lows in a letter from his agent to the defenders' agent:—"Mr Junner will be in attendance at that time and place to be examined by Dr P. H. Watson, Dr Dunsmure, and any other medical gentleman you may choose to send except Professor Spence. Mr Junner declines to be examined by him because of the treatment he received from the Professor when he called upon him as an ordinary patient, while suffering greatly both in body and mind through the results of the accident. On that occasion Professor Spence declined to look at him, or to give him any advice which would tend to relieve his pain and anxiety, because he (the Professor) stated that he could not do so, being retained by the North British Railway Company to examine patients, and give evidence in their behalf. Mr Junner on that occasion was very much hurt in his feelings when he reflected that a gentleman of the eminence and high standing of Professor Spence should allow himself to be feed or retained by the North British Railway Company so as to be prevented in giving his advice or assistance to any member of the public who might be hurt through the carelessness of the North British Railway Company."

In their answer to this letter the defenders' agent stated:—"Professor Spence states that nothing that took place at the interview between him and Mr Junner and Dr Young warrants the statements in your letter. Nothing said by Professor Spence was intended, or could reasonably be supposed to be in the least calculated, to hurt the feelings of any one, and the statements as to his being retained and feed by the defenders are unfounded and uncalled for."

The defenders therefore moved the Lord Ordinary for an order on the pursuer to submit to examination by Professor Spence.

The Lord Ordinary pronounced this interlocutor:—

"13*th March* 1877.—Having heard counsel on the motion of the defenders for an order ordaining the pursuer to submit himself, on behalf of the defenders, to examination by Professor Spence and other surgeons, Refuses the motion as regards Professor Spence, on the ground that the pursuer is unwilling to consult with that gentleman, and, as regards the others, that the motion is unnecessary, in respect that the pursuer states that he is willing to submit to examination by any other surgeon or surgeons: Grants leave to the defenders to reclaim against this interlocutor."

The defenders reclaimed.

At advising—

Lord Justice-Clerk—There is no doubt that we have the power to make the order which the Lord Ordinary has refused. The only question is, whether the pursuer, who says he is ready to submit to the inspection of any medical man for the defenders except Professor Spence, is bound to submit to examination by that gentleman, against whom he seems to entertain some not very intelligible grudge or pique. I should be slow in a matter of such delicacy as this to disregard any objection made to examination by a particular doctor even though the objection appeared to be altogether fanciful, though the result was to deprive a litigant of the services of an expert whom he was in the habit of employing. But looking to the explanations given by Professor Spence, I am clear there is no ground for refusing the motion.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for the North British Railway Company against Lord Adam's interlocutor of 13th March 1877, Recal the said interlocutor, and, on the motion of the reclaimers, appoint Mr J. C. Junner to allow himself to be examined by Professor Spence, along with the other medical gentlemen, on behalf of the Railway Company, reserving the question of expenses; and decern."

Counsel for Pursuer—Fraser—Rhind. Agent—Robert Menzies, S.S.C.

Counsel for Defenders—Jameson. Agent—Adam Johnston.

Tuesday, March 20.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

STANDARD PROPERTY INVESTMENT COMPANY *v.* COWE AND OTHERS.

Husband and Wife—Marriage Contract Provision—Infeftment—Power of Renunciation.

Where a wife, by virtue of an antenuptial marriage-contract, had been infeft in a liferent out of her husband's estate, *held* that she was capable of renouncing such provision *stante matrimonio* by consenting to onerous alienation of the estate by her husband.

This was an action raised by the Standard Property Investment Company against Henry Cowe, fishcurer in Edinburgh, Mrs Patricia Chalmers Hunter or Cowe, his wife, and others. The following narrative is taken from the Lord Ordinary's note:—"The defenders, Henry Cowe and his wife Patricia Chalmers Hunter, on the occasion of their marriage in 1869 entered into an antenuptial marriage-contract, by which Henry Cowe, on the one hand, disponed certain subjects belonging to him at Bonnington, near Edinburgh, to his wife in the event of her survivance, and so long as she should remain his widow, in liferent, for her liferent use allenarly, declaring that in the event of her entering into a second marriage a liferent annuity of £25 should be substituted for the foregoing liferent. These provisions were accepted by her as in full satisfaction of her claims for terce and *jus relictæ*. On the other hand, Mrs Cowe conveyed the whole estate, heritable and moveable, then belonging to her or which she might acquire or succeed to during the marriage, to trustees, for the purposes specified in the contract. Her own estate was thus protected against her husband and his creditors, and against her own acts, during the subsistence of the marriage, by the interposition of trustees for her behoof; but the liferent right provided to her by her husband was not so protected. She was, however,

infeft in her liferent of the subjects, conform to notarial instrument recorded in the Register of Sasines on 9th May 1872.

"In 1872 Henry Cowe, the husband, in order to pay off a debt of £1025 due by him to the Commercial Bank, borrowed that sum from William Hunter, and in security thereof he, with consent and concurrence of his wife for all right and interest competent to her in the premises under and in virtue of the said marriage-contract, conveyed to Hunter the subjects in question, and assigned a policy of assurance on his life, conform to bond and disposition and assignation in security, which, with a judicial ratification thereof by his wife, was recorded in the Register of Sasines on 1st July 1872.

"In 1874, in order to pay off the debt to Hunter, Henry Cowe borrowed the sum of £1025 from the pursuers, the Standard Property Investment Company, in consideration of which Hunter assigned to the pursuers the said bond and disposition and assignation in security, conform to assignation by him, with consent and concurrence of the defenders, Mr and Mrs Cowe, for all right and interest competent to them in the premises, dated 13th and recorded in the Register of Sasines the 15th August 1874. This assignation was not judicially ratified by Mrs Cowe, but it is not alleged that it was extorted from her by her husband *vi aut metu*. It is however alleged, and it is not disputed, that the loan of £1025, in security of which these deeds were granted, was wholly applied in payment of the husband's debts, and was not to any extent paid to or applied for behoof of Mrs Cowe.

"In the beginning of 1875 the estate of Henry Cowe was sequestrated, and the defender David Kinnear was appointed trustee in the sequestration. The interest and instalments of the debt fell into arrears, and the pursuers called up the loan in October 1875; and on the expiry of the notices in February 1876 they brought the subjects to sale by public roup under the power of sale contained in the bond and disposition and assignation in security; and on 23d March 1876 they were purchased at the roup by the defender, John Alexander Brodie, at the upset price of £1150. Brodie is willing to implement the sale, but he has been interpelled by the defender Mrs Cowe, who maintains that her consent to the security was a gratuitous donation to her husband *inter virum et uxorem* which she is entitled to revoke, and that the sale cannot be allowed to be completed except under reservation of her liferent rights; and in order to have that question settled the pursuers have raised this action, in which they ask for declarator (1) that under and by virtue of their said securities they have full power to sell and dispose of the said subjects over which their said securities extend, and that free and disencumbered of all right which might be pretended by the defender Mrs Cowe under her antenuptial contract of marriage to the liferent of the said subjects in the event of her surviving her husband; (2) that the defender Mrs Cowe has no right or title, by virtue of the said antenuptial contract, or her infeftment therein, or on any other ground, to interfere with or object to the sale of the said subjects, which has been arranged between the pursuers and the other defender John Alexander Brodie; (3) that the said subjects so sold will henceforth stand free and disencumbered of the right of liferent of the said Mrs Cowe, contained in the said antenuptial contract of marriage, and of the said contract itself; and (4) that the sale of these subjects to Brodie, under the powers contained in the said bond and disposition and assignation in security was a valid and effectual sale, and that the defender Brodie is bound to implement the same; and there is a petitory conclusion against him for payment of the price of £1150, with interest, which is by minute restricted to the interest allowed by the bank on the said price, which he has consigned.

"Defences have been lodged only for Mrs Cowe, to whom, as her husband and his creditors have an adverse interest, Mr C. B. Logan, W.S., has been appointed *curator ad litem*. In her defences she maintains that the sale, if carried out, must be made always under the burden of the liferent provided to her by the marriage-contract with her husband should she be the surviving spouse, and that the deeds founded on by the pursuers, viz., the bond and disposition and assignation in security, and the assignation thereof, both bearing to be executed with her consent, were, in so far as they import a discharge of her liferent right, granted by her without consideration, and for her husband's behoof, and are therefore revocable by her as a donation *inter virum et uxorem*."

The pursurs pleaded—"(1) Under and by virtue of the bond and disposition in security and assignation thereof above mentioned, the pursuers have full power to sell and dispose of the subjects libelled, and to apply the price, so far as necessary, in payment of the sums secured over the same. (2) The defender Mrs Cowe, not being barred by the said antenuptial contract, or otherwise, from disposing of the contingent right of liferent provided to her, was entitled to give her consent to the said bond and disposition in security and the assignation thereof, and the said right of liferent was thereby effectually renounced and discharged. (3) The said defender is barred by the judicial ratification condescended on from challenging the bond and disposition in security. (4) A valid and effectual contract of purchase and sale of the subjects libelled having been concluded between the pursuers and the defender Mr Brodie, the pursuers are entitled to have decree of declarator to that effect, and they are also entitled to have decree of implement. (5) The pursuers being, under and in virtue of the said bond and disposition and assignation thereof, *in titulo* to sell the said subjects, and to grant a valid disposition thereof, they ought to have decree in terms of the conclusions."

The defender Mrs Cowe pleaded—"(1) The liferent right in favour of the present defender contained in the said ante-nuptial contract of marriage being an onerous and reasonable provision created for her behoof after her husband's death, could not be discharged by her during his life, and the pursuers are only entitled to sell the said subjects under burden of the said liferent. (2) The deeds founded on by the pursuers, in so far as they import a discharge of the defender's liferent right in the said subjects, having been granted by her without consideration, and for her

husband's behoof, are revocable by her as donations *inter virum et uxorem*. (3) The pursuers being only entitled to convey the subjects in question subject to the present defender's liferent right, the conclusions of the summons, so far as directed against her, are incompetent, and she should be assoilzied, with expenses."

On 5th December the Lord Ordinary pronounced the following Interlocutor:—"Finds, decerns, and declares against the defender Patricia Chalmers Hunter or Cowe, and, in absence, against the other defenders, in terms of the whole conclusions of the summons, as restricted by the minute appended to the summons, and decerns, reserving to the defender Mrs Cowe all claims competent to her under and in virtue of her marriage-contract mentioned in summons against her husband Henry Cowe, and the trustee on his sequestrated estate, and against the price of the subjects mentioned in the summons, in so far as any free balance thereof may remain after satisfying the debt due to the pursuers, and arrears of interest and instalments thereof, and the expenses of the sale of said subjects, and the answers of all concerned as accords of law," etc.

"*Note.*—The question raised in the present action is, whether it is competent for a married woman, who has been infeft in a liferent or other provision out of her husband's estate, in virtue of her antenuptial marriage-contract, to renounce or discharge such provision *stante matrimonio*, by consenting for her interest to the alienation of the estate by her husband to a third party for onerous considerations. I had occasion to consider this question, and I decided it in the affirmative, in March last, in an action between the widow of the late Mr Falconer of Carlowrie and the trustees of Mr Hutcheson, who had purchased from her husband, with her consent, the estate of Carlowrie, in which she had been infeft in security of an annuity provided to her by her antenuptial marriage-contract. And as the question was then discussed as being one of general interest and importance, I thought it right, in the note appended to my judgment, to trace the history of this law, and exhibit the leading authorities applicable to the question. The parties having acquiesced in that judgment the case has not been reported, and I regret that I am thus unable to refer to it (as I should have wished to do) for the grounds upon which I have pronounced the foregoing judgment in the present case. I must, therefore, once more express my reasons for the judgment in detail.—[*Here follows the narrative given above.*]

"The defender does not allege that the price of £1150 to be paid by the defender Mr Brodie for the property is not a full and fair price, nor does she say that the sum of £1025, in consideration of which the bond and disposition in security was originally granted, was not paid by Mr Hunter to her husband, or that the like sum was not truly advanced by the pursuers to her husband as the consideration for their obtaining the assignation to the said bond and disposition in security. Nor does she say that her consent to the deeds, by which she virtually renounced her liferent over the subjects, was extorted from her *vi aut metu* by the force or fear of her husband. Indeed her judicial ratification of the bond and disposition in security would exclude any such ground of challenge. Her main ground of defence is that her consent to the sale of the property and her renunciation of her liferent are not now binding upon her, in respect that she could not *stante matrimonio* lawfully renounce the provision made for her in the antenuptial contract of marriage. The question is a material one for both the pursuers and the defender, and it is also of much importance in its general legal aspect. The authorities upon which the defender mainly relies are the judgments in a series of well-known cases, beginning with the case of *Anderson* v. *Buchanan*, and ending with the recent case of *Fletcher Menzies* v. *Murray*, in all of which it was held that a married woman could not during the life of her husband effectually revoke a trust constituted in her antenuptial contract of marriage for the purpose of securing the provision thereby made in her favour, or rather protecting her own separate estate; and if the present defender had been in the position which the married woman occupied in each of these cases, judgment must have been pronounced in her favour. But it appears to me, after careful consideration of the whole case, that the circumstances are essentially different from those which existed in the cases referred to, and that the principle which guided the Court in all these cases is not applicable to the present case. The principle I understand to be, that where in a antenuptial contract of marriage the provisions in favour of the wife for her own separate estate are vested in the trustees for her behoof, the law holds that this is done for the express purpose, not only of securing the wife against the risk of loss from the acts and deeds of her husband, or from his subsequent insolvency, but of protecting her against all influence and interference on his part, and against her being induced by her desire unto her husband to renounce or alienate her provisions or estate. In short, the trust is regarded as a means, if not the only effectual means, of protecting the wife's marriage-contract provisions and her separate estate, not merely against her husband, but quite as much against herself and her own acts, and it is now settled that such a trust is irrecoverable *stante matrimonio*, whether it is declared in the marriage-contract to be so or not. But I am not aware of any case in which it has been held that a married woman has not power effectually to renounce, alienate, or discharge during the marriage a provision in her favour contained in her marriage-contract not secured by a trust but merely constituted by an infeftment in her own name, without any restriction against alienation or renunciation, or without any declaration that it shall be irrevocable. There are, on the other hand, many cases in the books in which such renunciation and alienation have been expressly sustained as competent and lawful, and as binding upon her if judicially ratified and in some instances even where not ratified such deeds are regarded in the same light as alienations of the wife's heritable separate estate, where that has not been vested in trustees by the antenuptial contract, which are undoubtedly lawful if consented to by her husband and ratified by her *coram judice*, and outwith the presence of her husband.

"And here it may be observed, that so far

from the alienation or discharge by a wife of her marriage-contract annuity or jointure being regarded by the law as *ultra vires* of her, and inept, if granted by her own voluntary act, the system of judicial ratification which has now prevailed for nearly four centuries proves very clearly that the fact of coverture will not entitle a married woman to challenge such a deed where there has been no such ratification, unless she can establish that it has been extorted by her husband *vi aut metu*. As the defender contends, the fact of the discharge of her jointure having been granted by her, a married woman, *stante matrimonio*, is sufficient to entitle her to revoke the deed,—a judicial ratification, which merely bars her from challenging it on the ground of force and fear could afford no security to parties onerously accepting such a deed. Now, it is worthy of notice that the first case in which such ratification was held sufficient to bar a married woman from revoking a deed granted by her during marriage had reference to an alienation of jointure lands. 'This doctrine,' Erskine says (i. vi. sec. 34), 'was established by a judgment in a private cause pronounced by the Lords of Council 6th March 1481, which, because it is engrossed in the body of our statute 1481, c. 83, became part of our written law,' The title of the Act, as printed in the duodecimo edition of 1682, is—'Ane woman, conjunct fear, makand faith that scho sall never cum against the alienation thereof sall nocht be heard eftirwardes to impugne the said alienation;' and the words of the judgment are as follows:—'Memorandum.—The sext day of March, the yeir of God 1481 years. Robert Danielstown was persewed be a woman called Glen before the Lordes of Councel, and scho wald have cummin against her aith that scho maid in judgment before the official of Glasgow, and there was schawin ane instrument under the seale of the said official that scho consented to the alienation of sik lands, and swore that scho suld never come in the contrair hereof, and would have the saidis lands, allegeand that it was her conjunct feftment, and maid revocation after her husband's decease, sayand that he compelled her thereto. The action was delivered against this woman.'

"The following reference to some of the institutional writers and decided cases suffice in my opinion to shew that coverture, apart from force and fear of the husband, does not disable a married woman from discharging or renouncing a liferent of lands or jointure, even when constituted by antenuptial contract, in cases in which third parties have onerously contracted with her husband on the faith of her consent. Thus Erskine, in further treating of the subject, says (i. vi. sec. 33)—'In like manner, if the husband had, with the wife's consent, made over to a stranger any part of the lands settled on her in liferent, action was competent to her for setting aside the alienation, upon the ground that the consent given by her to the deed had been extorted from her by her husband. To secure the grantees against the consequences of such actions, when they were pursued vexatiously, ratifications have been introduced into our practice, by which the wife, appearing before a judge, declares upon oath that her husband neither induced her by force nor fear to grant the deed or give her consent, but that she did it freely and for her own utility, and that she shall never afterwards call it in question.' And again (*ib.* sec. 35)—'Every deed by which any right accrues to a third party may be thus secured by the wife's ratification, though a consequential benefit should arise to the husband; for the aforesaid Act 1481, which establishes the law of ratifications and fixes their extent, applies them expressly to the case of a wife whose husband was pressed by debt to sell his estate, and to have renounced her interest in her jointure lands that the purchase might be disencumbered, and had judicially ratified her renunciation.'

"So also Craig, writing long before the time of Erskine, says,—'Quomodo autem in alienatione per maritum facta, illius prœdii, cujus usufructum mulier habet, uxoris consensus interponi debeat, multi quæstionem movent. Antiquitus coram judice tantum et extra præsentiam mariti interponebatur; hodie si subscripserit instrumento alienationis coram testibus sufficit, nisi post, si ad subscribendum coactum vi et metu probare poterit; tutius tamen fecerit, qui in judico ejus consensum extra mariti præsentiam obtinuerit.'

"The cases now to be noticed shew that, where force and fear are not alleged, such deeds are, as Craig indicated, sustained even without ratification. Thus, in the case of *Hepburn* v. *Naismith*, 16th June 1613, a woman having consented to an alienation made by her husband of lands wherein she was infeft by him before her marriage in liferent or conjunct fee *intuitu matrimonii*, or for an annual rent of 400 merks yearly during her lifetime, the alienation was held to be effectual and without her judicial ratification, 'unless she had libelled *virum et expressum metum* by relevant circumstances and deeds, and proved the same by lawful and ordinary means.' In the case of *Grant*, 8th July 1642, a married woman having consented to and judicially ratified a disposition made by her husband of a tenement in Perth provided to her in conjunct fee by her contract of marriage, she was held not entitled to set it aside. And a similar decision was pronounced in the case of *Hay* v. *Cumming*, 28th June 1706, in which the question was distinctly raised and decided that a married woman, if not coacted *vi aut metu*, might effectually discharge her jointure *stante matrimonio* by consenting to the alienation of the subjects over which it is secured to a third party for a fair price. The case of *Lockhart*, 4th November 1762, is another decision to the like effect. The only other case of the kind to which I will refer is the case of *Arnold* v. *Scott*, 28th June 1673, where the widow of William Baxter having raised an action for maills and duties of her liferent lands, wherein she was infeft on a contract of marriage, the defence was that she was denuded by her consent to a wadset of the lands granted by her husband to the defender and judicially ratified—'Wherein, albeit there be a back tack, yet it is set to the husband, his heirs and assignees, and was apprised from him, to which apprising the defender hath right.' The Court, drawing the distinction between the wadset to the onerous creditors and the back-tack to the husband, held that the judicial ratification of the wife could only be extended to the interest of the wadsetter, and found the back-tack, being only in favour of the husband, a donation revocable, and found the wife to have the right

to the maills and duties more than the wadsetter's annual rent.

"In contrast to these cases, reference may be made to the cases of *Cassie*, 27th June 1632, Mor. p. 10,279, and *Woodhead*, 24th June 1662, M. p. 10,281, in both of which a married woman's consent to a wadset granted by her husband of her jointure lands was held to be revocable, and was set aside even against an onerous wadsetter, because she alleged and proved that it had been extorted from her by her husband by violence, and she had not ratified the deed.

"An authority which at first sight appears to be counter to these is the case of *Scott* v. *Cranstoun*, M. 6,108, reversed by the House of Lords, 2 Paton's App. p. 425. The rubric of the case is, as reported by Mr Paton,—'A husband procured a renunciation from his wife of her provision secured preferably over his estates, in order to allow them to be sold and the price paid to his creditors. Held the wife not bound by the renunciation, although the parties were interested and had agreed to abate claims on her granting it.' This rubric does not correctly state the import of the decision of the House of Lords, which, it is evident from the report, proceeded upon the grounds (1) that the renunciation had been granted by Lady Cranstoun under essential error on her part; (2) that although the creditors had agreed to make certain abatements in respect of that renunciation, nothing was done by them to implement the agreement, and nothing followed upon it; (3) that there was a final judgment of the Court of Session pronounced years before the ultimate judgment appealed against, to the effect that there was no evidence that the transaction between the creditors and Lady Cranstoun was ever concluded, and that the creditors were therefore not bound to give an abatement from their debts. It also appeared from documents produced in the House of Lords that negotiations had been renewed, although never completed, for a new deed of renunciation being granted by Lady Cranstoun. This case, therefore, is no authority for holding that a married woman cannot effectually renounce during her marriage an antenuptial marriage-contract provision made directly in her favour.

"These cases, which, as I think, must be taken as establishing the law that a married woman may effectually alienate or renounce a security held by herself directly over her husband's estate for her marriage-contract provisions, and that she cannot competently challenge her renunciation as being a donation *inter virum et uxorem* in a question with a third party, who, on the faith of it, has erroneously contracted with her husband, do not appear to me to be in any way affected, or to have their authority lessened, by the judgments in the recent cases already referred to, viz., *Anderson* v. *Buchanan*, 15 Sh. 1073; *Pringle* v. *Anderson*, 9 Macph. 982; *Hope* v. *Hope's Trustees*, 8 Macph. 699; *Ramsay* v. *Ramsay's Trustees*, 10 Macph. 120; and *Fletcher Menzies* v. *Murray*, 2 Rettie, 507. In all of these cases a trust was interposed for the express purpose of protecting the wife's interest. Such trusts are of comparatively recent introduction, and it is obvious that they enable parties to secure the provisions in favour of a married woman, and to protect her own separate estate in a much more effectual manner than by taking infeftment on the contract in her own name, or by allowing her separate estate to remain under the original infeftments in her own favour. Now, if I have not entirely misinterpreted the judgments in these recent cases, the existence of the trust was in each case the ground on which the Court held the wife's estate and the provisions in her favour to be effectually protected against the acts of the spouses *stante matrimonio*, and a provision not so protected must, in my opinion, be dealt with as the provisions were dealt with in the earlier decisions to which I have adverted. In the present case it was not intended to give the defender the security of a trust with reference to her liferent. This is shewn by the circumstance that the funds coming from herself were all carefully vested in trustees for her behoof, but no such precaution was taken with reference to her liferent. I am therefore of opinion that the defender is not entitled to be reinstated in the full right of her liferent as against the parties who lent money onerously and *in bona fide* over the property, and who have now brought the property to sale under the powers which she, and her husband with her consent, conferred upon them.

"The case of *Rae* v. *Neilson*, 2 Rettie 676, was referred to by the defender as virtually superseding the earlier decisions I have noticed, and as establishing the broad general proposition that a married woman cannot *stante matrimonio* renounce any provision made in her favour by her marriage-contract, whether secured by the interposition of a trust or not. But that case does not in the slightest degree support such a contention, for the deed which the widow was there found entitled to revoke after her husband's death was a mutual settlement executed by her and her husband, by which her marriage-contract provisions were materially reduced, and the estates of herself and her husband were settled gratuitously upon relatives of the husband and wife, who had given no onerous consideration for the deed, and the judgment of the Court proceeded on the ground that none of these beneficiaries could plead *jus quæsitum tertii*.

"On the whole matter I have come to be of opinion that the pursuers are entitled to decree in terms of the conclusions of the summons, with expenses."

The defender Mrs Cowe reclaimed.

At advising—

Lord Justice-Clerk—The Lord Ordinary has so fully stated the facts out of which this action has arisen that I forbear to recapitulate them. The question between the parties is whether the defender Mrs Cowe is entitled to interfere with the sale of the subjects referred to in the summons in respect that she was infeft in a contingent liferent of them in the event of her surviving her husband under an obligation contained in her antenuptial contract of marriage, and that the bond and disposition to which she was a party was gratuitous on her part, and is revocable by her, having been granted solely for her husband's behoof.

The pursuers are onerous holders of this bond for full value received, and therefore if Mrs Cowe had the power to burden the property to

the exclusion of her liferent right, she is clearly bound to the creditors whatever may be her claims against her husband's estate. The only question is, whether she had power so to bind herself.

It is maintained on the part of Mrs Cowe—first, that as the liferent right belonging to her in this property was contained in an antenuptial contract of marriage, she had no power to deal with it, burden it, or renounce it *stante matrimonio*, even with her husband's consent; and secondly, that by the terms of the marriage-contract the property was vested in the marriage trustees for her behoof, and so, under the authority of the cases of *Torry Anderson*, *Pringle*, and *Menzies*, was removed beyond the reach of the deeds of the wife.

I may as well clear the ground by disposing of the second of these pleas, which is clearly untenable. This liferent right did not belong to Mrs Cowe when the marriage-contract was executed; neither did she acquire it after the marriage. The deed was a contract, in which the husband provides a contingent liferent to his promised wife, and the lady on her part, and as the corresponding consideration, conveys all her own property which she then possessed, and which she might acquire after the marriage, to trustees for joint behoof. The consideration given by the husband cannot be part of the consideration given by the wife, which would appear quite distinctly if the lady's conveyance had been not to trustees but to the husband direct. Without going further into details, it is clear from the trust purposes that this liferent never was meant to fall under the trust, and, as the Lord Ordinary observes, the *jus mariti* is excluded as regards the funds and property conveyed in trust, while there is no restriction in the liferent right. But what is quite conclusive on this head is, that if it had been intended that the trustees should hold the liferent right, it would have been conveyed to them directly, while the obligation in the contract is to infeft the wife in it without burden or condition of any kind.

The proposition therefore is the very general, and, as I think, the very novel one, that an heritable estate acquired by a married woman in virtue of an obligation in an antenuptial contract cannot be the subject of conveyance by her *stante matrimonio*, although the right is not burdened by a trust or any qualification or condition. The general law as to real property vested in a married woman is exactly the reverse. Erskine says (1, 6, 27)—"All obligations granted by the wife, either charging or even alienating any estate or subject of which she retains the property exclusive of the *jus mariti*, whether proper heritage or bonds bearing interest, are effectual, provided the husband as curator consent to them." I am not aware that this rule of law has ever been questioned, although many cases have arisen in regard to the voluntary nature of such deeds by a wife or the necessity of judicial satisfaction. Lord Moncreiff, in the well-known case of *Buchan* v. *M'Laws*, 12 Sh. 511, stated the law thus—"That though the pursuer as a married woman could not grant any personal obligation on which diligence could proceed, she had power, with her husband's consent, and if of sound mind, and not induced thereto by force, fear, or fraud, to dispone her heritable estate effectually to a third party absolutely, or under reversion," and that such a disposition requires no separate ratification unless it can be shown by the wife that she acted under undue influence. This judgment was adhered to by the Court after taking the opinion of all the Judges on the last point. The first seems to have been thought to be beyond controversy. The authorities will be found collected in the last edition of Mr Fraser's work, p. 808; and the general point requires no farther demonstration.

But it is said that because this liferent right was acquired in virtue of an antenuptial marriage-contract there is a special restriction attaching to it, although none is expressed. I can see no principle on which this proposition can be supported, nor do I know any authority for it. An antenuptial marriage-contract is an onerous deed, but it is neither more or less as far as such a question as this is concerned. The betrothed wife being free to contract, contracts with her intended husband as she would with any other third party, and if she stipulates for and obtains a conveyance it is as valid to her and comprehends all the same rights and powers as if it flowed from anyone else, unless the contract limits it.

The cases of intervening trusts constituted by antenuptial contract which have been referred to, really illustrate this by contrast. A direct title taken to the wife means that she, and she alone, is proprietor. A title taken to trustees means that the wife, although a beneficiary, is so only through the sides of the trust-title, and subject to all the restrictions expressed and implied in the trust right. The recent case of *Menzies* illustrates this very forcibly. There it was necessary to break down the trust right in order to reach the desired result—to violate the terms of the title. The Court in effect held that this direct title interposed between the wife and the property could not be overpassed during the marriage, because the barrier had been intentionally erected for that very end. The intention was logically deduced from the act done. It is hard to see how it can be deduced from the grantee of the conveyance having done exactly the reverse.

The fact that this liferent was not vested in trustees, but taken directly to the promised spouse, indicates, as I think, as clear an intention not to limit the wife's power over her own property as the interposition of a trust-title would have indicated the reverse.

The cases of *Anderson* and *Pringle* were entirely out of the category to which this belong. The case of *Hope* was strongly founded on; but rightly understood it really confirms instead of weakening the views I have expressed. The case was this—Mr Hope, in his son's antenuptial marriage-contract became bound to the lady, in the event of her widowhood, to pay her an annuity of £400 a-year. On his death his widow as his executrix became liable in this obligation, and she, her son, and her son's wife came to an arrangement *stante matrimonio* by which the son's wife renounced the obligation contained in the marriage-contract, and, on the other hand, the widow conveyed to her son certain parts of the father's property, and stipulated that she should be discharged of her obligation for the annuity, and that it should be secured over part of the property conveyed.

These things were all done, and the Court found they could not be undone by the son and his wife, for they were parts of an onerous contract with a third party. But the case shows that a wife and her husband may deal with rights secured to the former even by a contract of marriage.

Lord Ormidale—I entirely concur with your Lordship, as well in the result to which you have come as the grounds on which you have proceeded.

Clearly the assignation challenged is not revocable on the principle of *donatio inter virum et uxorem*. And it is also clear that it cannot be challenged as having been granted gratuitously and without consideration, for it involves the interests of *bona fide* onerous third parties.

Neither can it be said that the wife's liferent right in question, although provided for her by her husband in their antenuptial contract of marriage, has the protection of a trust or any other protection. It is not declared inalienable or even alimentary. Nor is it said that in assigning it, as she did, the wife was coerced by force, fear, or fraud, or was actuated by any undue influence whatever.

I am therefore unable to see any reason for holding that the Lord Ordinary's judgment is erroneous. On the contrary, it appears to be supported by ample authority—the institutional writers as well as a whole series of decided cases.

Lord Gifford—I concur in the views now expressed by your Lordships, and in the views so fully and ably enforced by the Lord Ordinary.

It is now quite fixed that by antenuptial contract of marriage, or by separate deed entered into before marriage, a bride may place her own property or a part of it, or her marriage provisions or part of them, so completely out of her own power while the marriage subsists that she shall be unable, however much she may wish it, and however much she may think it for her husband's interests, to take back to herself or to hand over to her husband any part of the property or provisions which she so secured to herself before the marriage was entered into, that they should certainly be available for her in case of her widowhood. The latest illustration of this rule is the case of *Fletcher Menzies* v. *Murray*, 2 Rettie 507. In most of the cases which have occurred this object—I mean the object of putting a wife's provisions beyond her own power of defeating them *stante matrimonio*—has been accomplished by entirely divesting herself in favour of trustees, so that the property was not vested in the wife at all, but in third parties for certain trust purposes which were only to emerge on the wife's widowhood, and which trust, either by express words or by implication, the wife while she was under coverture disabled herself from recalling. Possibly the same object might be accomplished by a sort of interdiction making the consent of certain parties named indispensable to the validity of any deed affecting the secured provisions, but certainly the object is best and most completely accomplished by means of an irrevocable trust.

Where the wife, however, or her parents or advisers, do not resort to any such expedients for placing the wife's property or provisions out of her own power and beyond her own control, however much she may desire to effect them, and however much her husband may consent that she should do so, and where, on the contrary, the wife herself retains in her own hands, and in her own hands alone, the full and absolute control of her property or provisions, and does not give anybody else any power of any kind to interfere therewith or to restrain or prevent her from dealing with them as she pleases, then I do not see how such restraint or want of power is to be inferred from the mere fact that the property is reserved to or provided to the wife in an antenuptial contract of marriage. It may be that the *jus mariti* of the husband is well and effectually excluded. It may be also that the husband's curatorial power, or right of administration as it is sometimes called, is also well and effectually excluded. The effect of such clauses as these is just to leave the property or the provision more absolutely, more exclusively, and more uncontrolledly in the possession of the wife herself, and at her command and disposal. All these clauses simply keep out the husband, but they do not keep out or fetter the wife herself. On the contrary, they only enlarge the wife's rights; they leave her free to do as she pleases without requiring her husband's consent, or even against his wishes, but they do not prevent her from selling her separate property to a third party, or from disposing of it at pleasure. It may be very important that a wife should have this power, and she may often most naturally refuse to give it up, and refuse to put herself under restraints which, whatever be the emergency, she cannot remove.

Accordingly, where there are no restrictions on the power of the wife herself, where she is not fettered by a trust or by some other device which divests or disables her, she remains her own mistress and free to do as she pleases with her own. She is free even to give her separate property to her husband or to his creditors *stante matrimonio*, he consenting where his curatorial power is not excluded. For a married woman with her husband's consent may do all such acts affecting her property as she could have done by herself alone before marriage, or which she could do if she had become a widow. In such cases, however, the law still gives a remedy to the wife who is induced, it may be by the love of her husband, to give to him or his creditors, for all such gifts will be donations *inter virum et uxorem*, and the wife may revoke them at pleasure, but only in a question with her husband. The sale or the pledge will stand good to a third party, but the husband must when required restore the value or amount. All this is fully illustrated by the cases referred to by the Lord Ordinary, and I am unable to distinguish so as to make a different rule in the case of an antenuptial marriage-contract provision to the wife when it is stipulated for out of the wife's own estate, and when it is stipulated for out of the husband's estate, or when it is given from the property or funds of the parents or friends of either of the spouses. In all cases I think the broad general rule is, that if the wife wishes in antenuptial settlements to be absolutely secured against her own acts she can only be so by disabilitating herself from acting, and this she can only do by means of a trust or by means of effectual conditions duly made real and published, making the consents of third parties or some

equivalent indispensable. If she does not do this her only remedy seems to be revocation of a donation, and a claim against the husband.

Of course I am not now dealing with cases where the wife's act has been obtained by force or by fraud, or where there are grounds for challenging the grant as not her own act and deed. These cases have their own appropriate remedies.

The Court adhered.

Counsel for Pursuers — Kinnear — Guthrie. Agent—J. Duncan Smith, S.S.C.

Counsel for Defender—M'Laren—Blair. Agent —John Latta, S.S.C.

Tuesday, March 20.

SECOND DIVISION.

SPECIAL CASE—GAULD'S TRUSTEES AND OTHERS.

Succession—Conditio si sine liberis.

A testator gave a liferent of all the money of which he might die possessed to his brother, after whose death the capital was directed to be divided equally among the lawful children of the testator's living and deceased sisters "who may be alive at the time." All the children of the sisters survived the testator, but several of them predeceased the liferenter, leaving issue.—*Held* that by virtue of the *conditio si sine liberis* the issue were entitled to the share which their deceased parents would have taken.

George Gauld died in 1852, leaving an "assignation and settlement" whereby he appointed his brother John Gauld his sole executor, and gave him the liferent of all the money of which he might die possessed. On the death of John Gauld the testator provided that the whole money should be "divided equally among the lawful children of my living and deceased sisters who may be alive at the time, share and share alike, namely, the children of the late Mrs Peterkin; the children of Mrs Gauld, in Glenbeg; the children of Mrs Duncan, Corrie; the children of Mrs George, in Mains of Drummuir; and Alexander Carmichael, presently student at King's College, Aberdeen, the surviving son of my late sister Mrs Carmichael."

John Gauld was confirmed executor and enjoyed the liferent provided to him, until his death in 1876.

George Gauld was survived by all the children of his sisters named in his settlement, and by Alexander Carmichael, but James Peterkin, a son of Mrs Peterkin, William Duncan, a son of Mrs Duncan, and the said Alexander Carmichael, predeceased John Gauld, leaving issue.

The question for the Opinion and Judgment of the Court in this case was Whether the children of George Peterkin, William Duncan, and Alexander Carmichael were objects of the residuary bequest by George Gauld in favour of the lawful children of his living and deceased sisters which might be alive at the period then designated.

Authorities—*M'Call* v. *Dennistoun*, Dec. 22, 1871, 10 Macph. 281; *Blair's Executors* v. *Taylor*, Jan. 18, 1876, 3 R. 363, *ante* vol. xiii, p. 217; *Gillespie* v. *Mercer*, Mar. 8, 1876, 3 R. 561; *Hamilton* v. *Hamilton*, Feb. 8, 1838, 16 Sh. 478, 10 Jur. 263; *Rhind's Trustees* v. *Leith and Others*, Dec. 5, 1866, 5 Macph. 104: *Wishart* v. *Grant*, June 16, 1763, Mor. p. 2310; *Wallace* v. *Wallaces*, Jan. 28, 1807, Mor. Clause App. No. 6; *Christie* v. *Patersons*, July 5, 1822, F. C. and 1 Sh. 498; *Robb* v. *Thomson*, July 10, 1851, 13 D. 1326, 23 Jur. 619.

At advising—

Lord Ormidale—The question to be answered in this case relates to the application of the condition *si sine liberis decesserit*, and is attended with some difficulty, arising chiefly I think from what at first sight appears to be a conflict of decisions on the point.

The testator George Gauld, by what is called an assignation and settlement, constituted and appointed his brother John Gauld his sole executor, and assigned to him his whole moveable estate, for the purposes, first, of paying his debts, deathbed and funeral expenses, and, secondly, in order that he, the executor, should have the liferent enjoyment of the residue. And the testator goes on to declare it to be his will, that, after the death of his brother, the capital, after deducting necessary expenses, should be "divided equally amongst the lawful children" who might "be then alive" of his five sisters whom he names, some of them being living and others deceased.

It was assumed in the argument, and rightly I think, that the date to which the testator refers as that when the children of his sisters should be alive is the period of distribution, after the death of his brother the liferenter. The only disputed question was whether, although all his nephews and nieces, that is to say all the children of his sisters, survived the testator, yet as some of them died before the liferenter leaving issue, are the issue to be held entitled, as in place of their deceased parents, to a share oi the testator's estate, in virtue of the maxim *si sine liberis decesserit*.

It is certainly not enough to exclude the application of the maxim that the parties claiming the benefit of it are nephews and nieces of the testator, for the contrary may be taken as settled law; and this was not disputed. The only contested point was whether the testator by referring, as he expressly does, to the children of his sisters who "may be alive" at the period of distribution, has not so limited the objects of his bounty as to exclude all room for that presumed will which is the foundation of the maxim. It is certainly not sufficient to exclude the maxim that the words of the testator are not enough of themselves to effect that which without it could not be entertained, for the very object of the maxim is to supply what is not expressed, but what, in accordance with certain natural and equitable principles, it may be fairly presumed the testator would have expressly provided for had he had present in his mind at the time he executed his settlement the precise circumstances as they afterwards arose in relation to the objects of his bounty. Now certainly there is nothing to indicate in the present case that the testator, would,