of the £4000, did not afterwards allow Douglas, Reid, & Company to draw to that extent for the purposes of their business, so that the £4000 really and in substance would go in the manner in which it was averred it was intended to go. Now, your Lordships have given the respondents an opportunity of amending their condescendence, in case what I conceive to be the obvious meaning of it was only a slip. Possibly if the amendment which they propose had been in the condescendence in the first instance, it might have been considered sufficient; but I am bound to say that after the respondents had heard what had been said by your Lordships, and had known exactly where the shoe pinched, and where the averment was insufficient, if they had been able to aver that Messrs Douglas, Reid, & Company were not allowed to draw £4000 after the bills had been paid into the bank for the purposes of their business, I cannot conceive that the respondents would not have said so. Instead of that, they propose to insert an allegation which is to my mind perfectly consistent with the fact that Douglas, Reid, & Company were allowed to draw and did in fact draw out £4000 after having placed it to their credit with the bank, because what they say is, that "the bank's ultimate loss would have been larger by the amount of the said bills, namely, £4000 and interest thereon." My Lords, that is perfectly susceptible of the construction, and I am bound to say I think it is the true construction, that it means the ultimate loss of the bank having regard to further advances made against the £4000. No doubt if they allowed Douglas, Reid, & Company to draw out the £4000 there would have been £4000 added to Douglas, Reid, & Company's debts if you did not give the bank the benefit of the £4000. That I believe to be the true construction of the amendment, but it is sufficient to say that, in my opinion, it wholly fails to meet the requirements which it was pointed out to the respondents by your Lordships should be met in any amendment which they proposed to make of their pleadings.

Under these circumstances I think it would be a wilful and wanton waste of expense to allow the defenders to go to trial upon the fourth representation contained in the fifth article of the condescendence.

LORD CHANCELLOR—My Lords, before putting the question I should wish to say that my noble and learned friends Lord Macnaghten and Lord Morris concur in the judgment which your Lordships are delivering. And for myself I wish to add that if I only dealt with the fourth allegation in the condescendence in the opinion which I have just expressed to your Lordships, it was because I really, with all respect to those learned persons who have looked into the matter, thought that the question with regard to the statute was too plain for argument. But as my silence upon that question might be supposed to indicate some difference of opinion, I wish to say that I entirely concur in the construction of the statute which has been placed upon it by my noble and learned friends.

Ordered, "that the judgment appealed from be reversed, and that the action be remitted to the Court below to pronounce judgment of assoilzie, and that the respondent be found liable in expenses."

Counsel for the Appellants—Sol.-Gen. Murray, Q.C.—Ure—King. Agents—Murray, Hutchins, Stirling, & Murray, for Ronald & Ritchie, S.S.C.

Counsel for the Respondents—J. B. Balfour, Q.C.—Sir R. Reid, Q.C.—Edmund Robertson, Q.C. Agent—Wm. Robertson & Co., for J. Smith Clark, S.S.C.

Friday, May 15.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Herschell, Lord Shand, and Lord Davey.)

ASSETS COMPANY LIMITED *v.* BLAIR AND OTHERS.

Agent and Client—Negligence and Want of Professional Skill—Failure to Take Account of Stipulation in Testing Clause—Whether Stipulation in Testing Clause Effectual.

Stipulations in the testing clause of a deed are ineffectual to contradict or modify the agreement executed by the parties in the previous part of the deed.

Smith v. *Chambers' Trustees*, 5 R. 97, *approved; Johnstone* v. *Coldstream*, 5 D. 1297, and *Dunlop* v. *Greenlees' Trustees*, 2 Macph. 1, 3 Macph. (H. of L.) 46, *distinguished.*

In an action of damages against a firm of law agents on the ground of negligence and want of professional skill, the pursuer founded upon the alleged failure of the defenders to read the testing clause of a deed, or to advise that such a stipulation contained in it was effectual.

Held (in conformity with the above rule, and *restoring* the judgment of the Lord Ordinary) that the action was irrelevant.

The facts of the case appear from the following note of the Lord Ordinary (KINCAIRNEY) subjoined to an interlocutor of 18th June 1895.

Note.—"In this action the Assets Company conclude against the partners, as in 1878 and 1879, of the now dissolved firm of Davidson & Syme, W.S., for payment of £7500, which is said to be the amount of loss incurred by the City of Glasgow Bank and its liquidators through the failure in duty or want of reasonable skill of Messrs Davidson & Syme as law agents employed by the liquidators. Two points have been debated—the title of the pursuers and the relevancy of the action. The plea of *mora* was also adverted to, but it seems clear that that

plea could not be disposed of without inquiry.

The title of the pursuers is rested on the City of Glasgow Bank Liquidation Act 1882. By the 4th section of that Act it is provided that at the date of the vesting (which under the Act was 30th December 1882, the date of recording of a discharge by the liquidators to the Assets Company) the assets of the bank should be transferred to and vested in the Assets Company; and by section 1 the assets are defined to mean 'all lands and heritages, debts, bonds, mortgages, securities, moneys, effects, choses in action, claims and demands whatsoever, including claims for unpaid calls, and in general all property, real or personal, heritable or moveable, whether situate in the United Kingdom or elsewhere, belonging to or vested in the bank or the liquidators, or which the bank has power to acquire, or which are or is held in trust for or to be realised solely for account of the bank at the date of vesting hereinafter mentioned, but shall not comprise the liability of any contributory to calls, except such as have been made by the liquidators before the passing of this Act.'

"The averments on which the claim is founded, and the relevancy of which are in question, may be summarised as follows:—

"The Reverend John R. Campbell, now deceased, was, in respect of his shares in the City of Glasgow Bank, liable for calls amounting to £5500. On the representation that he was unable to pay the calls, he furnished a statement of his property to the liquidators, and emitted a declaration which contained this statement:—'My income is derived from three sources—(1) stipend as parish minister of Monzievaird, which on average of ten years has not exceeded £254; in addition there is manse and glebe valued at £40, less drainage interest, £4, 17s.; (2) income derived from stocks and shares above mentioned in said Schedule A; (3) my wife has a separate estate, the income of which for last year was £315; I enclose copy of our marriage-contract.' The liquidators forwarded the declaration and the copy of the marriage-contract, dated 31st May and 2nd June 1862, to Messrs Davidson & Syme; and the pursuers aver that the instructions of the liquidators to Davidson & Syme were, *inter alia*, '(1) To advise the liquidators as to the terms on which it would be advisable to settle with the said John Robert Campbell; (2) to satisfy themselves that the whole means possessed by the said John Robert Campbell at 2nd October 1878 had been disclosed; and (3) to report on what terms they would recommend the liquidators to grant a discharge.' It is averred that Messrs Davidson & Syme accepted this employment; and they, on 28th May 1879, wrote to the liquidators advising that certain sums particularly specified ought to be added to the items disclosed by Mr Campbell, bringing out a total of £2068, 4s. 10d. as the sum on payment of which they advised the acceptance of a surrender. In their letter they notice, as a point to be taken into account, that Mr Campbell's wife had a separate estate yielding an income of £315. It is averred that certain modifications on these terms were made by the liquidators, partly on the advice of the defenders, by which the sum required from Mr Campbell was reduced to £1250. It is then averred that, relying on the opinion and advice of Messrs Davidson & Syme, the liquidators agreed to accept the sum of £1250, and to grant a full discharge on payment of it. It is further averred that this compromise was submitted to and sanctioned by the Court, and that the liquidators on payment of this sum, granted Mr Campbell a full discharge, dated 27th June and 1st July 1879.

"Now, the pursuers aver that this advice given by Davidson & Syme proceeded on this error, that they failed to discover and to include or take into account a very important part of Mr Campbell's estate, viz., the income of his wife's estate, amounting to £315 per annum, and of an actuarial value of £4250; and I understand the pursuer's case to be that, if this life interest had been ascertained to be and had been treated as part of Mr Campbell's estate, the estate would have sufficed to pay the full amount of the calls, and no compromise would have been necessary or permissible; and they undertake to prove that in consequence the liquidators suffered damage to the extent of the sum sued for, which includes interest.

"The pursuers' contention that the annual interest of Mrs Campbell's estate formed part of Mr Campbell's estate is rested on the marriage-contract, an extract of which has been produced, the principal deed not having been before me. The marriage-contract is not a trust deed. It bears that 'the said Reverend John Robert Campbell hereby renounces and discharges his *jus mariti* and right of administration over the whole estate presently belonging to her' (Mrs Campbell) 'or which she may acquire or succeed to *stante matrimonio*.' But it is contended that this provision is qualified by a declaration in the testing clause, which is expressed in these very peculiar terms—'In witness thereof, these presents, consisting of this and the two preceding pages, and written on stamped paper down to and including the words in witness whereof, by' (the writer duly designed) 'and from thence to the end, by' (another writer duly designed) 'are subscribed by the said Jane Campbell at Moulin Manse on the 31st day of May 1862 before these witnesses' (who are then named and designed), 'and by the Reverend John Robert Campbell at Perth on the 2nd day of June 1862, before these witnesses' (who are then named and designed), 'it being hereby declared before signing that while the *jus mariti* and right of administration of the said John Robert Campbell are renounced and excluded, such renunciation and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell, and shall not extend or apply to the annual produce or interest of her said estate, the said John Robert Campbell being entitled to draw the said annual produce or interest.'

"The signatures of the parties follow this

testing clause in the usual way. There is a very singular peculiarity in this testing clause which may here be noticed. It mentions the signature of Mrs Campbell on 31st May, and of Mr Campbell on 2nd June, and presumably, therefore, it was not written until on or after 2nd of June, and therefore after the signature of Mrs Campbell on 31st May; and yet it bears that the declaration about the exclusion of the *jus mariti* was 'hereby declared' before signing. This may possibly be susceptible of explanation, but apparently there is here in the testing clause a glaring inconsistency. It appears to be self contradictory.

"The pursuers maintain that this declaration had the effect of conferring on Mr Campbell a right to the annual interest of his wife's estate, and they aver that in reliance on the marriage-contract as thus completed, the marriage took place on 3rd June 1862, that the deed was recorded on 5th June, and that in accordance with the declaration Mr Campbell thereafter drew and applied to his own purposes the income of his wife's estate. The pursuers put their case thus—they aver that it was the duty of Davidson & Syme to have called the attention of the liquidators to this provision in the testing clause, to have informed them that this liferent interest formed a part of Mr Campbell's estate or might fairly be claimed as such, and to have advised them that no settlement should be concluded with Mr Campbell except on condition of receiving from him the actuarial value of that life interest, and that it was also their duty to lay that information before the Court. They aver that Davidson & Syme did not call the attention of the liquidators to the provision in question, and advised them to settle with Mr Campbell on the footing that he had no such right, and that the marriage-contract was not laid before the Court at all, and that the attention of the Court was not called to the provision introduced into the testing clause. They aver that if Davidson & Syme had fulfilled their duty the liquidators would not have made the compromise, and that, if they did, the Court would not have sanctioned it; and they aver that loss arose to the liquidators in consequence.

"It is to be observed that the pursuers do not, and I think cannot, say that the liquidators would, if properly advised, have made a better compromise, for they do not, and I suppose cannot, say that Mr Campbell would have agreed to a compromise on any terms more unfavourable to him. Their case is, and must be, that there would have been no compromise, and that they would have recovered the amount of the calls by an action in which they would have succeeded in establishing that the annual interest of Mrs Campbell's estate formed an item of Mr Campbell's estate. I think it manifest that it is essential to the success of the pursuers' case to be able to shew that the declaration in the testing clause was effectual to restrict the clause in the body of the deed, by which the husband's *jus mariti* and right of administration were renounced to the fee of the wife's estate. It is clearly not enough to shew that at the date of the settlement that was a doubtful point, but it is essential to shew that as the law stood at that time it was a sound legal proposition. Otherwise there would have been no loss.

"Now, the pursuers put their charge of failure in professional duty against Messrs Davidson & Syme in an alternative form, which they were quite entitled to do, but which I have found somewhat embarrassing. They say that either Davidson & Syme failed to notice the testing clause altogether through negligence, or that they read it and failed, through professional ignorance or mistake, to appreciate the legal effect of it.

"I take the second view first, and assume that Davidson & Syme read the clause. It is then said that they were bound (1) to call the attention of the liquidators to it; (2) to have advised them not to compromise except on the footing that the life interest was part of the shareholder's estate; and (3) that they were bound to have brought the marriage-contract under the notice of the Court, and to have directed attention to its peculiarities.

"Now, I think that to the case as thus put, and as it appears on the record, and without further inquiry, the defenders have a sufficient answer.

"Their instructions were, as they are averred by the pursuers, to satisfy themselves as to the facts, and to advise the liquidators as to the terms on which they ought to settle. They were not instructed to inform the liquidators about the facts, which the liquidators might be presumed to know, nor were they instructed to give their reasons for their advice, but only to advise the liquidators as to the terms of settlement.

"Admittedly they advised them on the footing that the life-interest of Mrs Campbell's estate was not a part of her husband's estate, and if that view could not be taken without gross ignorance of law on their part, they may be liable for the consequent loss; otherwise not.

"Now, it is well settled that a law agent does not guarantee the correctness of every advice he may give, and does not incur liability in consequence of every error into which he may fall; but is only liable in damages if his mistake be gross and inexcusable, and amounts to *crassa ignorantia*. The cases are conclusive on that point—*Purves* v. *Landell*, 4 Bell's Appeals, 46; *Cooke* v. *Falconer*, 20th November 1850, 13 D. 157; *Hamilton* v. *Emslie*, 27th November 1868, 7 Macph. 173. Now, if Messrs Davidson & Syme formed the opinion that the provision in the testing clause was ineffectual to restrict the provision in the body of the deed, it is hopeless to contend that that opinion indicated gross ignorance; for it was, if not absolutely warranted, at least strongly supported, by the unanimous judgment of the Court in the then recent case of *Smith* v. *Chambers' Trustees*, 9th November 1877, 5 R. 97. In that case a clause had been introduced into

the testing clause of a testamentary settlement, purporting to restrict the rights conferred on beneficiaries by the deed; and it was held to be ineffectual, a point on which the Judges in the Inner House were unanimous. That case was not exactly the same as this, because here there is an allegation that the provision under question had been acted on. But if all that could be ascribed to Davidson & Syme was an opinion as to this case substantially the same as that held by the Judges of the Inner House in *Smith's* case, of course that did not indicate *crassa ignorantia*, whatever it might indicate. It is true that very serious doubts have been expressed as to the soundness of the judgment in that case. The judgment itself was recalled in the House of Lords on another ground, which rendered it unnecessary to decide the point as to the effect of the testing clause; but Lord Gordon expressed a distinct opinion to the effect that the judgment of the Court of Session on that point was inconsistent with a previous judgment in the House of Lords in *Douglas* v. *Greenlees' Trustees*, June 2, 1865, 3 Macph. (H.L.) 46, and was erroneous; and the other Judges reserved their opinions. So far as the judgment went, it may be admitted that at the date of the settlement the point might be held to be open; but Davidson & Syme could not be held to be in gross fault if their judgment concurred with that of the Judges of the First Division.

"But it is said that it was their duty to tell the liquidators that the question was not closed, and that opposing opinions had been expressed about it. It might have been proper enough to do that; but I see no reason to think that it was their duty. It was their duty to form their own opinion, and to advise the liquidators accordingly. But it was not their duty, nor according to their instructions, to reason out the matter with the liquidators, to say whether their opinion was given with confidence or hesitation, or to quote their authorities.

"The defenders say that the contract of marriage was before the Court. If so, the Judges presumably read the testing clause. In any case, I greatly doubt whether they would have gone back to any extent on the judgment in *Smith* v. *Chambers' Trustees*. The Judges who decided that case were the very Judges before whom the compromises with the City of Glasgow Bank shareholders came. It would not have been unreasonable had Davidson & Syme thought it hopeless to raise the question again, and I doubt whether the Court would have disapproved of the proposed compromise, and compelled the liquidators to litigate a question on which they had unanimously pronounced an adverse judgment. Lord Gordon, in the House of Lords, proceeded on what he considered the disconformity of the judgment in *Smith* with that of the judgment in *Douglas* v. *Greenlees' Trustees*. But that case had been very carefully considered by the Judges in Scotland in *Smith's* case, and they were of opinion that the two judgments did not conflict.

"I am unable to hold that the pursuer's averments, which proceed on the assumption that Davidson & Syme read the testing clause, amount to such a charge of gross ignorance as would subject them in damages; and in this view of the case, I do not require to consider the further averments, viz., that the liquidators did not know of this clause, and would not, had they known it, have concluded the settlement which they made; and that the Court would not have sanctioned the compromise. The prospect of being able to prove these averments seems but distant. But if they were proved, the liability of the defenders would not follow, because they were not chargeable with *crassa ignorantia*. Neither do I require to consider whether the view on which they are said to have acted was right or wrong—that is to say, whether *Smith* v. *Chambers' Trustees* was well decided.

"But then the pursuers have averred alternatively that Davidson & Syme failed to read the testing clause; and that, I cannot doubt, is an averment of such gross negligence as would support an action against them for such damages as might be proved to have resulted from it. But then I do not see that there is any relevant averment that any damage resulted from that. No doubt it is averred that if they had read it, then it would have been their duty to have advised the liquidators in the manner averred, but that seems to be the same point which has been already considered. What the pursuers have not averred and have not undertaken to prove is, that the defenders, if they had read the testing clause, would have formed the opinion that the provision in it was effectual, and that it was their duty to have advised the liquidators to that effect. Had the pursuers averred that, the case might have been different; but I suppose that such an averment would have been hopeless.

"I think, therefore, that there is no relevant averment that the defenders were guilty of such negligence or ignorance of law leading to loss as can make them liable for that loss.

"The defenders further argued that there could have been no loss, because the case of *Smith* v. *Chambers' Trustees* was rightly decided and would have been followed had a litigation been raised, and that the provision in the testing clause would have been held ineffectual. The pursuers argued that the judgment in *Smith* v. *Chambers' Trustees* was wrong, and that the clause was effectual. I was thus called on to review the judgment of the First Division. I consider that it is not necessary for me to undertake that task. If that had appeared to be necessary, I think it would have been proper to have allowed a proof in order to ascertain whether there was not a vital difference between that case and this. In *Smith's* case, as I understand it, the Court proceeded, not only on the opinion that the testing clause is a part of the deed, which may be held to be settled law, but also on the assumption that in that case it was added before the granter's signature and

was itself authenticated. But if it were shown in this case that the clause was added a couple of days after Mrs Campbell signed the deed, as seems probable, that might differentiate the two cases.

"I have found it necessary to examine the nature of the case made against the defenders before considering the title of the pursuers, and as I have come to the conclusion that there is no relevant case against the defenders, it is unnecessary to consider at any length the question of title, which seems attended with considerable difficulty. It is of course clear that the pursuers could have no claim or action unless the liquidators had. Nor, suppose a case of gross negligence or gross ignorance made out against the defenders, it is not quite obvious that the liquidators would have had an action. It might perhaps have been argued that their functions were limited to the recovery of calls sufficient to pay the whole debts of the bank, and that if they paid the whole debts they could not possibly be losers.

"On the whole, I am, however, disposed to think that at the date of the assignation to the Assets Company, when the debts of the bank were not fully paid, the liquidators would have had a right to sue the defenders to recover from them the amount of calls which, through their fault, had not been recovered, and that such a right is covered by the definition of assets in the statute. I am, therefore, not prepared to sustain the plea of 'no title to sue.'"

The Lord Ordinary accordingly on 18th June pronounced an interlocutor by which he repelled the defenders' plea of no title to sue, sustained their plea that the action was irrelevant, and assoilzied them from the conclusions of the summons.

The pursuers reclaimed.

LORD JUSTICE-CLERK—The Court are of opinion here that this case cannot be satisfactorily disposed of without inquiry, and we give no opinion upon the matter dealt with by the Lord Ordinary, but his interlocutor will be recalled and a remit made to him to allow parties a proof of their averments before answer, the proof to be comprehensive of the whole questions between the parties, including any facts bearing on the question of damages, so that it may be exhaustively dealt with after the proof has been taken.

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court on 27th November 1895 pronounced this interlocutor:—"Recal the interlocutor reclaimed against: Remit to the Lord Ordinary to allow the parties before answer a proof of their averments, and the pursuers a conjunct probation, reserving all questions of expenses."

The defenders appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is an action brought by the Assets Company, whose title to sue I will assume, against the partners in a firm of Writers to the Signet, in consequence, as the pursuers allege, of loss sustained by reason of the negligence of the defenders. It appears that the firm in question were retained by the Assets Company to advise them in respect of certain compositions which were being negotiated between themselves and the shareholders of the Glasgow Bank in liquidation. The particular shareholder, the Rev. John Campbell, was liable to the extent of upwards of £5000 for unpaid calls, and it became material for the pursuers to ascertain what was the extent of his property in order to judge whether they would or would not accept the composition offered by him in respect of his liability.

The only question in debate was whether they, the defenders, ought to have reckoned as part of his estate the income of his wife's separate property. The pursuers contend that the marriage settlement made that income part of Mr Campbell's own property, and therefore to be reckoned as one of the items to be taken into consideration in relation to the composition to be accepted. The appellants, the defenders, contend that the marriage settlement made it irrevocably the property of the wife, and the contention on the other side as to the liability of the defenders depends very much upon what is to be called in strictness the marriage settlement. There is no doubt that in one part of the parchment writing signed by the spouses (though at different times, under circumstances I shall have to refer to hereafter) there appears in writing a declaration that the renunciation by Mr Campbell of his *jus mariti*, which was absolute and unqualified in the earlier part of the instrument, was only to apply "to the capital or principal of the estate of Jane Campbell, the wife."

An important part of the discussion (though for reasons to be given hereafter I think not a conclusive part) relates to the place and the date at which this renunciation was written on the original parchment. But for the technicalities and the usage of Scotch conveyancing I should myself have said that the words I have quoted as existing on the parchment writing formed no part of the deed at all, but apparently it has been the practice sanctioned by decision, to consider the attestation clause a part of the deed and so to comply with the ancient Scotch Statutes, though I cannot but think in requiring the witnesses to be designed in the body of the deed these Statutes contemplated an attestation of the deed and not in the deed—the designing of the witnesses was required apparently for the purpose of ascertaining beyond dispute who the witnesses were to be—that they should be named and described in the body of the deed itself. The very distinction "in the body of the deed" would seem to show that this was what was originally contemplated.

The practice, however, appears to have grown up (probably for convenience sake) that after the parties have attached their

signatures to that which was in truth the bargain to which both the minds had assented, a space should be left between the end of what I call the deed and the signatures to enable the attesting clause to be added and so satisfy the words "in the body of the deed," and no limit appears to have been placed by Scotch law as to the interval which might elapse between the signature of the parties to what they had agreed to and the addition of the attesting clause. So that in one case 32 years have been held not too long an interval within which the attestation clause may be added. The very words by which the attesting clause begins, "In witness whereof," seem to show what is the true construction of what the attesting clause must be. We who are the witnesses hereto are putting our names to this written instrument to which the parties have agreed.

The contention before your Lordships apparently is that this attestation clause may legitimately be used for the purpose of introducing new stipulations, and even, as in this case, for qualifying and even contradicting the instrument which had previously been agreed upon and signed. In Scotch law, as in English, a deed is subscribed as a solemn instrument, and with the same object, in both countries, is intended to place the agreement beyond the doubts incident to any transaction where an infirm memory, not assisted by any written record of what has taken place at some distant interval, may fail to describe accurately what the agreement was. The proof of deliberation and authenticity was to be secured in various ways; sealing, at one time required in both countries, as it is now required in this, signature, by various statutes, delivery, and so forth. These are various expedients to preserve the evidence of things agreed upon equally against failure of memory as against the commission of fraud, or the conflict between the parties as to what has taken place. If, however, new stipulations can be introduced many years after the parties have come to their agreement and can either qualify or contradict the agreement by putting into the form of attestation such qualifications or contradictions, what becomes of the finality of a deed?

It is nothing to the purpose to suggest that if challenged you must prove the assent of the parties to the new matter thus introduced by the attestation clause. You can only prove it by the very means which the existence of a deed at all was intended to prevent the necessity of having recourse to; and it is manifest that if you can alter or qualify a deed by the introduction of verbal evidence its function as a deed is gone. The authority of the Court of Session itself had decided, not very long before the transactions now in question, that such a provision in the attesting clause of a deed was ineffectual to restrict the operation of what I have called the deed itself, and I concur both in the decision itself and in the reasoning by which that decision was supported.

My Lords, I do not stay for the moment to comment on what might be the operation on the minds of the defenders here of that decision, because I propose to treat more at large the question of the alleged negligence. But speaking of the matter of law only I think that was the law of Scotland, and I think nothing has passed in your Lordships' House which can qualify or cut down that decision. In saying that I do not omit to consider the observations of Lord Gordon in that case. I think the noble and learned Lord was in error in supposing that there was any conflict between the judgment of your Lordships in *Dunlop* v. *Greenlees' Trustees*, 2 Macph. 1; 3 Macph. (H. of L.) 46, and the decision in *Smith* v. *Chambers' Trustees*, 5 R. 97, and *id.* (H. of L.) 151, L.R., 3 App. Cas. 795, referred to by Lord Gordon. All that had to be proved was the wife's consent to a provision for herself, and she put her signature "in token of her consent to and approval of the foregoing settlement."

It appears to me that, whether she signed that consent in the attesting clause or on the paper in which the deed was wrapped up, her consent was effectual. In a strict sense her signature of the deed, although it was written on the same parchment, and although included in what was described as an attesting clause, was no signature to the deed. She was no party to the deed. Her signature had no operation in the deed as a deed. Her signature only operated as a conclusive proof that she had assented to that provision for herself in the deed, and she might just as easily have established that consent by a separate and independent writing altogether.

My Lords, it appears to me that the diligence of the learned counsel has failed to discover any authority which justifies the proposition now contended for. The only case suggested to be in point is one in which, as my noble and learned friend Lord Watson pointed out, it would have been impossible for the parties representing the interests they did to urge the objections now insisted on.

But I will now assume that the question is more open to doubt than I think it is. Can it be gravely contended that a Writer to the Signet in Scotland can be made liable in an action for negligence because his opinion has coincided with the unanimous judgment of the Court of Session? As I have said, I think the judgment in *Smith* v. *Chambers' Trustees* on this point was perfectly right. But suppose for a moment that Lord Gordon's observations should have made the defenders doubtful of the accuracy of the decision in *Smith* v. *Chambers' Trustees*, does it follow that they would be negligent for advising their clients to accept the composition? They might well and most prudently think it was better to accept the composition offered than to incur the risk of a law suit to be carried to your Lordships' House in order to solve those doubts. That the same Court before which an approval of the composition in question was to come in the first instance would adhere to their

own decision was tolerably certain, and therefore the proposition must be, that to accept a composition — which for the moment I will assume to be not all that could have been obtained—rather than incur the expense of an appeal to your Lordships' House, was negligence. That is too absurd, as it appears to me, to require more than the statement of the proposition. Besides negligence, the plaintiff in such an action is bound also to prove the loss or damage in consequence of the negligence. Is it susceptible of proof that if Mr Campbell had been driven to extremities more could have been obtained in any view of this case? I think not.

My Lords, I concur entirely with the very powerful reasoning of Lord Kincairney, and I only regret that the Judges of the Second Division did not deal with his judgment in such a way as to allow your Lordships to understand why they did not accept his reasoning.

As it is, I move your Lordships that the interlocutor appealed from be reversed with costs, and that the interlocutor of the Lord Ordinary dated the 18th June 1895 be restored, and that the cause be remitted to the Second Division of the Court with directions to find the appellants entitled to the expenses incurred by them in the Court of Session from and after the date of the interlocutor restored.

LORD WATSON—My Lords, this action was brought in December 1894 by the appellant company, who in the year 1882 acquired by statutory title all assets and claims then vested in or competent to the liquidators of the City of Glasgow Bank. It is directed against the appellants, two members of the Society of Writers to the Signet, and concludes for the payment of the sum of £7560, 6s. 10d., as damages resulting from their professional negligence or want of reasonable skill, whilst they were acting as law-agents of the liquidators in the year 1879.

The Reverend Mr Campbell, late minister of the parish of Monzievaird, was placed on the list of contributories as the holder of £200 stock upon which the calls made by the liquidators amounted to £5500, which he was unable to pay. He made proposals for a compromise, and with that view sent to the liquidators an offer of £1000 for a full discharge of his liabilities, accompanied with a statement of the whole estate and effects then belonging to him, verified by his oath, and also a copy of his antenuptial marriage-contract executed in May and June 1862. The latter is the document which has, after a lapse of fifteen years, given rise to the present litigation. The statement of his affairs so affirmed by the reverend gentleman did not include any interest in the estate of his wife. These were submitted to the appellants, and the liquidators acting upon their advice agreed to accept a payment of £1250. The terms of compromise were approved by the First Division of the Court of Session, under whose superintendence the liquidation of the bank was conducted.

The marriage-contract contains in that part of the deed where one would naturally expect to find it, a renunciation and discharge of the husband's *jus mariti* and right of administration over the whole estate then belonging to his wife, or which she might acquire or succeed to *stante matrimonio*. But at the end of the testing clause there have been inserted these words—"It being hereby declared before signing, that while the *jus mariti* and right of administration of the said John Robert Campbell are renounced and excluded, such renunciation and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell, and shall not extend or apply to the annual produce or interest of her said estate; the said John Robert Campbell being entitled to draw the said annual produce or interest." It does not admit of controversy that if these words, instead of occupying their present position, had immediately followed the previous renunciation of the husband's legal rights, he would have been entitled to an annual payment of £315, which was not entered in his statement.

The respondents aver that the appellants were under a duty, which they culpably and negligently failed to discharge, "to read the whole of the said marriage-contract, including the clause above quoted, and to satisfy themselves thereby, and by ascertaining all the material facts, that the right to the said annual produce or interest was vested in, or at least might be lawfully and properly claimed to be vested in, the said John Robert Campbell, and to report to the said liquidators that no settlement should be concluded with the said John Robert Campbell except on condition of the liquidators receiving, *inter alia*, the said actuarial value or such sum as they might deem to be the value of the said John Robert Campbell's claim to the said annual produce or interest, or an assignation or surrender of the said right or claim." The respondents then make the alternative averment that the appellants either culpably and negligently failed to read the whole testing clause, including the words I have already quoted, or having read these words, culpably and negligently failed to advise the liquidators to the effect just stated.

In my opinion the relevancy of these averments entirely depends upon the proposition that the words so introduced into the testing clause form part of the deed, and must as such receive their full legal effect; if that proposition fails, the other averments of the respondents amount to nothing more than this, that before marriage there was an informal agreement between the future spouses to alter the terms of their probative deed. As might have been expected, Mr Balfour did not maintain that such an agreement could *per se* prevail against the deed, but he argued at some length that the agreement was after marriage so validated *rei interventu* as to possess that effect. Upon the general question which was discussed by learned counsel I do not find it necessary to express any opinion. His argu-

ment completely ignored the well-known rule of Scotch law which regards such acts of *rei interventus* by the wife after marriage, or even a formal ratification by her, as a *donatio inter virum et uxorem* which she can revoke at pleasure.

Two years before the date of the acts of negligence imputed to the appellants, the learned Judges of the First Division had unanimously decided in *Smith* v. *Chambers*, 5 R. 97, that words similarly introduced into the testing clause of a trust-disposition and settlement, which materially qualified one of the directions previously given by the testator, were of no legal effect. Upon that point separate judgments were delivered by Lord Deas and Muir and by my noble and learned friend (Lord Shand) opposite, with the concurrence of the late Lord President Inglis. It does seem rather extravagant that a Scottish law-agent should be accused of negligence and want of skill because in advising the liquidators as to the terms of a compromise he accepted the law laid down by the same Judges who had the control of the liquidation, and whose sanction to the compromise was requisite.

If the judgment of the Court of Session in *Smith* v. *Chambers* be according to law, it necessarily follows that the present action is groundless. That decision was accordingly strenuously impeached by the respondent's counsel, partly upon the authority of previous decisions with which it is said to conflict, and partly on the strength of observations made by my predecessor, Lord Gordon, in the case of *Smith* v. *Chambers* when it came by appeal to this House. The other noble and learned Lords who were present when the appeal was disposed of, did not find it necessary to consider that part of the case which related to the testing clause of the deed, and expressed no opinion upon the point. In deciding *Smith* v. *Chambers* the Judges of the First Division had of course no opportunity of considering the remarks subsequently made by Lord Gordon (3 App. Ca. 827 *et seq.*), but all the authorities cited to us in the course of the argument for the respondents, with the exception of *Brown* v. *Govan* (F.C. February 1, 1820), which has been exhumed by the industry of their counsel, were carefully examined and discussed by Lord Deas, who also refers to a number of other authorities which are by no means favourable to the respondents' contention.

The testing clause of a probative deed, which is an anomalous feature of Scottish conveyancing, apparently owes its origin to 1685, cap. 5, which enacts that "all such writs to be subscribed hereafter wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer, or the designation of the writer and witnesses," and also "that in all the said cases, the witnesses be designed in the bodie of the writ, instrument or execution respectively, otherwise the same shall be null and void, and make no faith in judgment, nor outwith." The Act appears to me to contemplate that these requisites shall be inserted in the body of the deed before it is executed by the subscriptions of the parties to it, and of their attesting witnesses. That course might be possible in cases where there was only one party to the deed, or where several parties and their witnesses were all present for the purpose of its execution at the same time and at the same place. But it became a practical impossibility in cases where a deed was executed by several parties and their respective witnesses at different times and in different places. In order to meet the difficulty, the practice was introduced and sanctioned by decisions of the Court, of filling in the testing clause after the deed had been executed by all the parties and their witnesses at any time before the deed is recorded in a public register or produced in judgment. Mr Bell (Prins. s. 2226) justly observes that it is "a very dangerous practice." In *Blair* v. *Earl of Galloway*, 6 Shaw, 51, it was held that a testing clause might be lawfully inserted by the holder of the deed after the lapse of thirty-two years, one of the learned Judges observing "as to the defect in the execution of the deed, there is nothing in the law of Scotland requiring the testing clause to be filled up within a specified period; and I therefore consider the objection to be a great deal too critical."

Their admission of the practice which has just been noticed involved the Judges of the Court of Session in the unpleasant consequences which must inevitably attend the affirmation of two conclusions of fact which are self-contradictory. On the one hand it compelled them to hold *fictione juris* that the testing clause had actually been filled in before execution of the deed, and had been subscribed by the parties and their witnesses. On the other hand, it equally compelled their recognition of the fact that according to the practice which they themselves had sanctioned, and which was generally if not invariably followed, the testing clause formed no part of the deed at the time of its subscription, but was, or might have been, added after the deed had been formally authenticated by the signatures of the parties to it, and of the attesting witnesses. In these circumstances it appears to me to be clear beyond doubt that a testing clause which may have been, and probably was, inserted after subscription, ought not to contain, and cannot legitimately contain, any terms which would, if given effect to, cut down or modify the agreement which the parties had in point of fact executed. I am not prepared to go that length unless constrained by clear and cogent authority, which I have been unable to find either in the argument of the present respondents or elsewhere. It would be an extraordinary state of the law if one of the parties to a deed, who had the custody of it, could, after the lapse of twenty or thirty years, and after the death of some or all of the original parties to it, alter its whole tenor and effect by the insertion of a testing clause. But that is the logical result of the argument addressed to us for the respondents.

In my opinion, it is not immaterial to notice the facts and allegations which are before us in the present case bearing upon the time at which the testing clause of the marriage-contract was written into the deed which was signed by the wife on the 31st May, and by the husband on the 2nd June 1862. The insertion must have been made on or before the 5th June, because on that day the instrument was duly recorded for preservation in the Books of Council and Session. But the productions made along with the record and relied on by the respondents as showing that the lady consented to an alteration of the terms of the deed, also show conclusively that no proposal for an alteration was made to her until the 2nd June, two days after her signature had been adhibited and attested, and that her husband in like manner subscribed the deed without the alteration, upon the written assurance of his law-agents that it would be subsequently inserted in the testing clause.

I am satisfied with the judgment of the First Division in *Smith* v. *Chambers*, which, in my opinion, is decisive of the present case, and I entirely concur in the exhaustive exposition of the law and examination of previous decisions which is to be found in the opinion delivered by Lord Deas. I do not propose to occupy your Lordships' time by repeating the reasoning of Lord Deas, and shall content myself with a brief reference to two authorities relied on by the respondents, which, as already stated, are not noticed in his Lordship's opinion.

The case of *Brown* v. *Govan*, F.C. (February 1, 1820), appears to be a recent discovery. It is not surprising to find that it was neither cited nor commented upon in *Johnstone* v. *Coldstream* (5 D. 1297), *Dunlop* v. *Greenlees* (2 Macph. 1), or in *Smith* v. *Chambers* (5 R. 97), because the question involved in these cases, and which arises for decision in this appeal, was not there raised, and no judicial opinion was expressed upon it. According to the report, a father by his contract of marriage made certain provisions in favour of the children of the marriage, payable on their attaining majority or being married; and by a subsequent declaration he postponed the period of payment until twelve months after his decease. During his lifetime he made a conveyance of heritable subjects to his children in security of their provision, upon which they were infeft. After his death the trustee in his sequestration brought a reduction of the conveyance and sasine following upon it. It was suggested by the respondents that the declaration postponing the period of payment was only to be found in the testing clause of the contract, and they read some extracts from the session papers which did not altogether satisfy me that such was the case. Whether it was so or not is to my mind immaterial. If the fact was as represented, it is clear that the children, who were the only persons having an interest to raise the point, did not attempt to do so. The only defence upon which they relied was that the heritable security which they had obtained from their parent was in law equivalent to payment of their provisions.

There only remains to be noticed the opinion expressed by Lord Gordon in *Chambers* v. *Smith*, which was undoubtedly adverse to the unanimous decision of the Court below, in relation to the testing clause of Dr Chambers' settlement. That point was not disposed of by the House, and seeing that the opinion expressed by the noble and learned Lord was strictly *obiter*, I feel at liberty respectfully to differ. It was mainly rested upon the ground that the decision of the learned Judges of the First Division was at variance with the judgment of this House in *Dunlop* v. *Greenlees* (3 Macph. (H. of L.) 46. The two cases were to my mind essentially dissimilar. In *Chambers* v. *Smith* the effect of the testing clause was to alter materially one of the directions of the trust created by the testator. In *Dunlop* v. *Greenlees* the words introduced into the testing clause were merely descriptive of the object with which Mrs Greenlees, who was not a party to the deed, subscribed her husband's settlement. They did not alter or affect a single provision made by the settlor, and in my opinion, if they had been omitted from the testing clause, the legal inference deducible from the bare effect of her subscription would have been precisely the same.

For these reasons I am of opinion that the order appealed from ought to be reversed, and the interlocutor of the Lord Ordinary restored, and I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD HERSCHELL—My Lords, I am entirely of the same opinion. The matter has been so fully treated by my noble and learned friends who have preceded me that I shall not detain your Lordships long.

It is admitted by the learned counsel for the respondents that unless the condescendence discloses a case of negligence against the appellants whereby the respondents have been damnified, there was no necessity to send this case to proof, and that the interlocutor of the Lord Ordinary ought to have stood.

I think the case might really be disposed of upon a very short point. The negligence charged is that the appellants, being professional men, advised the respondents erroneously—so erroneously as to be negligent—upon a question of law. At the time they gave their advice a decision had been arrived at by the very Court under whose superintendence the liquidation was being conducted, which the learned counsel for the respondents have not attempted to distinguish from the present case, and that decision was in exact accordance with the advice which the appellants gave to those who had employed them. The utmost that could be said is that subsequently to that decision, namely, when the case then in the Court of Session came before this House where it was reversed upon another point, one of the noble and

learned Lords expressed a doubt whether, upon the point which is now of importance, that case (*Smith* v. *Chambers' Trustees*) was rightly decided. My Lords, it was no part of the necessary duty of the appellants to discuss the questions of law which might arise upon the matters upon which they were asked to advise. I can see not the faintest shadow of ground for alleging that in giving the advice they did they displayed any want of care whatsoever. That would be enough to dispose of the case.

But inasmuch as the question of law whether the case of *Smith* v. *Chambers' Trustees* was correctly decided or not has been elaborately argued and is of great importance, I think it right to say that I have arrived at the same conclusion as my noble and learned friends have already expressed. I cannot entertain any doubt whatsoever that *Smith* v. *Chambers' Trustees* was a perfectly sound and correct exposition of the law of Scotland. If there had been a long course of decisions to the contrary effect one might have been bound to give effect to them, and to hold that the law of Scotland as regards deeds and their execution was in a condition so lamentably unsound and unreasonable as to require immediate amendment. But no such decisions have been furnished to us. The purpose and object of parties in reducing their agreements into writing and executing a deed which contains them is, that being thus solemnly recorded, no question shall arise afterwards as to what their agreement really was. It is not to depend upon infirmity of memory as to what passed between them. It is not to be liable to fraudulent misrepresentations as to what the agreement really was. The matter is to be put beyond doubt by a written instrument signed by the parties, their signatures being attested. If the law of Scotland were as the respondents contend it is, to my mind the value of a deed would be absolutely and utterly destroyed. What would be the use of parties solemnly recording the agreement which they had come to, signing the deed, and having their signatures attested, if one of the parties afterwards, in whose custody the instrument was, behind the back of the other, could insert in the testing clause (which it would be perfectly proper for that party to fill in without reference to the other) a provision repugnant to some of the stipulations of the deed which the parties had signed. That might be perfectly honestly done, but the matter might never come to the notice of the other party until some dispute arose years afterwards—it might, indeed, never come to light until all the parties to the transaction were dead and all that could be referred to was the instrument itself, and yet the provision thus inserted *ex post facto* in the instrument by one of the parties would inevitably control their rights, and might impose obligations or destroy rights which had been stipulated for and agreed to and embodied in the deed which had been signed and attested.

My Lords, one need only state such a proposition to see that it would be impossible to maintain it on any ground of principle, and that, as I say, one could only give one's assent to it if constrained to do so by an overwhelming weight of authorities. But no such authorities have been produced; the case of *Johnstone* v. *Coldstream* and the case of *Dunlop* v. *Greenlees* appear to me to be cases as far as possible removed from the case of *Smith* v. *Chambers' Trustees* or the present case. The point that was decided by the Court of Session in *Johnstone* v. *Coldstream*, and by the Court of Session and this House in *Dunlop* v. *Greenlees* was entirely different from the present. The only prior case not reviewed in the judgment of *Smith* v. *Chambers' Trustees* is the case of *Brown* v. *Govan*. I agree with my noble and learned friend Lord Watson, and for the reasons he has given, that that really is not a case in point at all.

For these reasons, my Lords, I think that not only was there no case of negligence against the appellants, but that the opinion which was involved in the advice which they gave with regard to the law of Scotland was perfectly correct.

LORD SHAND—My Lords, I also am of the opinion that the facts stated by the pursuers in this case do not warrant the conclusion of liability for damages on the part of the law-agents who are sued in this action.

The whole case of the pursuers, the Assets Company, seems to me to depend on their establishing that the provision which was inserted in the testing clause of the marriage-contract was an effectual provision. If it was not so, it appears to me that they have failed to show that they have suffered any loss whatever on the facts as otherwise stated by them. By the provision contained in the marriage-contract, as it was signed by this lady, Mrs Campbell, it was declared that her husband renounced and discharged "his *jus mariti* and right of administration over the whole estate presently belonging to her or which she might acquire or succeed to *stante matrimonio*." With that clause standing as a part of the deed she signed it. But days after she had signed that deed, when this testing clause was filled in, there was a most important stipulation added, repugnant to that which I have read, and which was contained in the deed when she signed it. It was to this effect — "Such renunciation (that is, the renunciation I have just read) "and exclusion shall only apply to the capital or principal of the estate of the said Jane Campbell, and shall not extend or apply to the annual produce or interest of her said estate."

My Lords, I am clearly of opinion, as I think all your Lordships are, that this alteration seriously affecting a provision of the deed as it left the hand of this lady, as she signed it, was ineffectually to create an alteration in it.

Having taken part in the decision of *Smith* v. *Chambers' Trustees*, I do not propose to enter upon the grounds of that

opinion. I might well have been silent in the First Division of the Court of Session in the way of giving reasons after the elaborate and careful judgment of Lord Deas, but I find on looking to the report that I went fully over the grounds of my own judgment, and I do not think it necessary to add anything to what I there said.

Although I do not say that it is very material, still it is worthy of observation, that in one aspect of this case it is more unfavourable for the present pursuers than what occurred in the case of *Smith* v. *Chambers' Trustees*. The Lord Ordinary (Kincairney) in the careful and exhaustive and closely reasoned judgment which he has given in this case makes this observation in reference to *Smith* v. *Chambers' Trustees*—"In *Smith's* case, as I understand it, the Court proceeded, not only on the opinion that the testing clause is a part of a deed, which may be held to be settled law, but also on the assumption that in that case it was added before the granter's signature, and was itself authenticated. But if it were shown in this case that the clause was added a couple of days after Mrs Campbell signed the deed, as seems probable, that might differentiate the two cases." Having refreshed my memory from a report of that case, I agree in the opinion Lord Kincairney states. I think there the Court proceeded to give their judgment even upon the view that the addition had been made before the granter's signature. But in this case the matter stands very differently, for it is admitted that it appears to be perfectly clear upon documents which the pursuers have themselves produced, that the lady signed the deed on the 31st of May, and that the alteration was made days afterwards—certainly not earlier than the 3rd of June, when the marriage was just about to take place. It is therefore a clause that is unauthenticated in any way by the signature of the lady who is said to be bound by it. That appears to me to illustrate the dangers there would be in giving to the alterations inserted in a testing clause the extraordinary virtue which is contended for by the appellants in this case.

It is true they have said this feature of the case may be overcome, and it was said by Mr Balfour in his able pleading in this case that he was prepared to prove authority by external circumstances—practically by parole evidence—for this change that was made in the testing clause altering the deed; and, again, it was said that there was another answer to the argument urged against him, namely, that the deed had been acted upon by the spouses afterwards in such a way as to show that the provision added in the testing clause was really a provision to which the spouses intended to give effect.

My Lords, in regard to the first of these matters I have to observe as to the proof of authority that it seems to me obvious that evidence of that kind would be plainly incompetent to control a solemn deed. It is really a proposal to control it by parole evidence—it might be by evidence of witnesses as to what had occurred in conversations. It so happens here that that would be fortified by a signature given by the lady, in which she said, "I approve of the alteration," for she is said to have signed that, but that practically would be nothing stronger than parole evidence in a case in which it is attempted to cut down the effect of a deed deliberately entered into. Plainly, therefore, that answer could not be maintained.

As to the acting of the parties, it is said that the lady from the time of the marriage onwards allowed her husband to draw this annual income. As was observed by my noble and learned friend opposite (Lord Herschell) in the course of the discussion, there is nothing more common than for a wife, although she has an income settled upon herself, to arrange that the husband shall draw it from time to time, and that arrangement goes on as long as it is satisfactory. Therefore I should attribute nothing in point of fact to an acting of that kind. But, my Lords, there is another more vital defect in that argument, namely, that actings after the marriage could surely never be allowed to control the direct obligations of the parties as those are recorded in the deed which the parties had signed. Therefore, my Lords, I am of opinion that neither of these replies can have any effect upon the argument of the case.

I have come to the conclusion without difficulty that there has been no allegation of such negligence on the part of these agents as would involve responsibility for damages in regard to the claim made upon them. If they read the clause in the deed, the clause was ineffectual to operate what it was said to be intended to operate, and therefore there could be no injury. If they did not read the clause in the deed, equally there could be no injury, because there was no loss. Even if they did read that which is the thing complained of, it would not have affected their duty in the circumstances.

It is true that after the date when *Smith* v. *Chambers' Trustees* was decided in the Court of Session, Lord Gordon did, on an appeal to this House, express, I will not say a distinct opinion that that judgment was wrong, but at all events a strong opinion that according to his view sufficient effect had not been given to certain previous cases, but it is worthy of notice that in the opinions which were delivered in the First Division of the Court these cases were discussed; they were fully before the Court, and I think it was unanimously held there that they were quite distinguishable from the case then before the Court. I believe several of your Lordships have already expressed that view.

Lord Kincairney very justly observes in his opinion that the instructions given to the agents "were as they are averred by the pursuers, to satisfy themselves as to the facts and to advise the liquidators as to the terms on which they ought to settle." That was an instruction to give their final opinion upon the whole matter as to what they thought would be reasonable terms, and as to whether the terms which had been offered were reasonable or not. As

he says in a subsequent passage, "But it is said that it was their duty to tell the liquidators that the question was not closed, and that opposing opinions had been expressed about it. It might have been proper enough to do that, but I see no reason to think that it was their duty. It was their duty to form their own opinion, and to advise the liquidators accordingly. But it was not their duty, nor according to their instructions, to reason out the matter with the liquidators, to say whether their opinion was given with confidence or hesitation, or to quote their authorities." My Lords, I concur in these observations by Lord Kincairney. The law-agents in the circumstances might well hold the opinion, which I think was a sound opinion, that Mr Campbell had no right whatever to the income of the capital belonging to his wife, and entertaining that opinion, I think it cannot for a moment be maintained that they were bound to enter into details of the kind which have been suggested by the present appellants.

On these grounds I am opinion with your Lordships that we should revert to the opinion of Lord Kincairney, and reverse the interlocutor of the Second Division.

LORD DAVEY—My Lords, I am of the same opinion. It appears to me that those who maintain the doctrine that the substantive provisions in the earlier part of the deed may be varied by words introduced into the testing clause, rest their argument on the legal presumption that everything in the deed was there before execution by the parties. Legal presumptions are very good and useful things when properly applied, but they ought not as a rule to be introduced in plain contradiction of the facts and settled usages of mankind. It has been decided, and is now settled law, that the testing clauses may lawfully and properly be inserted after execution, and it is admitted that such is the almost invariable practice. When once that has been decided, it appears to me that the legal presumption referred to no longer applies to the testing clause, and the real presumption of fact is the other way. The considerations of convenience and the inveterate practice which led to its being held that the testing clause may be inserted after execution by the parties have no application to words contained in the testing clause which have the effect of varying the provisions contained in the earlier part of the deed. It is in this sense that I understand and appreciate what has been said by learned Judges, that the testing clause is not the proper place in which to introduce substantive provisions.

But, my Lords, if I felt more doubt than I do as to the correctness of the decision of the Court of Session in *Smith* v. *Chambers' Trustees*, it seems to me, as it does to your Lordships, extravagant to hold that law-agents were guilty of actionable negligence because they gave advice to their clients which involved the assumption that a recent and unanimous decision of the very Judges before whom the question would come, was correct. I say this notwithstanding the *obiter dictum* of Lord Gordon in this House in *Smith* v. *Chambers*. That noble and learned Lord assumed, as I think erroneously, that the decision in *Smith* v. *Chambers* was inconsistent with *Johnstone* v. *Coldstream* and *Dunlop* v. *Greenlees*. I may remark that Lord Deas, who delivered the leading opinion in *Smith* v. *Chambers*, was a party to the decision in the Court of Session in *Dunlop* v. *Greenlees*. That learned Judge thought the latter decision right and not inconsistent with the opinion he was delivering in *Smith* v. *Chambers*.

It does not very clearly appear what facts the Inner House desired proof of in this case. I am of opinion with the Lord Ordinary that no evidence is required for the decision of the case, and I think his judgment should be restored.

Ordered, "that the interlocutor of the Lord Ordinary dated 18th June 1895 be restored, and that the cause be remitted to the Second Division of the Court with directions to find the appellants entitled to the expenses incurred by them in the Court of Session from and after the date of the interlocutor restored."

Counsel for the Pursuer and Respondents—J. B. Balfour, Q.C.—Cosens Hardy, Q.C.—C. D. Murray. Agents—Wm. Robertson & Company, for J. Smith Clark, S.S.C.

Counsel for the Defenders and Appellants—Lord Advocate (Graham Murray, Q.C.)—Ure—John Wilson. Agents—Faithful & Owen, for Davidson & Syme, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, March 18.

(Before the Lord Justice-Clerk, Lord Young, and Lord Trayner.)

MACARTHUR *v.* CAMPBELL.

Justiciary Cases — Process — Suspension — Irregularity in Procedure—Interlocutor Adjourning Diet Unsigned—Burgh Police Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 495.

Section 495 of the Burgh Police Act 1892 provides, *inter alia*—'No order, judgment, record of conviction, or other proceeding whatever, concerning any prosecution instituted before the magistrates shall be quashed for want of form" . . . "and all judgments and sentences pronounced by the magistrate shall be final and conclusive, and not subject to suspension or appeal, or any other form of review or stay of execution, unless on the ground of corruption, malice, or oppression on the part of the magistrate, or of such deviation in point of form from the statutory enactments as the court of review shall think took place wilfully, or of incompetency, including