The pursuer, in addition to his own interest, represents that of Mr Brebner, a deceased partner. The partners are thus entitled to the free balance of the assets of the company in the proportion of two shares to the pursuer and one share to each of the defenders. Each of the three parties had claims against the company and its assets as individuals for work performed by them respectively and otherwise. Having differed as to these claims, they entered into the submission which is the subject of this action for the purpose of having them adjusted. Some relative points had been previously adjusted between them by the same arbiter, and another submission to determine the amount of their respective claims had accidentally fallen.

"The submission now entered into sets forth that the parties differ as to the division of the balance of money received from the Inverness and Aberdeen Junction Railway Company, which constitutes the remaining assets of Mitchell, Brebner, & Company. They refer to the arbiter their differences as to the division of the remainder of the foresaid balance of money, with power to him to hear us thereon, and finally to decide the said differences, and with special power to the said Alexander Gibb to receive all claims which may be given in to him against the said balance of money, whether in the shape of claims for extra work on the said railway by each or any of us, or in the shape of debts due by the said firm of Mitchell, Brebner, & Co., or in any other shape or upon any ground whatever, with power to the said arbiter to hear us thereon; to take all manner of probation which he may consider necessary; and, finally, to fix and determine the extent and amount of all such claims; and whatever the said arbiter shall fix or determine in the premises by any final award to be pronounced by him, whether formal or not, we bind and oblige ourselves, and our respective heirs, executors, and successors, to give full effect to, in the division of the remainder of the foresaid balance of money received from the said railway company, and to abide by, implement, and fulfil the same to each other in good faith."

"There was no difference between the parties as to their respective shares in the free assets of the company when the amount of these should be ascertained. Their differences had reference entirely to claims upon these assets before they could fall to be divided. The pursuer accordingly alleges that there was no power given to the arbiter in regard to the ultimate division of the company funds; and on that ground he maintains that the arbiter has gone *ultra fines compromissi* in so far as he has proceeded to divide the funds of the company. The terms of the submission are not quite clear or consistent on this point, but the Lord Ordinary does not think that it would have been a great objection to the decrees that they did not stop short on ascertaining the amount of the individual claims, but proceeded also to divide the remaining balance of the assets after deducting these claims among the partners according to their respective shares. He rather thinks that this was within the power of the arbiter, and it would have been a merely formal proceeding.

"The important objection to the proceeding of the arbiter in this matter is that their individual claims being the real matter in dispute between the parties, he has so framed his award (assuming him to have pronounced an award at all) that it is impossible to discover what he holds to be the amounts of these individual claims. He has only fixed *in cumulo* the amount which each partner is to receive of the assets, on account both of his individual claims and his share of the balance. The parties are thus left ignorant as to what judgment the arbiter has formed upon the only point on which they differed and required his decision. The Lord Ordinary is of opinion that he was expressly required by the submission to fix and determine the extent and amount of the individual claims, and that not having done so upon the face of his award, it cannot be sustained.

"There is another objection of a more formal kind, but which the Lord Ordinary has also felt himself bound to sustain. It is stated (Cond. XV.) that the arbiter issued to the parties a draft of the decreet-arbitral which he proposes to pronounce. In that document he proposes to find the parties each entitled to a *cumulo* proportion of the entire assets. It is not alleged that any award in terms of that draft, and dealing with the interests of the whole three parties as it did, was ever signed by the arbiter; but he subsequently issued at different times the two decrees under reduction in favour of the two defenders. By these he found each of them entitled to the sum which by the draft-award he had proposed to give them. But each decree deals only with the interests of the party in whose favour it is conceived, and neither of them takes any account of the interest of the pursuer. It is said that it necessarily follows that the pursuer is entitled to the whole balance after payment of what has thus been awarded to the other parties. It was only after both the existing decrees were issued that this inference could be drawn, and the argument would not have applied to the first decree while it stood alone. But the Lord Ordinary is not inclined to think that it is competent for the arbiter to pronounce a final decree, which leaves his award upon an important part of the case to stand upon mere inference. The defenders must maintain that the submission is exhausted, except to the effect of still giving a formal decree in favour of the pursuer, and they can only do so by holding that there is no complete award upon the whole subject-matter of the reference, while no deliverance has been made upon the claims of the pursuer."

Tuesday, Dec. 12.

HEARING BEFORE THE WHOLE COURT.

GORDON *v.* GORDON'S TRUSTEES.

Trust—Entail. Effect of direction in a trust-deed to purchase lands and execute a deed of entail thereof in favour of a person and his heirs whatsoever.

Counsel for the Pursuer—The Solicitor-General, Mr Gifford, and Mr Crawford. Agent—Mr Peacock, S.S.C.

Counsel for the Defenders—Mr Patton, Mr Clark, and Mr Lee. Agent—Mr Gentle, W.S.

This is a question between Mr Gordon of Cluny and the trustees of his father, the late Colonel Gordon, and it arises out of the two following clauses in a disposition and deed of trust-settlement, executed by Colonel Gordon on the 28th of May 1853.

The third purpose of that deed is expressed as follows:—"After the said trustees shall have completed a title in their persons to the whole lands and estates belonging to me in Scotland, I hereby direct and appoint them to execute a deed or deeds of strict entail, in terms of the Act of Parliament of Scotland passed in the year 1865, intituled 'Act concerning tailzies,' of the whole lands and estates situated in Scotland, now belonging, or which shall belong to me at the time of my death (with the exceptions of the estates of South Uist, Benbecula, and Barra, and other lands now belonging to me in the county of Inverness, hereafter specially destined), and that to and in favour of my eldest son, the said John Gordon, now Captain John Gordon, and his heirs whatsoever: whom failing, to and in favour of my youngest son, the said Charles Gordon, and his heirs whatsoever: whom failing, to any persons to be named in any deed of nomination to be afterwards executed by me at any time of my life; the eldest heir-female, and the descendants of her body, excluding heirs portioners, and succeeding always without division through the whole course of the female succession, and failing such nomination, or of the persons so to be named, and their heirs whatsoever, then to my own heirs whatsoever and their assignees," &c., &c. The sixth purpose of the trust-deed disposes of the

residue in the following terms:—"After accomplishing all the other purposes of this trust, the said trustees are hereby directed to lay out and invest the whole residue that may remain of my heritable and personal estates in the purchase of lands and heritages situated as near and convenient as they can be reasonably had to my said estate of Cluny and my other principal estates, and to execute a deed or deeds of strict entail, in terms of the foresaid Act of the Parliament of Scotland passed in the year 1685, intituled 'Act concerning tailzies of the whole of the foresaid lands so to be purchased as aforesaid, to and in favour of my eldest son, John Gordon,' &c." (Here follows a destination in the same terms as that in the third purpose of the trust; and there is a provision that the trustees shall record the deed so executed by them in the Register of Tailzies, and also in the Books of Council and Session, and complete proper feudal titles thereon, so as to render them effectual in terms of law.) Charles Gordon, the youngest son of the truster, predeceased his father unmarried, and without leaving any heirs, and the truster died without having executed any deed of nomination naming any persons as heirs of entail in whose favour the said disposition and deed of entail was to be conceived. In consequence of this predecease and the failure of the truster to nominate any other heirs, the landed estates in Scotland of the truster having devolved on the pursuer, Mr Gordon, the trustees proceeded, in implement of the directions of the trust-deed, to execute a deed of entail according to the destination expressed in the trust-deed. The residue realised by the defenders amounted to £251,598, 15s. 4d., out of which the truster's debts were paid and some landed property was bought, but a large balance is still in the hands of the trustees.

There is no question in regard to the third clause of the trust-deed *per se*. The dispute is as to the effects of the sixth. On the one hand, Mr Gordon maintains, on the authority of the Dalswinton case, that the destination to John Gordon and his heirs whatsoever cannot be made the foundation of a good entail, and therefore it is a fee-simple destination. The trustees, on the other hand, maintain that they are bound to give effect to the directions of the trust-deed, and that they are entitled to cure the defect in the destination by reading the destination to John Gordon and his heirs whatsoever as a destination to John Gordon and the heirs of his body. On the suggestion of the Court, it was pleaded alternatively for the trustees, that if the destination of the trust-deed was not valid to make a good entail, it is valid to defeat the interest in his father's succession, to which Mr Gordon lays claim, and that *quoad* the residue Colonel Gordon must be held to have died intestate.

To-day the Court made avizandum.

Wednesday, Dec. 13.

FIRST DIVISION.

MP.—BROWN'S TRUSTEES *v.* PATONS AND CRAIG.

Reduction—Force or Fear. Held that an averment by a married woman that she was induced to subscribe a deed, out of anxiety to prevent the incarceration of her husband for civil debt, is not relevant in a reduction on the ground of force or fear.

Cautioner. Held that a person who subscribes a deed as a cautioner, after hearing another person, who was named in it as a co-obligant, refuse to subscribe, was barred from pleading that she was discharged because the deed was not subscribed by all the proposed parties to it.

Counsel for Mr Craig—Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

Counsel for Mr and Mrs Paton—Mr Scott. Agent—Mr D. F. Bridgeford, S.S.C.

This was a competition for the share of the moveable estate of the late Thomas Brown, writer in Glasgow, thereafter residing at Irvine, falling to his niece, Margaret Brown or Paton, under his settlement. It was claimed by Mrs Paton and her husband, Adam Paton, and also by James Craig, Comely Park, Glasgow. The grounds of Mr Craig's claim were, that on 12th September 1860 Mr and Mrs Paton had granted to him a promissory-note for £128, 10s., payable three days after date, and in order to secure the payment thereof, had, on 29th September 1860, assigned to him their respective interests under the late Mr Brown's settlement. Mr Craig had used diligence on the promissory-note, and arrested in the hands of the trustees. It was originally stated for Mrs Paton that Mr Craig obtained the promissory-note under a promise that it would be kept by him only by way of security of advances made and to be made, and that no diligence should be used on it; that immediately after receiving it he gave a charge of payment to her husband; that when the charge was about to expire, Craig "requested the presence" of herself and her husband at the Glasgow Police Office, where a lieutenant of police produced the assignation, and, under threats of the immediate incarceration of her husband, coerced her to sign it. Her subscription, she said, was extracted from her by force and fear; the deed was never read over or ratified by her, no consideration was given for it, and its narrative was false. Mrs Paton was allowed to lodge an issue to prove these averments; but in February last her issue was disallowed by the Court in respect of the irrelevancy of her averments. Mrs Paton did not state on record what was the nature of the incarceration, the fear of which induced her to sign the deed. She could not say that it was anything other than the diligence which Mr Craig was entitled to use for recovery of his debt, and the Court held that it was not a sufficient averment of force or fear that a wife has acted out of anxiety to save her husband from imprisonment for debt.

The case then returned to the Lord Ordinary, when Mrs Paton pleaded that the assignation was not binding, in respect that although it bore *in gremio* that her brother, Matthew Brown, was also a party to it, it had not been signed by him. She averred that, being a married woman, she could not legally undertake the obligation in the promissory-note, and that she signed the assignation merely as a cautioner, and on the understanding that Matthew Brown was also to sign it as a co-obligant. She therefore pleaded that on the principle of Pringle *v.* The Scottish Provincial Insurance Company (20 D. 465) the assignation was not binding on her. The Lord Ordinary (Ormidale) held that there was nothing in the assignation to indicate that Mrs Paton and her husband were cautioners merely, but that from the admissions on record it rather appeared that they were principal debtors, and were therefore not entitled to the equities pertaining to cautioners. In such a case the subscribers are liable for the whole, provided the omission of the signature has not arisen from any fault or collusion of the creditor. (M'Donald *v.* Stewart, 5th July 1816, F.C.). Mr Craig was therefore preferred in the competition. The Patons reclaimed. The Court to-day, without calling for a reply to the reclaimers' counsel, adhered.

The LORD PRESIDENT (after narrating the previous procedure) said—It is now said that Mrs Paton was only a cautioner. There is nothing very clear about that. The assignation bears that the money was paid to them all. But though she be only a cautioner, I don't think the absence of Matthew Brown's signature renders the assignation nugatory. It is said on record by Mrs Paton that Matthew Brown was present in the Police Office and refused to sign. The deed is not signed by him. It is said that it does not appear that