should not be revoked, and is the mere form in which a presently disposable fee is vested absolutely in the wife. This difference between the two cases warrants me, as I conceive, in not holding myself compelled to follow in the present case the course followed in *Anderson* v. *Buchanan*, but in applying to the case the sound legal principle by which I consider it to be ruled.

The same observation is applicable to the after case of *Pringle* v. *Pringle's Trustees*, July 3, 1868, which is in substance a similar case to that of *Torry Anderson*, and with the same clause of irrevocability attached to the trust in the marriage-contract.

The case of *Hope* v. *Hope's Trustees*, 15th March 1870, is a case entirely different from the present. In that case the marriage-contract provided a certain annuity to the lady in the event of her husband's decease, for which security was given by a joint obligation granted by the bridegroom's father, afterwards commuted for a disposition by the husband, who obtained right to the father's estate, of a house in Edinburgh in favour of trustees to hold for the lady's benefit. The Court held that the husband could not revoke this trust, and deprive his wife of this security, even with the wife's consent. They held, in other words, that he could not use his wife's consent, procured presumably by his influence over her as her husband, to validate an act performed by him for his own benefit to his wife's clear prejudice, and thereby not to carry out, but to frustrate, the right given her by the marriage-contract. The trust was in that case reasonably held constituted for the very purpose of protecting the wife against marital influence to this very effect, and to admit of her consent as sufficient to revoke the trust would be to hold the very act against which the trust was to guard to be an act capable of destroying it. It is clear that no sound deduction can be drawn from that case to the present.

I am therefore of opinion that the question put to us should be answered in the affirmative.

Agents for Admiral and Mrs Ramsay—Mackenzie & Kermack, W.S.

Agents for the Marriage-Contract Trustees—W. H. & W. J. Sands, W.S.

Friday, November 24.

SECOND DIVISION.

JANE KIPPEN *v.* RICHARD KIPPEN AND OTHERS.

Trust—Annuity—Revocation. Where an annuity is to be purchased for a woman, and settled on her exclusive of the *jus mariti* of any husband she may marry, but is not expressly alimentary, she is entitled to the sum that would be expended in the purchase of the annuity; and if she has conveyed her right to trustees, with directions to pay her the life interest exclusive of the *jus mariti* of any husband she may marry, but is unmarried, she may revoke the trust-deed.

By trust-disposition and settlement executed in 1849 the late William Kippen conveyed his whole estate to trustees, of whom his son James Hill Kippen is now the sole survivor. By codicil in 1853 he directed his trustees immediately after his death to purchase or provide from his means and estate an annuity of £120 sterling in favour of each of his said daughters, payable at the usual terms, the same to be exclusive of the *jus mariti* of their respective husbands in the event of their marriage, and of their debts and deeds, and of the diligence of their creditors, which annuities thereby directed to be provided to his said daughters should be in lieu of any former bequest in their favour, and in full of all other claims legally competent to them upon his means and estate. The residuary legatees were the pursuer's brothers Richard Kippen and James Hill Kippen. Mr Kippen died in 1853. The trustees proposed to purchase an annuity for £120 sterling in favour of the pursuer, in implement of the provisions contained in her father's settlement and codicils, but the pursuer was desirous that this should not then be done, and ultimately it was arranged that the pursuer should grant, and accordingly on April 14, 1856, she did grant a trust-deed, whereby she appointed her brother Richard Kippen, Andrew Buchanan Yuille, and James Keyden, and certain others now deceased, trustees for her behoof, with full power to them to uplift, receive, and discharge from her father's trustees such sum of money as should be deemed by them to be an adequate price or value for the annuity of £120 sterling, according to the tables provided by the Act 10 Geo. IV. c. 24. The second purpose of the trust gave powers of investment to the trustees, and declared that the trustees should have full power and authority at any time thereafter to invest the trust funds, in whole or in part, in the purchase of an annuity for the pursuer's behoof, seclusive of the *jus mariti* of any husband whom she might marry, and in no way affectable by her own facts and deeds, or by the facts and deeds of such husband, or by the diligence of creditors. In the third place, it was declared that the trustees should make payment to the pursuer during all the days and years of her life, and that also seclusive of the *jus mariti* or right of administration of any husband she might marry, of the whole free annual interest, profits, and dividends of the trust funds thereby committed to them, and in the event of her trustees at any time thereafter purchasing an annuity of £120 for her, and of there being a surplus of the fund remaining after making such purchase, it was declared that it should be lawful for them to make payment to the pursuer or otherwise to apply for her behoof the surplus of the principal sums of money thereby intrusted to them, it being thereby declared to be the pursuer's intention that the trustees should have as full powers in every respect over the surplus of money as what any person otherwise unfettered enjoyed or possessed in the management of his own affairs, and that neither the pursuer herself nor any husband whom she might marry should have any right or title to interfere with the management of the funds thereby entrusted to them, or to control the trustees in the application of the same, or the annual profits and proceeds thereof otherwise than as above provided for; and that all receipts for annual profits by the pursuer alone should be full and ample discharges and acquittances therefor without the concurrence of any such husband, any law or custom to the contrary notwithstanding. Lastly, the trust-deed provided that after the death of the pursuer her trustees or trustee should denude themselves of the trust thereby created, and should pay over the sums of money then remaining in their hands to the pursuer's heirs, executors, or assignees whomsoever.

in such manner and way as she should at any time of her life, and even on deathbed, by any writing under her hand, direct, and failing such appointment, to her own nearest heirs whomsoever.

By discharge dated May 1856, and recorded in the Books of Council and Session on March 3, 1860, the pursuer, with the special advice and consent of her trustees under her trust-deed, and of her brothers James Hill Kippen and Richard Kippen, her father's residuary legatees, on the narrative of the codicil of 7th January 1853, and that she had requested James Hill Kippen and Richard Kippen to consent to the sum required being paid to her trustees, and that her father's trustees had consented, on receiving a discharge from the pursuer, and obligation by her and her brothers freeing and relieving them of the annuity and all further responsibility or liability in regard to it, and on the further narrative of the trust-deed by the pursuer, and payment of the sum of £2448 sterling to the trustees named in it, discharged the trustees of her father of the annuity and of all claims and demands competent to her against them or the trust-estate. The discharge also contained an obligation by the pursuer and her brothers to relieve their father's trustees of all responsibility, and a declaration by the trustees under the pursuer's trust-deed, with her consent, that they held the money paid to them for the purposes of the trust, and the further declaration that in the event of the pursuer effectually challenging the discharge of the annuity thereby granted, and repudiating the same, and calling upon the trustees of William Kippen still to make payment of the said annuity, the trustees under her trust-deed should be bound to apply the sum in the purchase of an annuity.

Miss Kippen now raised this action to have it found that she was entitled to revoke her trust-deed, and demand payment of the capital conveyed to her trustees, or at least the surplus after purchase of an annuity of £120. She called as defenders her trustees and James Hill Kippen for any interest he might have. Messrs Yuille and Keyden were the only parties who appeared as defenders. They stated they were willing to pay over the surplus claimed, but that they were not entitled to pay over the principal without the consent of Mr James Hill Kippen, which had been refused, or the sanction of the Court. The Lord Ordinary (Mure) held the trust-deed only revocable *quoad* the surplus.

The pursuer reclaimed.

Solicitor-General and Balfour, for her, argued that as Miss Kippen was the sole party interested in the deed she was entitled to revoke it. She could sell the annuity if purchased for her, and trustees were not entitled to do what could be undone—*Gordon* v. *Gordon's Trustees*, March 2, 1866. The provision was not alimentary. It was settled in English law that an annuitant could demand the capital sum—*Stokes* v. *Cheek*, 29 L.J. (Ch. R.) 922. And this had also been decided in Scotch law in the case of *Tod's Trustees*, March 18, 1871.

Watson and J. M. Lees replied that the direction was to "purchase or provide from my means and estate," and if the trustees gave Miss Kippen the interest to the amount of £120 they might retain the capital. In *Tod's Trustees* the direction was to purchase the annuity only if the trustees thought fit, and the annuitants were the only parties interested. Here there were residuary legatees. Revocation of the trust-deed would cause the trustees to repay the capital to Mr Kippen's trustee, as indeed they were bound to do for their own safety. The provision was intended to be alimentary. A truster could not revoke a trust-deed granted to guard against a specific risk—*Balderston* v. *Fulton*, Jan. 23, 1857—or where the restrictive terms of the deed were a condition of its being granted. Even if Miss Kippen was entitled to revoke the trust-deed she should have called her brother, not merely for his own interest, but as trustee under her father's settlement.

At advising—

Lord Cowan had not been present at the case of *Tod's Trustees*, but felt satisfied it was a sound decision. The principle settled in that case was a very important one in the law of trusts—that where there were no parties interested other than those to whom the funds were left they were entitled to disregard the fetters that had been imposed on the bequest. Practically there was here no ulterior interest—the interest of Miss Kippen as regarded her portion was exhaustive of all interests in it. The residuary legatees had none. And the judgment the Court were about to pronounce would effectually protect Miss Kippen's trustees and her father's trustee from any liability. It was simply carrying out the principle of the English case of *Stokes* v. *Cheek*, and the cases in this Court of *Tod's Trustees* and *Gordon's Trustees*.

The restrictive words of the codicil were to apply to the truster's daughters if they got married before his death, but if they were unmarried then the annuity was given absolutely. He held she was entitled at her father's death to have demanded the capital sum of this annuity, and therefore if she was entitled to it at her father's death she was entitled to revoke the trust-deed, and have it now. She was marriageable, and might wish to marry, and if so, and she was to get only an annuity, her children would have nothing.

Lord Benholme thought the conclusions of the summons were well calculated to bring out the rights of the lady. The conclusion was double, not merely that her trust-deed was revocable, but that she was entitled to have payment of the sum in the hands of her trustees, and this called her father's trustee into the field. The English decisions had gone ahead of the views of the Court in the case of *Torry Anderson*, but latterly our law had been carried in the direction of English law upon the subject. He agreed with Lord Cowan in the opinion he had given.

Lord Neaves held the citation of Mr Kippen's trustee kept the pursuer's trustees free from risk, and the conclusions of the summons were sufficient to develop the meaning of the pursuer that she was entitled to claim the money, and not that it should be paid back to her father's trustee. If he meant to say the revocation of this deed should make the money revert to him he should have appeared in the case. He had been called, and he was the proper contradictor. But he did not appear, and therefore the Court had the real point at issue properly before them.

The first case in this direction was the case of *Gordon's Trustees*, and in it the Court held that there was no use to do what could be undone. It was immaterial how the exclusion of the *jus mariti* was construed. The provision was not alimentary, and Miss Kippen was entitled to the capital of it.

The LORD JUSTICE-CLERK entirely concurred. Even had the trustee under Mr Kippen's settlement appeared his contention would have been fruitless. The principle underlying the cases of *Gordon* and *Tod's Trustees* was that where there was no conflicting or further interest the beneficiary was entitled to the trust-estate unrestrictedly. The case of *Tod* had no doubt another element in it, but the decision rested on this ground, and in this case the question was raised very fairly.

LORD COWAN wished to say that had the trust-deed made the daughter's interest purely alimentary the case might have been different.

Agents for Miss Kippen—Dalmahoy & Cowan, W.S.
Agents for Trustees—Ronald & Ritchie, S.S.C.

Saturday, November 25.

BLAIKIE *v.* PEDDIE.

Bankrupt—Alimentary Fund. A bankrupt who was in the enjoyment of an alimentary provision of about 30s. a-week, *held*, in the circumstances, not bound to pay any part to his creditors.

Andrew Blaikie was sequestrated, and presented a petition in the Sheriff Court of Edinburgh for discharge. The Sheriff-Substitute (HAMILTON) granted the discharge. The facts of the case, and the contentions of the trustee, Mr Peddie, C.A., sufficiently appear from the following note appended to the interlocutor of the Sheriff-Substitute:—

"*Note.*—The application is not opposed by any of the creditors in the sequestration, but the trustee maintains that as a condition of his discharge the petitioner, who carried on business as a merchant in London, should secure him in one-half of an alimentary provision, which he the petitioner enjoys under the trust-settlement of his father, consisting of rents drawn from the estate of St Helens, near Melrose. The gross amount of these rents is about £140 a-year, but the petitioner states, and the accuracy of the statement is not disputed, that the free proceeds actually paid to him by his father's trustees do not exceed 30s. a-week—a sum which he maintains is not more than sufficient for the maintenance of himself and his wife. Having regard to the position in life of the petitioner, to his age, and to the fact, which is sufficiently instructed by the medical certificate of Dr Anderson, produced with the present proceedings, that he is disabled by a complication of maladies from working for his livelihood, it does not appear to the Sheriff-Substitute that he would be justified in refusing the petitioner his discharge merely because he declines to make over any part of the provision referred to for behoof of his creditors."

The trustee appealed.

ORR PATERSON for him.

MAIR and RHIND for respondent.

At advising—

LORD JUSTICE-CLERK—The appellant has not been able to point out any case in which the Court found that a bankrupt was bound to make payment to his creditors out of an alimentary fund. We must be satisfied that the bankrupt has done all he can for the creditors. In this case I do not think that the course he has taken is at all unreasonable. It is beyond our power to attach the alimentary provision.

LORD COWAN—This is a case for the exercise of the discretion of the Court. We must refuse or grant a discharge according to the circumstances of the case. Had the alimentary fund been an income of £1000 a-year I cannot say that the Court would not have taken that into consideration in judging whether the discharge ought to be granted. We must consider all the circumstances of the bankrupt. Other sums of money came to the bankrupt from his father besides this alimentary provision of £130 per annum, and these have come into the hands of the trustee. It is not the fault of the bankrupt that these have been taken to meet the claims of creditors whose debts were preferably secured. The report by the trustee is favourable to the bankrupt. We have it certified that he is in a bad state of health. The case now is in a different position from what it was when before the Lord Ordinary in 1870. Time is an important consideration, as we held in the case of *Campbell*. I concur that in the special circumstances of this case we should grant the discharge.

LORD BENHOLME—I concur. No precedent has been given for the course recommended to us. I find no case in which a discharge has been refused because the bankrupt has been in the enjoyment of an alimentary fund. It would require a very strong case to induce us to begin to make such an exception. We have not a strong case here. Bad health is a very important element in the case. I think we should adhere.

LORD NEAVES—I am of the same opinion. A mere declaration that a fund is alimentary will not make it so. We have to consider whether, looking to the rank and circumstances of the bankrupt, this could reasonably be held to be a proper provision. This is by no means an extravagant one. The bankrupt is a married man, and has been accustomed to live as a gentleman. It would have been different if any of his debts had been incurred by his own misconduct, for in such a case he would not be entitled to his discharge. But we cannot make a resolutive condition that unless he pays a part of this alimentary fund to his creditors he is not to get his discharge.

Agents for Petitioner—Lawson & Hogg, S.S.C.
Agents for Respondent—J. & A. Peddie, W.S.

Monday, November 27.

FIRST DIVISION.

(Before Seven Judges.)

WATSON & CO. *v.* SHANKLAND AND OTHERS.

Ship—Charter-Party—Advance by Charterer for Ship's Disbursements—Repetition—Insurance. A ship was chartered to proceed to Calcutta, and there load a cargo from the charterers for the United Kingdom, "the freight to be paid on unloading and right delivery of the cargo." The charter-party contained the following clause—"Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission." The ship reached Calcutta, and whilst there money was advanced by the charterers for the ship's disbursements. The ship was lost with her cargo on her homeward voyage.

Held, in an action by the charterers for recovery of their advances from the shipowners