

pursuer on the counter issues, and on the pursuer's issue they find for the pursuer, and assess the damages at fifty pounds; but with leave reserved to the defenders to move the Court to enter up the verdict for the defenders in the event of the Court being of opinion that the patent is invalid on the ground of any legal objection or objections that may be competently urged by the defenders; and, with reference to such legal objections, the jury find specially that the novelty of the pursuer's invention consists in the construction of the polisher described in the specification and its application to the polishing of thread. Find that polishing threads or yarns by frictional contact with rollers or cylinders revolving on their own axis, in which grooves or annular indentations are made for the purpose of smoothing or polishing the said threads or yarns, was new at the date of the pursuer's patent. Find that the system or mode of polishing or finishing threads or yarns by means of a pair of frictional polishers was not new at the date of the pursuer's patent. Find that the system or mode of polishing or finishing threads or yarns by means of a single frictional polisher, roller, or cylinder, was not new at the date of the pursuer's patent. Find that the system or mode of constructing frictional polishers, in which a current of air is made to pass through the shafts thereof, and to impinge on the threads or yarns by means of fanner-blades or vanes, was new at the date of the pursuer's patent. Find that the term "preparing thread," used in the title of the patent, means, in the language of the thread manufacturing trade, the starching or sizing of the thread previous to its being polished, and means nothing else."

Agents for Pursuer—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Defenders—Campbell & Smith, S.S.C.

Monday, July 20.

SECOND DIVISION.

PRINGLE v. PRINGLE'S TRUSTEES.

Trust—Antenuptial Contract—Power to Revoke. A lady, in right through her father's settlement to certain heritable properties and heritable bonds, entered with her husband into an antenuptial contract of marriage, by which she conveyed her property to trustees in order that the income might be applied for the benefit of the spouses during their lifetime, the fee to be disposed of after the lady's death according to her father's settlement. Both parties bound themselves to do nothing at variance with this provision, and the deed was declared irrevocable. There is no issue of the marriage, and no probability that there can be any. *Held*, in conformity with the judgment of the Court in *Anderson v. Buchanan*, that the trust subsisted and was not revocable, and that the power of the contracting parties to revoke was not affected by any want of interest in third parties.

This was an action of declarator brought by Mrs Mary Anderson or Pringle, of Wilton Lodge, in the county of Roxburgh, and Mr David Pringle, of Wilton Lodge, her husband, for the purpose substantially of putting an end to the trust constituted by their antenuptial marriage-contract, and declaring the right of Mrs Pringle to dispose of the sub-

ject of the trust at pleasure, either onerously or gratuitously.

It appeared that Mrs Pringle was infest under the settlement of her father in certain heritable properties, and was also vested in two heritable bonds of the value of £10,000; and by her marriage-contract, dated in 1858, entered into between her and the other pursuer, she conveyed her whole property to trustees for the purpose, *inter alia*, of the income being applied for the benefit of the spouses during the marriage, and the fee being disposed of after Mrs Pringle's death in the manner provided by the settlement of her father. By the marriage-contract it was declared, that "both parties hereby bind and oblige themselves to implement their respective parts of the premises, and not to do any act or grant any deed at variance with these presents, which are hereby declared not to be revocable or subject to alteration by the parties hereto, or either of them, on any ground, or on any pretext, or in any capacity whatever." It was with reference to this provision that the present question arose.

The pursuer maintained the following pleas:—
 "(1) According to the legal construction of the contract of marriage before set forth, no person, except the pursuer David Pringle and the heirs of the body of the pursuer Mary Anderson or Pringle, has a vested and indefeasible right or interest under any of the provisions contained in the said contract, so far as regards the lands and others, and bonds and dispositions in security mentioned in the conclusions of the summons, or under the disposition and assignation above mentioned. (2) There being no heirs, and no possibility of there now being heirs of the body of the pursuer the said Mary Anderson or Pringle, and the said David Pringle being ready and willing to renounce all his rights under the said contract and disposition and assignation, in so far as the same affect or might hereafter affect the said lands and others and bonds and dispositions in security, the pursuer Mary Anderson or Pringle has full right and power to sell and onerously dispose of the said lands and others, and also to discharge or assign, either onerously or gratuitously, the said bonds and dispositions in security. (3) The defenders, the trustees under the said contract, being vested by virtue of the said registered disposition and assignation in the said lands and others and bonds and dispositions in security, for the sole purpose of protecting interests which do not exist and cannot come into existence, they are bound to redispone and convey and assign the same to and in favour of the pursuer Mary Anderson or Pringle, as concluded for; or otherwise to concur in and consent to all dispositions, conveyances, discharges or assignations to be executed by her of the said lands and others. (4) The pursuers having, since the date of the marriage-contract and the said disposition and assignation, acted and transacted with the property upon the footing that they had the powers now claimed in this action, and this having been done with the knowledge and concurrence of the defenders, the defenders are not now entitled to maintain the defence which they have stated to this action."

The defenders pleaded:—"(2) According to the sound construction of the marriage-contract no absolute right to the lands and bonds labelled is vested in the pursuers, or either of them, and neither of the pursuers has any power, *stante matrimonio*, to sell, burden, or dispoise, onerously or gratuitously, of the said lands, or to uplift, discharge, assign, or otherwise dispose of, either onerously or gratuitously,

the bonds; and the whole defenders should be assolzied from the conclusions of the summons, in which it is sought to be declared that the pursuers have such a right. (3) According to the sound construction of the marriage-contract, the lands and bonds libelled were irrevocably conveyed to the defenders, the trustees under that contract, for the purpose, *inter alia*, of protecting the pursuer Mrs Pringle against herself and her husband, and of preventing any alteration of the settlement and destination of the said lands and bonds during the subsistence of the marriage, and the pursuers are therefore not entitled to call upon the said defenders to denude of said trust-estate, or any part thereof; and the defenders should therefore be assolzied from the conclusions of the summons, with expenses. (5) The defenders, the trustees under James Anderson's trust-disposition and settlement, having under that deed, and under the said marriage-contract, a right to said lands and bonds indefeasible during the subsistence of the marriage except in the event of the existence of heirs of the body of the pursuer Mrs Pringle, the pursuers cannot defeat that interest on any pretext whatsoever; and the defenders are therefore entitled not only to be themselves assolzied from the conclusions of the summons, but also to insist that the other defenders, the marriage-contract trustees, shall be assolzied from said conclusions."

The Lord Ordinary (KINLOCA) pronounced the following interlocutor:—

"The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the proceedings, In respect of the decision of the Court in the case of *Anderson v. Buchanan*, 2d June 1837, Finds that the pursuer Mrs Pringle cannot, during the subsistence of her marriage with the other pursuer David Pringle, revoke, alter, or affect the provisions of the marriage-contract libelled, with reference to the properties and subjects to which the conclusions of the present summons are made applicable: Finds that, according to a sound construction of the contract of marriage, the said pursuer is, during the subsistence of the marriage, debarred from selling, burdening with debt, or disposing, whether gratuitously or onerously, of the said properties and subjects: Finds, therefore, that her claim of right so to sell, burden, or dispose, advanced under the present action, cannot be at present given effect to: Dismisses the action, and decerns: Finds the defenders entitled to the expenses of process, taxed as between agent and client: Allows an account thereof to be lodged; and remits to the Auditor to tax the same, and to report.

"*Note.*—The Lord Ordinary accedes to the proposition laid down by the pursuers, that the only parties having legal right to maintain in subsistence the provisions of the marriage-contract are the spouses and the children of the marriage. There are no children of the marriage; and the lady being now 57 years of age, there cannot now be any such.

"In regard to the pursuer Mrs Pringle, the state of facts in which the present question has been raised appears shortly the following.—Her father, by his *mortis causa* settlement, disposed to the pursuer—then Miss Mary Anderson, his only surviving child—and the heirs whomsoever of her body, the whole property, heritable and moveable, which he should leave at his death, and, in particular, two heritable properties, called Wilton Lodge and Dean Mill, and also certain lands called Clouden, in room of which, as ultimately sold, there came two heritable bonds, amounting together to £10,000. Fail-

ing his daughter and the heirs of her body, the subjects contained in the settlement were disposed to trustees, to hold for certain purposes; and amongst others, to divide the residue between two of the testator's nephews. It is specially provided by the settlement, 'that although the said Mary Anderson shall, in the event of her surviving me, be entitled to sell and dispose of the whole or any part of the property hereby conveyed for an onerous cause, she shall not be entitled gratuitously to dispose of the property hereby conveyed, or of any part thereof, to the effect of disappointing the succession which is hereby created by the conveyance to trustees herein contained, in the event of the failure of my said daughter, and of the heirs of her body; all gratuitous alienations or dispositions by her being hereby declared to be void and null.'

"Mr Anderson, the framer of this settlement, died on 3d October 1833; and the pursuer, his daughter, succeeded under it.

"In the year 1858 the marriage-contract now in question was executed, on the occasion of Miss Anderson's marriage to Mr David Pringle. By this marriage-contract the properties above referred to were, with others, conveyed to trustees; and the primary purposes of the trust are thus expressed—'*Primo*, That during the lifetime of the said Mary Anderson she shall be allowed and permitted to have the full and unlimited use, enjoyment, and management of the said lands of Wilton Lodge and Dean Mill, and to draw and receive the rents and other profits thereof, and to grant leases and charters, and exercise all other rights of property in the same manner as if the said trust-assignment had not been granted; and *Secundo*, The trustees acting for the time shall pay and make over the whole free interest, dividends, or other annual income of the said sum of £10,000, &c. to the said David Pringle and Mary Anderson during their joint-lives, and to the said Mary Anderson during her life, in the event of her survivance, aye and until the said Mary Anderson shall, by a writing under her own hand, addressed to the said trustees, direct the same to be otherwise applied, and which direction, if so given, the said trustees shall follow and comply with.' After Mrs Pringle's death, it is provided that the subjects should be disposed of in accordance with the terms of Mr Anderson's *mortis causa* settlement. And it is declared, 'that nothing herein contained shall be held to limit, renounce, or control the rights and powers of the said Mary Anderson under the said trust-disposition and settlement of the said James Anderson beyond the special provisions hereby made, and in so far as not inconsistent with the same.'

"It is afterwards provided, 'that in the event of the intended marriage being dissolved by the predecease of the said David Pringle, without issue of the marriage, or if such issue shall fail during the life of the said Mary Anderson, then it shall be in the power of the said Mary Anderson to extinguish and put an end to the whole trusts created by these presents and relative deeds, and to require the trustees or trustee acting for the time to denude of the said trust, and to convey and make over to her the whole trust-funds and estate vested in them or him at the time.' It is also said in the close of the deed, that 'both parties hereby bind and oblige themselves to implement their respective parts of the premises, and not to do any act, or grant any deed, at variance with these presents; which are hereby declared not to be revocable or subject to

alteration by the parties hereto, or either of them, on any ground, or on any pretext, or in any capacity whatever.'

"It appears to the Lord Ordinary that the undoubted meaning and intention of this deed is to prevent Mrs Pringle from affecting the fee of the subjects by any disposition granted during the marriage; and so to preserve entire the whole annual proceeds for the use of herself and her husband. The deed is meaningless on any other construction. Mrs Pringle is to have the entire proceeds of the subjects, either as drawn directly by herself or paid over by the trustees. But as regards the fee, it is made over to the trustees, to lie in their person until the dissolution of the marriage by the death of the husband, when the trustees are to reconvey it to Mrs Pringle. By this arrangement it was pretty clearly intended to protect Mrs Pringle from being induced by her husband to sell the subjects, and, by turning them into cash, bring them within his power of appropriation. The clause which reserves Mrs Pringle's rights under her father's settlement only does so in so far as these are not innovated by the marriage-contract; which, it is thought, they plainly are to the extent and effect now stated.

"Mrs Pringle is therefore manifestly tied up by the marriage-contract from disposing or burdening the subjects during the subsistence of the marriage. But it is contended on her behalf in the present action that the trust created in the marriage-contract, being now, on the failure of children, a trust for her own behoof exclusively, cannot be set up to prevent her doing what she wills with her own; and, so far as it stands in the way, may be revoked or altered by her own act, performed with consent of her husband. It is maintained by her, with great force, that to prevent her from dealing with the subjects as authorised by her father's settlement, is not merely to interfere with proprietary rights held by her exclusively for her own behoof; but in truth is to enforce a constructive entail in favour of the ultimate beneficiaries, to whom no conclusive or irrevocable right arises under the marriage-contract.

"Except for the authority to be immediately mentioned, the Lord Ordinary would have given great weight to this contention. But he thinks the plea excluded by the case of *Anderson v. Buchanan*, 2d June 1837, 15 S., 1073. In that case there was in like manner constituted a trust in an antenuptial contract, under which the trustees were to pay over to the wife the annual proceeds of the property conveyed by it for her own separate behoof. The deed does not seem to have contained any expression of the time at which the trust was to terminate; but the Court held its implied endurance to be clearly that of the marriage. There was, as in the present case, a clause in which the lady stated, 'I declare that these presents shall not be revocable by me, on any ground, or in any form whatever.'

"Some years after the marriage an action was brought at the instance of the lady, with consent of her husband, in order to have it found that the trust was inoperative in opposition to her will; and was extinguished and set aside by her revocation. It was strongly contended in this action that the trust being constituted solely for the wife's own behoof, she had it in her power to put an end to it at pleasure; and that the supposed protection against her husband's influence could not be forced on her, when she did not desire such protection. And with

respect to the clause declaring the deed irrevocable, it was maintained that no such clause could be binding on the party inserting it when no other party was interested; being, as regarded the grantor, nothing better than a statement of present purpose. In opposition to this argument, it was found by a majority of the whole Court that the trust could not be revoked by the wife during the marriage; and must subsist in full effect till the death of the husband placed the wife in a position to act freely in the matter of the revocation.

"The Lord Ordinary is of opinion that the present case is directly ruled by that of *Anderson v. Buchanan*. It has always appeared to him (and the pursuers are entitled to the benefit of the statement), that the decision in that case is of doubtful soundness; and that the doctrine thereby sanctioned is one which might fitly receive the reconsideration of the Court. His own impression as to the true principle of the case accords with the view expressed by the eminent Judges who formed the highly influential minority in *Anderson v. Buchanan*. But he considers the authority to be express, and such as leaves to him, as Lord Ordinary, no other course than to give effect to it.

"A distinction has been attempted to be drawn between the present case and that of *Anderson v. Buchanan*, in the fact that in the latter case the *ius mariti* of the husband was expressly excluded in the marriage-contract, whereas in the present case it is not so, in so far as concerns the subjects now in question. But this circumstance, as it appears to the Lord Ordinary, only tended to make the case of *Anderson v. Buchanan* an easier case for sustaining the right of revocation. Even had the trust been revoked, the wife had still the protection operated by the exclusion of the *ius mariti* in the marriage-contract, on which to fall back. In the present case the absence of that protection gives a stronger claim for the maintenance of the trust as its equivalent, if the principle on which the case of *Anderson v. Buchanan* rests be well founded.

"The Lord Ordinary would observe, in conclusion, that some reliance was placed by the pursuers on the alleged fact, that the trustees in the marriage-contract (acting under the advice of counsel) at one time entertained the same view with that for which the pursuers now contend, and gave practical effect to it in divers transactions. The Lord Ordinary can afford no weight to this circumstance. If the Court think the trustees to have been wrong, they will not therefore follow them in their error; on the contrary, will correct it. There can be no plea of personal exception against trustees. See *Weller v. Kerr*, House of Lords, 1st March 1866. Law Reports, 1 Scotch Appeals, 11."

The pursuers reclaimed.

DEAN OF FACULTY and FRASER, for them, argued, that the trust created in the marriage-contract, being a trust for her own behoof exclusively, it could not be set up as preventing her from doing what she willed with her own; and, so far as it stood in the way, might be revoked or altered by her own act, performed with consent of her husband. It was said that to prevent her from dealing with the subjects as authorised by her father's settlement was not merely to interfere with proprietary rights held by her exclusively for her own behoof, but, in truth, was to enforce a constructive entail in favour of the ultimate beneficiaries, to whom no conclusive or irrevocable right arose under the marriage-contract.

CLARK and JOHN MARSHALL, for the defenders,

answered, that a trust created in a marriage-contract for the protection of the wife, and declared to be irrevocable, could not be revoked by the wife during the subsistence of the marriage even though the trust was exclusively for her own behoof. This was a doctrine established by the decision of the whole Court in the case of *Anderson v. Buchanan*, 2d June 1837; and it was founded upon considerations of sound policy, looking to the peculiarities of a wife's position during the subsistence of the marriage relation.

At advising—

LORD JUSTICE-CLERK—The circumstances in which the present action arose are as follows. The late Mr Anderson of Wilton Lodge, by trust-disposition and settlement, executed a conveyance of the lands of Wilton Lodge and Clouden in favour of his daughter Miss Mary Anderson, the female pursuer, and the heirs of her body, whom failing, to trustees for purposes declared in the trust-deed.

In the deed, which was in the form of a direct disposition to her and the issue of her body, there was inserted a prohibition against Miss Anderson's gratuitously alienating the estates. There is no question here which requires us to consider how far this prohibition, standing nakedly on the face of the deed without the clauses necessary to make an effectual entail, is or is not valid.

Mr Anderson died on the 3d October 1833. Miss Mary Anderson succeeded to the estates, completed a title, and sold Clouden, investing the sum realised by the sale in two bonds over property in Perthshire and East Lothian for £10,000. In June 1858 she married the concurring pursuer Mr Pringle.

On the eve of the marriage the antenuptial contract, out of which the present question arises, was executed.

The first material provision of this contract relates to property in England, to which Mrs Pringle succeeded through her mother, as to which it was provided that she should retain the same rights as if she had remained single. To effectuate this purpose Mr Pringle renounced all the rights which the marriage could confer on him whether of ownership, administration, or succession.

Then follows provisions as to Wilton Lodge and the proceeds of the sale of Clouden. The contract narrates the execution of a disposition and assignation of even date with the marriage-contract to the present defenders as trustees. The disposition in trust refers to the marriage-contract for the statement of trust purposes, which, as given in the contract, are first—That Mrs Pringle herself should draw the rents of Wilton Lodge, grant leases and charters, and “exercise all the other rights of property in the same manner as if the trust had not been granted.” Second, that the interest of the £10,000 be paid to the spouses during their joint lives, and to Mrs Pringle, if surviving her husband, during her life. Third, that on the death of Mrs Pringle's issue, the marriage-contract trustees should convey Wilton Lodge and the £10,000 to her father's trustees, but under condition that Mr Pringle should, in his option, be entitled to the rents of Wilton Lodge and an annuity of £200, or the interest of a sum of £12,000 to be held by the same trustees out of the general estate of Miss Anderson.

As to children, it was declared (p. 39, G.) that in the event of a “child or children being born of the said marriage, then the whole rights conferred upon him, her, or them by the said trust-disposi-

tion and settlement of the said James Anderson shall remain entire to him, her, or them, and unaffected by the provisions herein contained.”

It was further declared, that in the event of Mrs Pringle's predecease without issue, or on failure of issue, in event of Mrs Pringle surviving him, that Mrs Pringle should have the power of extinguishing the trust, and calling upon the trustees to denude; and lastly, both parties bound themselves not to do any act or grant any deed at variance with these presents, which are declared “not to be revocable or subject to alteration by the parties, or either of them, on any ground or pretext, or in any capacity whatever.” The only other clause to which it is necessary to advert is one which declares “that nothing herein contained shall be held to limit, renounce, or control the rights and powers of the said Mary Anderson under the said trust-disposition and settlement of the said James Anderson, beyond the special provisions hereby made.”

There is no issue of the marriage, and it is said that Mrs Pringle has attained an age at which the possibility of issue may be disregarded as an element in our judgment. The trustees have accepted and acted. It is said that deeds have been executed by them, and by the pursuers, proceeding on the assumption that the creation of the trust formed no impediment to the exercise of Mrs Anderson's alleged powers over the estate. She seeks in this action to assert her rights in conjunction with her husband. I do not think that the averments as to the fact of deeds having been granted by the parties is relevant. We must determine the question on the contract and facts, not on the opinion which may have been erroneously entertained by the parties.

It is very important, as it occurs to me, to consider the precise nature of the conclusions of this action, especially when regard is had to one very important finding in the Lord Ordinary's interlocutor.

The first conclusion affirms that the only parties having rights or interests vested and indefeasible under the marriage-contract are the two pursuers, Mr and Mrs Pringle. The second, that from the two parties agreeing to renounce their rights under the deed, and the non-existence, or possibility of existence, of children of the marriage, it should be declared that Mrs Pringle is entitled to burden or sell the estate of Wilton Lodge just as if the trust-disposition had never been executed, and to uplift and dispose of onerously and gratuitously the heritable security for £10,000. There is, then, a conclusion that the trustees shall execute a disposition in her favour, and that of the heirs of her body, and them failing, to the parties named in the trust-disposition of her father. She proposes that the prohibition against gratuitous alienation should be inserted in the disposition to be granted in her favour. An alternative conclusion is to the effect that the trustees should concur and consent in any deed to be executed by Mrs Pringle.

This summons, as it appears to me, is framed so as to raise and have properly determined the question as to whether this trust is or is not to subsist in the face of a joint revocation of it accompanied by a renunciation of rights under it by the only parties said to have a vested interest. It does not appear to me that the summons laid is aptly framed for raising any broader or more general question; and, in particular, the general and important question apparently decided by the Lord Ordinary. He has found “that according to a sound construction of the

contract of marriage the said pursuer is, during the subsistence of the marriage, debarred from selling, burdening with debt, or disposing, whether gratuitously or onerously, of the said properties and subjects."

There seems to me to be no *termini habiles* for this decerniture. The summons is framed with a view to the relief of the pursuer from the trust, or the enforced concurrence of the trustees in acts to be done by her, which affirms the inefficacy of the trust, but it does not go farther. There are no parties in this action to raise the question of which the interlocutor of the Lord Ordinary, in words, disposes of. The proper and necessary contradictors as to the validity of deeds which may be executed during the trust—which shall not disturb the trust—might be raised by a party holding a disposition for onerous causes to come into operation on the death of Mrs Pringle, or a disposition for gratuitous causes. There is no party here holding such a disposition. It does not seem to follow from a negation of a right to recal a trust,—the duration of which by its very constitution is temporary,—that all deeds done as to the subject matter of the trust are null if the trustees are left in full and unchallenged possession during the subsistence of the marriage, which is the fixed term for the endurance of the trust. The existence of the trust, and the creation of rights by the proprietrix of the estate during its continuance are or may be compatible. It may be perfectly true that the trust may not be revocable, and yet that there may be a full power of disposal in the proprietrix in so far as nothing is done to infringe upon the trust while it subsists. The trust is a burden on the property, and if it subsists, affects the right of the female pursuer to the extent of the trust purposes; but it does not follow that she, the party vested in the property subject to that burden, is absolutely incapacitated. All that the pursuers seek to declare is, that the trust may be put an end to, and that their powers should be held to be the same as if the disposition to these trustees had never been executed. It is one thing to find that the trust must remain while the marriage subsists; another, and a very different thing, to hold that all manner of deeds, onerous or gratuitous as to the estate, executed during the subsistence of the marriage, shall be null and void. There is no such question, it seems to me, raised in this summons. The question which it does raise is really as to whether the trust is revocable.

It may, I rather think, be assumed in considering this question that there is no right on the issue conferred by the marriage-contract. The form of the provision as to children is that of the reservation of a previous right only. The only question is, whether the recognition of the right might not affect the clause of prohibition? I should be disposed to concur with the Lord Ordinary as to the interest of children being disregarded, from the age of the female pursuer, if there were proof of skilled persons to support the view which he has expressed, which I should certainly expect to be easily capable of being adduced, or at all events any objection arising from the supposed interest of possible issue might be obviated by caution. But assuming, as I think we must, that the two pursuers are really the only parties vested in any rights under the trust, are we to deal with the case as one within their control? Is the trust liable to be revoked at their pleasure?

The revocation is directly in the face of a positive declaration that there shall be no such thing done. The parties bind and oblige themselves to uphold the deed. *Prima facie*, this stipulation should be given effect to. The contract is onerous in the highest sense of onerosity; and I confess that where an engagement is deliberately entered into to an express and special effect in an onerous deed, I see very great difficulty in disregarding that stipulation upon the principle that, notwithstanding the special compact, there is a general power to do the very thing. A renunciation of *jus mariti* was disregarded in our earlier law as water spilt upon the ground. The sounder practice of later times upholds the acts of parties; and I do not see why, if parties say, in terms explicit and unequivocal, we bind ourselves not to revoke,—and it is possible to figure any possible object to be obtained by the stipulation—a Court should, upon the mere *ratio* that they have the only interest in the matter, sanction the act of revocation.

There are two parties to this contract, and it is quite manifest that the interests of one of these at least may suffer by the revocation. Mrs Pringle is to be secured in the rent of Wilton Lodge, and interest of the £10,000 during her life. She is to ingather the rents, and to exercise, independent of the trustees or of any one, the ordinary acts of management and administration. The subsistence of this trust precludes the possible interference of the husband, and preserves to her the position and the interest of proprietrix. If she sold or burdened the property without the purpose of investment in other property, the husband would get the control of the proceeds of the sale or loan, and Mrs Pringle would lose the right which she certainly intended to preserve by the terms of the marriage-contract. Can we say that the very contingency was not in contemplation, and the trust created to prevent it? There are also provisions in favour of Mr Pringle which the sale of Wilton Lodge might altogether defeat, because he is secured by the contract an option dependent on Wilton Lodge remaining in the pursuer Mrs Pringle.

The case of *Anderson v. Buchanan* is one in which such a trust, constituted in an antenuptial contract and declared irrevocable, was upheld notwithstanding a revocation. It is said that the circumstances were different, and it is certain that there was a difference in the state of the facts of the case. The narrative of the deed set out in that case with plainness and precision the jealousy of the husband and the apprehension of the influence which he might exercise. This constitutes one distinction; a second is, that Mrs Torry Anderson was an entailed proprietrix, whose right was substantially those of a liferentrix of the entailed estate, and who had apparently little or no estate otherwise; and it was difficult to see what deed she could execute other than one by which her interest in the estate would be diminished. Here, there is no such narrative, and acts of sale or disposal of portions of the estate in feu may very well be beneficial, but still we have the same legal machinery resorted to: we have clear, intelligible interests to protect from possible detriment: we have the mode followed which the whole Court held effectual for such a purpose: we have a similar obligation—somewhat more stringently expressed if there be any difference—not to revoke. Can we, because of a less full narrative of the cause of execution, or a possible benefit as well as a possible prejudice, instead of a certain prejudice from anticipatory

acts, go in the face of that decision? When a matter so important in the law of conveyancing has once been settled as that a trust which shall not be revocable, notwithstanding of the absence of present vested interests in third parties under that trust, may be created in a marriage-contract, I do not think that it would be safe or right to disturb the judgment. Parties know that by the adoption of certain acts and declarations such a result may be obtained, and act upon the faith of it. How can we say that in framing this very deed the case of *Anderson* was not before the parties? The difference of the detail of narrative in a deed is not material. The decision is that of the whole Court, and it has stood as a ruling case for thirty years. It has not been, so far as I know, dealt with as an unsound decision by any judge in any subsequent case, or by any institutional writer. I do not myself consider the decision wrong, but if I did, I should adhere to it as a decree settling an important general question, and as having regulated numerous important transactions.

The two clauses in the deed on which the pursuers rely are, first; "that during the lifetime of the said Mary Anderson or Pringle, she should be permitted to have the full and unlimited use, enjoyment, and management of the lands of Wilton Lodge, including Dean Mill, and to draw and receive the rents and other profits thereof; and to grant leases and charters, and exercise all other rights of property in the same manner as if the said trust-assignment had not been granted."

I read this expression, conformably to the usual canon of construction, as covering acts in the exercise of property of the nature of the antecedent acts specified.

The other clause is, that the trustees acting for the time shall pay and make over the whole free interest of the said sum of £10,000, and certain other money, in a certain manner "aye and until the said Mary Anderson shall, by a writing under her own hand, addressed to the said trustees, direct the same to be otherwise applied, and which direction, if so given, the said trustees shall follow and comply with." As to which I have only to remark, that the exception applies to the particular matter here in question, which is specially dealt with and cannot go further.

The result to which I come is, that the interlocutor of the Lord Ordinary should be so far altered as to deal only with the first of the points disposed of, and that we should dismiss the action.

The other Judges concurred.

Agents for Pursuers—Scott, Moncrieff, and Dalgetty, W.S.

Agents for Defenders—J. & F. Anderson, W.S.

Friday, July 10.

OUTER HOUSE.

(Before Lord Barcaple.)

THOMSON v. THOMSON'S TRUSTEES.

Husband and Wife—Marriage-Contract Provision—Trust Provision—Debitor non præsumentur donare. By antenuptial contract of marriage, a husband settled on his wife, in the event of her surviving him, an annuity of £200. He died, leaving his property in trust for the purposes *inter alia* (1) of paying his widow an annuity of £400; (2) of paying annuities to

his brothers and sisters (which were to suffer a proportionate abatement in case of insufficiency of trust-funds to pay them in full); and (3) on the death of his widow of dividing the trust-estate among his brothers and sisters. Held (1) that the widow was not entitled to both annuities, but that the testamentary annuity was in satisfaction of the annuity provided by the marriage-contract, on the ground that *debitor non præsumentur donare*; (2) that, should the income of the trust-estate be insufficient to pay the widow's annuity in full, the deficit should be made up out of capital.

The late Mr William Thomson, by antenuptial contract of marriage, settled on his wife in the event of her surviving him an annuity of £200, and in security thereof conveyed certain heritable subjects to trustees. He also, by the same deed, assigned to his wife the whole household furniture of which he should die possessed. Thereafter, he executed a trust-disposition and deed of settlement by which he conveyed to trustees his whole means and estate (including the subjects previously conveyed in security to his marriage-contract trustees) for the purposes *inter alia* (1) of paying his widow an annuity of £400; (2) of paying annuities to his brothers and sisters; and (3) on the death of his widow of dividing the trust-estate among his brothers and sisters. The trust-deed also directed that "in the event of there being a shortcoming of funds to pay in full the annuities hereby provided to my said brothers and sisters after deducting all necessary expenses attending the execution of this trust, then the whole annuities provided to them shall suffer a proportional and equal diminution."

The widow now brought this action to have it found and declared that, besides the annuity of £400 provided by the trust-deed, she was entitled to the annuity of £200 under the marriage-contract; and further, that should the income of the trust-estate be insufficient for payment of these annuities, the deficit should be paid out of capital.

The defenders, the testamentary trustees, maintained that the provisions of the antenuptial contract were satisfied by those of the trust-settlement, and that the widow accordingly was not entitled to more than £400 a-year, and that only if the annual income of the estate was sufficient for the payment of that sum. The Lord Ordinary has found that, on a sound construction of the settlement, the annuity of £400 provided to the pursuer by the trust-deed, dated 29th March 1851, and codicils, must be held to be in satisfaction of the annuity of £200 which Thomson had previously bound himself to pay to the pursuer in the event of her surviving him; that the pursuer is not entitled to both annuities; and that the pursuer is entitled to payment of the £400 out of the capital of the trust-estate, so far as there may be a shortcoming of annual income for full payment thereof.

In a note his Lordship says:—

"The first question is, whether the pursuer is entitled to claim both the annuity of £200 provided to her in her contract of marriage and the annuity of £400 settled upon her by her husband in his subsequent trust-settlement. The Lord Ordinary cannot doubt that the principle *debitor non præsumentur donare* is applicable. It has been directly applied and held effectual for determining whether a subsequent voluntary provision by a husband or father was made in satisfaction of, or as additional to a prior obligatory provision in a marriage-contract. In other cases, effect has been re-