does not at all rest there; because, when we come to the other clause, by which he is to be exonerated in a certain event, that leaves no doubt whatever of the meaning of the parties: then it goes on, and describes the events, in which he is to be

relieved from the liability. It is of necessity, that in describing the events that are to relieve him from the liability, they must be events corresponding with those which are to impose an obligation. The clause in which it is declared what events shall relieve him from this liability is in these words:—"declaring that in " the event and so long as the said Agness Forlong " shall draw and receive from the said Military Fund " a pension or annuity equal to the pension that " has hitherto been paid or that shall be payable " therefrom to the widows of a subscriber holding the " same rank which now belongs or shall belong to " the said John Taylor at the time of his death, or " would have been entitled to draw and receive, " such pension and annuity, but for the possession of other property than the personal obligation " hereby undertaken by him, shall be suspended aye " and while she is provided as aforesaid from the said " Fund." In what event, then, is the estate of the husband to be exonerated from this obligation? So long as the widow receives an annuity equal to that which has hitherto been paid. But has she received an annuity equal to that which has hitherto been paid? She certainly has not; there has been a deduction from the amount. Can it be supposed, then, that—the party having imposed upon himself an obligation to supply the total loss of the annuity, if that should occur, and who, in that part of the deed which exonerates his estates, is relieved only in the event stated, namely, in case of her receiving a pension equal to that of an officer of his rank—his liability would be satisfied, unless she received a sum equal to that amount. It appears to me, that, taking these two clauses together, there

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cannot be a doubt that he, having provided this annuity, undertook that she should have the benefit of the full annuity; and that if she could not derive it from the Bombay Fund, from whatever cause, his estate should make up the loss, if there was a deficiency in the proceeds, or if there was a failure from any cause operating to deprive her from the benefit of that annuity.

My Lords, there is only one expression in the whole of this deed which it appears to me at all difficult to deal with; and I cannot by any construction put a very accurate meaning upon the words which are used,—I mean the words “or shall be payable from the said “Fund.” It is said that the meaning of that is, that so long as she received the annuity which had before that time been paid, or which should from time to time be payable,—that is, all the husband contracted she should receive,—and that event taking place, she receiving whatever was payable, his estate was to be exonerated from liability to make up the loss.

My Lords, it would be a most extraordinary provision, if that were the real intent of the parties, because, if the Fund was liable to be reduced, so long as any fraction of the annuity remained payable that would exonerate his estate. It cannot possibly be supposed that that was the meaning and intent of the parties; it would in fact defeat the whole object of the settlement. I shall presently advert to the argument used on the other side, by which it was contended that the assignees of the annuity became entitled. Unless that can be maintained, the object of the settlement obviously is, that she should receive the benefit of the annuity so long as she could receive it out of the Bombay Fund; but that at all events her husband

was to guarantee to her an annuity equal to the benefit she would be entitled to receive out of the Bombay Fund; and to consider his liability as reduced and diminished, according to the diminution of the annuity which would be payable from time to time, would obviously be a construction which would deprive her of the benefit to which she was entitled.

Now, my Lords, there are two ways in which these words may receive a reasonable and rational construction, although neither of them, perhaps, is entirely and grammatically correct. The husband, at the time of the marriage, was a major; it would naturally be expected that the next step in rank might be attained by him; he provides, therefore, that his liability shall be to pay a sum equal to the pension which had hitherto been paid or shall in future be payable from the Fund to the widows of subscribers holding the same rank in the army which now belongs or shall belong to him, John Taylor, at the time of his death,—that is, that he will pay a sum equal to what has been paid to the widows of officers of the rank he then held; or looking to the future, and providing, therefore, in the future tense, to the amount of annuity which would be payable to the widows of an officer holding the rank which he might hold at the time of his death. The objection to that construction is, that the words are unnecessary; because the construction would be the same if the words were omitted, and that it would be a sum equal to the pension which had hitherto been paid to the widow of an officer holding the rank which he then held or which should belong to him at the time of his death; but it is no objection that the words are unnecessary, provided

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that which is intended to be expressed may be otherwise extracted from the sentence. Those particular words cannot vitiate the construction, supposing that appears to be the intention of the parties.

My Lords, another construction has been put upon these words, which would lead to the same conclusion, as far as the merits of the question are concerned; namely, that the parties contemplated not a reduction in the amount of the annuity payable, but a reduction in the amount of what would be actually paid; and that is not unnatural, because, though the annuity was a fixed sum, and although there is nothing whatever in the statement of the title to the annuity or pension which would show that they looked to any increase—nor is there any reason to suppose that the widow would be entitled to an increase of annuity, an annuity of a certain amount being purchased by certain annual payments—yet as this, like other funds, might be liable to reduction, and might not be sufficient to pay the full amount of the annuity, it is not at all unreasonable to suppose that the parties contemplated such an event, and that the husband, intending to guarantee to his wife a certain amount, intended to guard against the possible event of the funds not being sufficient to keep up the amount of the annuity which would be payable, inasmuch as he had contracted to secure to her a certain amount of annuity, and it was possible the whole of this might not be received from those who had the management of the Bombay Fund. That would put a natural construction, and not an unreasonable construction upon those words, that she shall receive a sum equal to the pension which shall be paid or shall be payable. These words would not

be necessary; still, although they were unnecessary, they would not alter the meaning; and the event has actually taken place which appears to have been supposed and contemplated by the parties, for there has been not a diminution of the annuity payable—there has been no deduction from the amount which the widow is entitled to receive—there does not appear to be any power to diminish that—it is the contract between those who subscribe and those who have the management of the Funds that, in consideration of certain annual payments, there shall be a certain annuity payable to the widow—but there seems to be a power, and necessity would impose it if there were no such power reserved, that if the Fund did not produce the income necessarily there would be a deduction made from the amount to be paid to the annuitants upon the Fund; and accordingly it has taken place, and in the very terms which are used in ordering that deduction the title to the annuity is preserved, for it is, that the Fund not being adequate, there shall be so much per cent. deducted; but the arrears, so deducted, are to be made good to the annuitant as soon as the funds are adequate for that purpose. Now, that fact very much diminishes the importance of the question which arises upon these words, because if we are to adopt the construction contended for on the part of those who represent the husband's estate the event contemplated has not arisen. There has not arisen a diminution in the annuity payable; there has been a reduction in the amount received, but there has not been a diminution in the annuity payable. What the husband has undertaken to do is, to make up a sum equal to that which

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has hitherto been paid to the officers of equal rank, or that which should be payable. Now, that which is payable is still the 365*l.*; it is not the less payable because it is found impossible to furnish an income sufficient to pay the annuities in full; the title of the annuitant to the 365*l.* still remains; so that even were the construction to prevail—which is not the natural construction, nor that which is necessary at all consistently with the fair meaning to be put upon these words—but even if that construction were to prevail—the event has not happened in which, according to the terms of the contract, the husband would be relieved from his obligation, because there has not been a diminution in the amount of the annuity payable, but only a reduction in the amount actually received. And therefore, my Lords, in any way of construing this contract, coupled with the facts which have taken place, it appears to me very clear that the husband intended to devote the annuity in the first instance as a provision to his wife, and that he intended to contract in all the events which might constitute a failure, except from one cause specified, which is not now in question, that his estate should make up to her an annuity which was of an ascertained amount, namely, 365*l.* My Lords, upon this point seven of the Learned Judges were in favour of the husband's estate, and six were of opinion in favour of the widow's claim.

My Lords, there is one other ground of question, which relates to Lord Clive's Fund, and upon that subject the case is left in considerable obscurity. It is one of the principal points in the cause;—and I can find no allusion to it in the opinion of any of the Learned Judges; they take no notice of it at all. It

has not been contended that she would have received that 91*l.*, her husband having left more than 3,000*l.* It seems very clear that, her husband having left more than 3,000*l.*, according to the regulations of Lord Clive's Fund she could not receive any thing from that fund. It appears also equally clear—I say so, though it is a matter in dispute between the parties—that though she could not receive any thing from Lord Clive's Fund, still a deduction of the amount of what she might otherwise have received from Lord Clive's Fund was properly made by those who administered the Bombay Fund. That is not in terms so expressed in the register; but is to be found in the regulations themselves. It will be then clearly seen what is the ground of that deduction. It is not that a deduction shall be made equal to the amount the widow shall receive from Lord Clive's Fund, which are the terms used in the register, but that the annuity used in all cases shall be subject to a deduction equal to the amount of Lord Clive's Pension. Now, Lord Clive's Pension is not paid, because the husband has property to a certain amount. The regulation of the Bombay Fund is, that there shall be a deduction equal to the amount of Lord Clive's Pension. The amount of Lord Clive's Pension would be 91*l.*—not payable in this particular case, on account of the amount of property which the husband left. Now, there is nothing to explain that, in the opinions of the Learned Judges, which I can find; but it is not matter of dispute that she has been obliged to submit to that deduction from what she was entitled to. If it had not been for the failure of the Bombay Fund, she could not have received the full amount, without submitting to the

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deduction of 917. Now, if that be so, and the contrary is not contended, it is a failure arising from the other part of the case; it is an event not arising from the excepted cause which has occasioned the pension to that extent not to be available to the wife. If, therefore, the right construction of the contract be, that the husband was to make good any failure in the amount of the annuity, from whatever cause, except that particular cause, certainly this is a particular circumstance which has caused a reduction in the amount of the annuity to be received, and, according to the construction, which appears to me to be the right construction of the case, his estate is bound to make good the loss.

My Lords, this construction and this result appear to me so very clear, that a case has been attempted to be made (probably because it was the only ground which held out any chance of success) by the Learned Counsel in support of the husband's estate; namely, that the whole of what was meant was an assignment to pay the jointure or provision afforded by the pension itself, with a covenant for title. In the outset of such an argument, it was rather unfortunate that the Learned Counsel were obliged to go to the end of the settlement to find the assignment of that which was to be secured to the wife, so that the instrument would be an instrument which covenanted for a title remaining unassigned, and not the property being made available for covenants. At the end, after all those provisions, there comes an assignment of the pension, which stands by itself.

My Lords, if the intention had been merely to give her the benefit of the pension, with a covenant for

title, nothing could, in the common and ordinary acceptance of the term, impeach the title, but the failure of making the payments. The obvious frame of such an instrument would be, to assign the pension, which was totally unnecessary, for that was the property of the wife. The husband would only have bound himself to make good those payments which would constitute the title of the wife; but instead of that the deed provides for many events, which have nothing to do with securing the title to the pension. If that had been the object, how can any one explain, instead of that provided by the Bombay Fund, namely, a payment during widowhood, the husband binding himself to pay an equivalent for life, providing against the various events which might cause a failure in the title of the widow, for instance, her marriage again, and various other circumstances which might cause a failure. He covenants against them all, though forming no part of the title to the annuity, according to the regulations under which it was payable; he covenants to make good the annuity in all events but one, going far beyond any undertaking or stipulation that could possibly be required of him if the object had been merely to secure the title to the annuity, and the whole object had been to give her the pension to which the regulations would entitle her, so to secure her merely against the event of her losing the benefit of that annuity by his failure in making good the payments. It was probably the best argument that could be used; at all events the bringing forward such an argument shows that the case was thoroughly sifted. When we look at the different arguments remaining,

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there is no difficulty in coming to a satisfactory conclusion.

Upon the whole, my Lords, I have no difficulty in advising your Lordships to put that construction upon this contract, which throws upon the husband's estate the liability to make good to this widow, now married to another person, such a sum out of his estate as would make good to her the various deficiencies which have successively arisen, creating a total failure, indeed, during the time the second marriage may continue.

That is consistent with the interlocutor of the Lord Ordinary; and what I shall propose, is, to vary the interlocutor which followed, and to restore the interlocutor of the Lord Ordinary, which will, I apprehend, effect the object of your Lordships, if you agree in the opinion I have expressed.

Sir William Follett.—Will your Lordship allow me to ask, whether the costs should not come out of the fund; it is a trust fund?

Mr. Webster.—I trust that your Lordship will not decide that in the absence of my counsel.

Lord Chancellor.—This is an appeal in which the interlocutor of the Court of Session is varied. There can be no costs given in such a case.

The House of Lords ordered and adjudged, That the said interlocutor of the 24th (signed the 25th) of November 1836, so far as complained of in the said original appeal, be and the same is hereby reversed: And it is further ordered and adjudged, That the said cross appeal be and the same is hereby dismissed this House; and that the said interlocutor of the Lord Ordinary of the 11th July 1835 therein complained of be and the same is hereby affirmed: And it

is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

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DEANS and DUNLOP — GEORGE WEBSTER, Solicitors.