contract to sell the same estate for a fixed price if in an application for an order of sale under the Act of 1882 the Court shall sanction a private sale at that price, and the next heir of entail does not exercise his power of forbidding the bargain.

But Lord Shand goes a great deal further than holding that the appellant's error with reference to the nature of the contract of sale was an error in substantials. He expresses the opinion that the mere existence of such an erroneous belief in the mind of the appellant affords a sufficient ground for annulling the contract. So far as I can judge, his opinion rests upon the inference or assumption that in such a case there cannot be *duorum in idem placitum consensus atque conventio*, which is necessary to the constitution of a mutual contract. To give any countenance to that doctrine would in my opinion be to destroy the security of written engagements. In this case I do not think it has any foundation in fact. By delivering his missive offer to Mr Glendinning the appellant represented to the respondent that he was willing to be bound by all its conditions and stipulations, construed according to their legal meaning, whatever that might be. He contracted, as every person does who becomes a party to a written contract, to be bound, in case of dispute, by the interpretation which a court of law may put upon the language of the instrument. The result of admitting any other principle would be that no contract in writing could be obligatory if the parties honestly attached in their own minds different meanings to any material stipulation. As soon as one of them obtained the final judgment of a competent court in favour of his construction the other would be at liberty to annul the contract. It is a significant fact that although courts are constantly resorted to for their decision on the conflicting views of parties as to the meaning of their written contracts, and not unfrequently interpret them in a sense contemplated by neither of the litigants, not a single case has been cited in which it has been attempted to void a contract on that ground.

I am of opinion that the alleged error of the appellant is by itself insufficient to invalidate his consent, but that it will be sufficient for that purpose if it can be shown to have been induced by the representations of the respondent, or of anyone for whose conduct he is responsible. Whether the appellant is entitled to an issue raising the matter of representation chiefly depends upon the relevancy of his averments in the seventh article of his condescendence. Had his averment as to the particular representation made by Mr Glendinning stood alone I should have hesitated to hold that it was sufficient. But having regard to the other allegations made on record with respect to the actings of Mr Glendinning, and to the knowledge imputed to him of the petition which the appellant had presented to the Court, I have come to the conclusion that an issue of essential error induced by Mr Glendinning ought to be allowed. If the surrounding circumstances are established, the question will arise whether the representation imported that the effect of the offer when accepted would be to give the appellant a little hold on the respondent, whilst it did not absolutely bind the appellant himself. These are matters well fitted for the consideration of a jury, and I purposely abstain from further observation upon them.

I concur in the judgment which has been moved by my noble and learned friend on the woolsack.

LORD MACNAGHTEN—My Lords, I entirely agree in the conclusion at which my noble and learned friends have arrived, and in the reasons assigned for that conclusion.

This judgment was pronounced — That the interlocutors of the 28th of May and the 25th of June 1889 be reversed in so far as they disallow the third issue proposed by the pursuer, and the said interlocutor of the 25th June in so far as it finds the defender entitled to expenses, and that the cause be remitted, with directions to allow the said issue, and to find neither party entitled to expenses of adjustment in the Inner House.

Counsel for the Appellant—D.-F. Balfour, Q.C.—Finlay, Q.C.—Sir H. Davey, Q.C.—Dundas. Agents—Loch & Goodhart, for Dundas & Wilson, C.S.

Counsel for the Respondent—The Lord Advocate, Q.C. — Rigby, Q.C. — Graham Murray. Agents — Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.

COURT OF SESSION.

Tuesday, March 11.

SECOND DIVISION.

(WHOLE COURT.)

SIMSON'S TRUSTEES.

Succession—Antenuptial Contract of Marriage—Acquirenda — Legacy Excluding Marriage-Contract Trustees — Nominal Trust—Fee.

A lady by her antenuptial contract of marriage bound and obliged herself to hand over all *acquirenda* during the subsistence of the marriage to her marriage-contract trustees. An aunt, in full knowledge of the terms of the said antenuptial contract of marriage, directed her testamentary trustees to pay to her niece a share of her estate, declaring that notwithstanding the provisions of said contract the trustees under the same were not to be entitled to claim said share, but that it was to be her niece's absolute property, free from the control of the said trustees, and further declaring that in the event of its being necessary to give effect to her wishes and intentions, her testa-

mentary trustees were to pay over the said share to her niece in trust for herself in liferent and her children in fee, with power to her to distribute and apportion the same amongst her children, and to use and apply the capital in any way that might appear to her to be right for the benefit of herself and her children.

Held, by a majority of the Whole Court (following the case of *Douglas' Trustees* v. *Kay's Trustees*, December 2, 1879, 7 R. 295—Lord Young and Lord Lee *diss.*), that a fee in the share of her aunt's estate was given to the niece, and that her marriage-contract trustees were entitled to demand that the said share should be paid and conveyed over to them to hold and administer under and in terms of the contract of marriage.

Mrs Margaret Romanes Rankine or Brown, wife of the Rev. John Brown, minister of the parish of Bellahouston, near Glasgow (the second party to this special case), entered into an antenuptial contract of marriage dated 13th March 1882 with her husband.

By the contract Mr Brown conveyed to his wife, in the event of her surviving him, as her absolute property, the whole household furniture and effects which should belong to him at the time of his death, and he conveyed to trustees a policy of assurance upon his life for £1000, to be held by them for payment of the income thereof to his wife, if she should survive him, and for the children of the marriage in fee.

Mrs Brown, on the other part, conveyed to Mr Brown, as his absolute property, the whole corporeal moveables except paraphernalia which might belong to her at the time of her death, and further, with consent of her intended husband, she assigned, disponed, and conveyed to the Rev. John Patrick, minister of Greenside Parish, Edinburgh; the Rev. William Brodie, minister of the parish of Kirkpatrick-Juxta, Dumfriesshire; John Rankine of Bassendean, advocate, Edinburgh; and Adam George Rankine, merchant, Livepool (the third parties to this special case), as trustees, "All and sundry the whole estate, funds, and effects, heritable and moveable, real and personal, presently belonging to her, and which she may succeed to or acquire during the subsistence of the said intended marriage, and particularly, and without prejudice to the said generality, her share of and interest in the estate and funds of her deceased father and of her deceased mother Mrs Jane Simson or Rankine to which she has right or may succeed, or of which she may have the power of disposal or settlement, but excepting from this conveyance a sum of £1000 sterling which the said Margaret Romanes Rankine has received from her father to account or in anticipation of her share of her said father and mother's estate and funds, and excepting also any mere rights of liferent to which she has right, or may hereafter acquire right, and excepting also all or any legacies of less amount than £100 sterling each, and also all paraphernalia and other corporeal moveables now belonging or that may belong to her."

The purposes of the trust were—"(First) For payment of the expenses of the trust: (Second) For payment of the annual income of the trust funds to Mrs Brown on her own receipt: (Third) In the event of Mrs Brown's predecease leaving issue, for payment to Mr Brown of the annual income of the trust-funds for behoof of himself and the issue of the marriage, restricted to one-half in the event of his entering into second marriage; (Fourth) In the event of Mrs Brown's predecease leaving no issue of the marriage, or in case such issue should thereafter fail during Mr Brown's lifetime, for payment to him of the sum of £1, which payment it was declared was made of nominal amount at his own special request: (Fifth) After implementing the foregoing provisions in favour of the spouses, and the survivor of them, the trustees were directed to hold the trust-estate and funds for behoof of the issue of Mrs Brown in such proportions and on such conditions as she might appoint, and failing appointment, equally, and failing such issue, then for such purposes as she might direct, or for her nearest heirs and representatives whomsoever *ab intestato*."

The marriage-contract then declared, with reference to the trusts constituted by Mr and Mrs Brown respectively, that the provisions in favour of children should not vest or be payable during the lifetime of the spouses, or the survivor, or until the youngest of the children should attain majority, but that the issue of any child predeceasing the period of vesting should be entitled to their parent's share. The marriage-contract also provided that Mr and Mr Brown accepted of the provisions thereby made for them respectively as in full of their legal rights and interests in each other's estates.

Miss Simson, an aunt of Mrs Brown, died on 2d July 1888 leaving a trust-disposition and settlement, and codicil thereto, dated respectively 3rd July 1885 and 23rd March 1887. By her settlement Miss Simson disponed her whole estate to the said John Rankine, Charles Simson Rankine Simson of Threepwood, W.S., Edinburgh, and Robert Romanes, writer, Lauder (the first parties to this special case), as trustees, and directed them to divide the whole residue between her nephews and nieces (the second party and her brothers and sisters). She further directed her trustees as follows—"To hold in trust the shares, original or accrescing, of my estate falling to my nieces, and the minor issue and the female issue of any one of my nephews or nieces who may die leaving issue, the interest and proceeds to be paid periodically to such as have attained majority or been married, and to be applied at the discretion of my trustees for behoof of minors: And in case of the death of any one of my nieces without issue, or in the event of such issue all dying before attaining majority, I direct my trustees to divide the share of such niece equally

amongst my surviving nephews and nieces, and the issue of any one who may have predeceased, as in room of their parent; and with reference to the shares which may fall to the female issue of any one of my nephews or nieces, I authorise my trustees to continue to hold the same for such females for their behoof so long as my said trustees may think it prudent to do so."

Miss Simson's codicil was in the following terms—"I, Janet Simson, before designed, and now residing at 23 Ainslie Place, Edinburgh, being desirous that my nieces, and the female issue of any one of my nephews or nieces (on their attaining majority) who may become entitled to a portion of my estate, should be put into possession of their shares of my estate for their own behoof and benefit without the intervention of any trust, and so that they may have it in their power to dispose of the capital sums in any way that may seem to them proper, do hereby direct my trustees to account for and pay to my nieces Margaret Romanes Rankine now Brown, Marion Elizabeth Rankine, and Janet Simson Rankine, their shares of my estate on occasion of my death for their own absolute use and benefit; and in case any female issue of any one of my nephews or nieces shall be entitled to a portion of my estate, I direct my trustees to pay the capital sum to which such female issue may be entitled to such female issue on such issue attaining majority or on my death, whichever event shall last happen: And I make this provision in the full knowledge of the terms of the antenuptial contract of marriage entered into between the said Margaret Romanes Rankine now Brown, and her husband the Reverend John Brown, minister of the parish of Galston, and declare that notwithstanding the provisions of the said contract the trustees under the same shall not be entitled to any part of my estate as in right of the said Margaret Romanes Rankine or Brown, but that the share of my estate left to the said Margaret Romanes Rankine or Brown shall be her own absolute property, free from the control of the said trustees: And in the event of its being necessary in order to give effect to my wishes and intentions, I direct my trustees to account for and pay over the share of my estate provided to the said Margaret Romanes Rankine or Brown to her in trust for herself in liferent, and her children in fee, with power to her to distribute and apportion the same amongst her children, and with power and authority to her to use and apply the capital sum, or a portion thereof, in any way that may appear to her the said Margaret Romanes Rankine or Brown to be right for the benefit of herself and her children."

The second party's share of the residue of Miss Simson's estate amounted to between £7000 and £8000. Miss Simson had for many years resided with the Rev. John Rankine (the second party's father) and his family, and was so living at the date of the execution of the said contract of marriage. The Rev. John Rankine died on 30th April 1885, and the second party's share of his and of her mother's estate, amounting to about £6000, was then paid to and was now held by the third parties.

The second party maintained that she was entitled to have her share of Miss Simson's estate conveyed to her absolutely, free from any claim on the part of her marriage-contract trustees, or that at all events she was entitled to have the said share conveyed to her in trust in terms of the alternative direction contained in the said codicil.

The third parties, on the other hand, maintained that the share falling to the second party under her aunt's settlement fell under the conveyance in the marriage-contract, and that they were therefore entitled to receive payment of it and hold it for the purposes of the marriage-contract.

This special case was accordingly presented to the Second Division of the Court of Session by the parties interested to have the following questions of law determined, viz.—"(1) Is the second party entitled to have her share of Miss Simson's estate paid or conveyed to her absolutely for her own use and behoof, and free of any claim therefor on the part of the third parties? Or (2) Is the second party entitled to have the said share paid or conveyed to her in trust for herself in liferent and her children in fee, with the powers of appointment and disposal contained in said codicil, free of any claim therefor on the part of the third parties? Or (3) Are the third parties entitled to demand that the said share shall be paid or conveyed to them to hold and administer under and in terms of the said contract of marriage?"

As the second parties relied upon the case of *Thurburn's Trustees* v. *Maclaine and Others*, decided by the First Division (*reversing* the judgment of Lord Barcaple) upon 24th November 1864, and reported in 3 Macph. 134, and the third parties relied upon the case of *Douglas' Trustees* v. *Kay's Trustees*, decided by a majority of the First Division (*dissenting* Lord Deas, and *reversing* the judgment of Lord Young), upon 2nd December 1879, and reported in 7 R. 295, and as it appeared that these judgments could not stand together, the Second Division appointed the parties to prepare minutes of debate on the questions of law submitted for determination, and to lay them with the special case before the Judges of the Court for their opinion.

It was argued for the second party—No doubt it was impossible to give a person the absolute disposal of a sum of money and yet exclude his other ordinary creditors, but marriage-contract trustees were not in the position of ordinary creditors. Their duty was simply to administer funds falling under the trust. There was here no specific debt. The trustees claimed under a general obligation in the marriage-contract to hand over *acquirenda*, but the Court would not give effect to a marriage-contract further than to secure the objects for which it was executed. There might be *acquirenda* which ordinary creditors could attach, which marriage-contract trustees could not

demand—*Boyd's Trustees* v. *Boyd*, July 13, 1877, 4 R. 1082. The testatrix here was under no obligation to leave this money to her niece, and she was entitled to annex any lawful condition to her gift she chose. There was nothing illegal in the condition she had annexed to the gift. No one was defrauded, and it was by no means certain that she would have left this money as she did if she had known that her wishes would not be given effect to. The whole circumstances here must be looked at, and they made the case for the second party very strong. There was no doubt here as to the testatrix's intention. She was fully cognisant of her niece's marriage-contract and of the sums which had already been paid over to the marriage-contract trustees. She thought sufficient had been paid over in implement of the marriage-contract, and she had expressly declared her wish that this sum should go to her niece and not to her marriage-contract trustees. The case of *Thurburn's Trustees*, *supra*, and the English case *in re Mainwaring's Settlement*, L.R., 2 Eq. 487 (Lord Hatherley's opinion, incorporating the opinion of Lord Cottenham in *Thornton* v. *Bright*, 2 My. & Cr. 230) were directly in point. The contention of the second party was strengthened by the analogy of the law of the *jus mariti*. The earlier law considered that that right being inseparable from the character of husband could not be renounced, but it always recognised the right of strangers to leave money to wives free from that power, and such a condition of the gift was always given effect to—Ersk. i. 6, 13; Fraser on Husband and Wife, i. 679; Stair, i. 4, 9; *Annand and Colquhoun* v. *Scott*, M. 5844—*aff.* 2 Pat. 369; *Young* v. *Loudoun*, June 26, 1855, 17 D. 998. The first question ought to be answered in the affirmative, but at all events the second question should be so answered. If the second party was not entitled to the sum in question absolutely, she was entitled to it in trust for herself in liferent and her children in fee, with power to distribute and apportion the same amongst her children and apply the capital as might appear to her right for the benefit of herself and her children under the alternative provision made in the codicil. That provision was not equivalent to giving her the fee by another form of words. That she herself was the trustee did not invalidate the trust—*Annand* v. *Scott*, *supra*. The power of appointment superadded to a liferent did not constitute a fee—*Weddell* v. *Ness*, Feb. 3, 1849, Exch. Rep.; *Morris* v. *Tennant*, June 7, 1853, 15 D. 716, and 27 Scot. Jur. 546; *Alves* v. *Alves*, March 8, 1861, 23 D. 712. Nor did the power of using and applying the capital amount to an absolute *jus disponendi*. The second party could not without breach of trust dispose of the money in any way she chose. She could apply it for her own benefit only if it was also for the benefit of the children. Her right *qua* beneficiary was one of liferent only, but *qua* trustee. She had a discretionary power to apply capital when the united interests of herself and her children made it advisable to do so. Further, under this direction in the codicil she was to hold for herself in liferent and her children in fee. The fee under this destination would vest at once in the children as a class. There was no postponement of vesting as in the destination under the marriage-contract. Accordingly, to hand over the fund to the third party would defeat the testator's intention not only as regarded the second party but as regarded her children.

It was argued for the third parties—This case was ruled by that of *Douglas' Trustees* v. *Kay's Trustees* (*supra*). As the Lord President pointed out in that case, so here although the marriage-contract trustees were not ordinary creditors or creditors in a definite sum, they were creditors in a most onerous obligation by a married woman in her antenuptial contract of marriage to convey to them everything that might come to her during the marriage. It was impossible to convey a fee and yet exclude such creditors. A mere expression of intention by a testator that such creditors should be excluded was insufficient. The only effectual way in which it could be done was by the creation of another trust, which had not been created in this instance—*Allan's Trustees* v. *Allan*, December 12, 1872, 11 Macph. 216; *White's Trustees* v. *White*, June 1, 1877, 4 R. 786 (Lord President's opinion, p. 790); *Gibson's Trustees* v. *Ross*, July 12, 1877, 4 R. 1038; *M'Nish* v. *Donald's Trustees*, October 25, 1879, 7 R. 96; *Clouston's Trustees* v. *Bulloch and Others*, July 5, 1889, 26 S.L.R. 644. Again, by the Married Women's Property (Scotland) Act 1881, sec. 6, the husband had a very material interest in his wife's estate upon her death. This had been discharged here by the husband, because the provisions of the marriage-contract had been accepted in full of all his claims. If the argument of the second party prevailed, although the husband was bound by the discharge, the wife would be freed from her obligations under the contract. The case of *Boyd's Trustees* was decided entirely upon a construction of the terms of the contract itself. The case of *in re Mainwaring's Settlement* was not an authoritative decision even in England—Eversley's Law of Domestic Relations, p. 151; Davidson's Conveyancing Precedents (3rd ed.), vol. iii. p. 199; *in re Allnutt, Pott, & Brassey*, 22 Ch. D. 275 (Justice Chitty); and Scottish cases, *Douglas' Trustees* (*supra*), and *Napier* v. *Scott*, November 18, 1864, 3 Macph. 57. Nor was the argument of the second party advanced by the cases of *Annand and Colquhoun* v. *Scott*, and *Young* v. *Loudon*, which related to the exclusion of the *jus mariti*. No doubt a legacy might be left to a married woman exclusive of the *jus mariti*, but this in no way affected her *jus disponendi*. The *jus mariti* might be excluded, and yet the wife might be absolute fiar of the property from which it was excluded—*Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120; *Kippen* v. *Kippen's Trustees*, November 24, 1871, 10 Macph. 134; *Allan's Trustees* (*supra*). Here the wife was absolute fiar, and as such was entitled and bound to hand

over the money to her marriage-contract trustees. But it was alternatively contended for the second party that a trust had been created in which the second party was the trustee, and was to hold for herself in liferent and her children in fee. Though nominally constituting a trust, the words of the codicil really gave the second party a fee. The idea of a fee was not excluded by the power of appointment—*Mackintosh* v. *Gordon*, April 17, 1845, 4 Bell's Ap. 105; *M'Donald* v. *M'Lachlan*, January 14, 1831, 9 S. 269. The clause in question did not create any *jus quæsitum* in the children. They could not interdict their mother from applying the funds in any way she might think fit. If the testatrix had really intended to limit the right of the second party to a liferent there was no reason why she should not have put the money into the hands of the third parties as trustees to whom she had no objection personally. The slight difference in the destination was not material, and it could not be seriously maintained that the testatrix had created a new trust to exclude the possibility of the husband liferenting the sum left to his wife in the same way as he would do under the marriage-contract if he survived her and there were children of the marriage. The third question should be answered in the affirmative.

The Consulted Judges returned the following opinions:—

LORD PRESIDENT—For the reasons which I assigned for the judgment of the First Division of the Court in the case of *Douglas' Trustees* v. *Kay*, I concur with the other consulted Judges in holding that in this case the first and second questions ought to be answered in the negative, and that the third question ought to be answered in the affirmative.

LORD SHAND—For the reasons stated in my opinion in the case of *Douglas' Trustees* v. *Kay's Trustees*, I agree with the other consulted Judges in holding that the third question should be answered in the affirmative, and the other two questions in the negative.

I remain of opinion that the case of *Douglas' Trustees* was rightly decided; and there is nothing in the special terms of Miss Simson's deed of settlement and codicil which can, in my view, avoid or prevent the application of the principle, to which effect was given in that case, to the bequest by Miss Simson of a share of her estate in favour of the second party Mrs Margaret Rankine or Brown.

LORDS ADAM, M'LAREN, KINNEAR, TRAYNER, WELLWOOD, KYLLACHY, AND KINCAIRNEY:—

The special case proposes three questions of law, but of these it is only necessary to consider separately the first and second questions; because the answer to the third question depends entirely on the answer to be given to these.

First Question. Is the second party (Mrs Brown) entitled to have her share of Miss Simson's estate paid or conveyed to her absolutely for her own use and behoof, and free of any claim therefor on the part of the third parties (Mrs Brown's marriage trustees)?

The claim of the marriage trustees is founded on a clause in the contract of marriage whereby Mrs Brown conveys to them the whole estate, funds, and effects "which she may succeed to or acquire during the subsistence of the said intended marriage." There is no question as to the meaning or obligatory effect of such a clause; it imports an obligation on the part of the wife (Mrs Brown) to pay or convey to the trustees of the marriage all estate which she may acquire during the marriage, and which it is in her power to pay or convey.

It is then for consideration whether the terms of Miss Simson's bequest (which it is not necessary to quote at length) place Mrs Brown under a legal disability to fulfil her obligation to place Miss Simson's money at the disposal of the marriage trustees for the purposes of their trust. Under the first alternative direction of Miss Simson's codicil the trustees are "to put Mrs Brown into possession of her share of the residue absolutely, but under this declaration, that notwithstanding the provisions of the contract of marriage, the marriage trustees shall not be entitled to any part of the fund. Supposing that Mrs Brown had received her share of the residue under a deed of conveyance incorporating this declaration in the most formal manner, and that the marriage trustees were to bring an action of payment or adjudication against Mrs Brown in the assertion of their right to administer the fund, it is our opinion that the declaration annexed to Miss Simson's bequest would not constitute a good defence to the action. Because if we give to Miss Simson's declaration the utmost effect that can be given to a simple condition annexed to a gift of estate or money, such a condition would only affect the voluntary acts of the grantee, and would have no effect in competition with the claims of creditors. This rule has been long recognised in questions relating to conveyances of heritable estate, and in principle it is equally applicable to gifts of money or personal property. We are accordingly of opinion that the judgment in the case of *Douglas' Trustees* v. *Kay* is well founded, and we concur in the opinions of the Judges constituting the majority of the Court in that case.

Second Question. Is the second party entitled to have the share paid or conveyed to her in trust for herself in liferent and her children in fee, with the powers of appointment and disposal contained in said codicil, free of any claim therefor on the part of the third parties?

We do not doubt that it was in the power of Miss Simson, by the constitution of a continuing trust, to give Mrs Brown a certain interest in her estate and at the same time to prevent Mrs Brown's share from falling under the marriage trust. This might have been accomplished by giving

directions to trustees to pay over the income of a share of the residue to Mrs Brown during her life, and to dispose of the capital in some other way after her death. A power of disposal of the fee might also have been given to Mrs Brown; but supposing this done, and that Mrs Brown were to exercise the power in her own favour, then, according to our opinion, in answer to the first question, the fund would become subject to all Mrs Brown's obligations. In our view the marriage trustees have a good claim to all estate of which Mrs Brown has an unqualified right of fee, and it makes no difference in the result that the right is declared to be a trust for herself. The alternative direction in the codicil, to pay to Mrs Brown "in trust for herself in liferent and her children in fee," vests the fee in Mrs Brown; and the declaration intended to exclude the right of the marriage trustees cannot receive effect in this way any more than under the first alternative, of a direct payment to Mrs Brown for her own absolute use.

We are accordingly of opinion that the first and second questions ought to be answered in the negative; and it follows that the third question should be answered in the affirmative.

At advising—

LORD JUSTICE-CLERK—The second party under her antenuptial marriage-contract became bound to hand over to her marriage-contract trustees—the third parties—all estate she might acquire during the subsistence of the marriage.

The late Miss Simson left a share of her residue to the second party, directing her trustees, the first parties, to put her in possession of her share absolutely, with the declaration added that the second party's marriage-contract trustees should not be entitled to any part of it. I am of opinion, with the consulted Judges, that the second party has no answer to a demand by the third parties that her share shall be handed over to them. That which she receives during the subsistence of the marriage, she owes as a debtor to the third parties. She cannot free herself from her obligation by founding on a desire of the testator to give the bequest to her free from the marriage trust. The testator's stipulations might prevent her from conveying to the third parties if she was under no obligation to do so, but the obligation subsisting the third parties are entitled to insist that she shall pay what is plainly a debt due to them.

I therefore agree with the consulted Judges that the first question must be answered in the negative.

The only other question is, whether by the codicil of 23rd March 1887 the testatrix by constituting a trust over the share left to the second party has excluded the third parties from having a claim to it as she might have done. But what is it that she has done? She has directed her trustees to pay over the second party's share to her in trust for herself in liferent and her children in fee, with power to her to apportion it among the children, and with power to her to apply the capital as may appear to her right for the benefit of herself and her children. By this codicil the second party is not only empowered to apply the capital for herself, but the fee is vested in her. The declaration of a trust in herself can make no difference. She has the disposal, and under her marriage-contract that disposal is compulsory and must be in fulfilment of her obligation. The third parties, her creditors, are entitled to compel a conveyance from her, the debtor.

I therefore agree again with the consulted Judges that the second question must be answered in the negative.

The answers to the first and second questions must be followed by the third question being answered in the affirmative.

LORD YOUNG—I think the only question for our consideration is, whether or not the estate to which the second party is entitled by Miss Simson's will falls under the trust of her marriage-contract. Should this question be answered in the affirmative the estate must, of course, be paid or conveyed to the marriage trustees. If in the negative the marriage trustees have no right or duty with respect to it, and it must be paid or conveyed to the second party, whose right to it is disputed by no other.

The question depends, in my opinion, on the construction and legal import of the marriage-contract and the duty of the trustees acting under it; and that contract being, so far as we have occasion to consider it, in very common and usual form and terms, the question is a general one and of corresponding interest and importance. Stated generally, it is whether a general conveyance to the trustees of an antenuptial marriage-contract by either of the intending spouses (it cannot signify which—here it was the lady) of *acquirenda* during the marriage, comprehends the subject of a gift contrary to the expressed will and intention of the giver? That the law on the subject should be fixed and known is, I need hardly say, of importance not only to conveyancers but to contracting spouses, that they may not unwittingly (and plainly only to their own detriment) hinder the gifts of bountiful friends, and also to the bountiful friends of married people that their lawful and probably wise and beneficent intentions may not be frustrated.

In 1864 in the case of *Thurburn's Trustees* this question was decided in the negative by a unanimous judgment of the First Division reversing the judgment of the Lord Ordinary (Lord Barcaple). That judgment was, clearly and in terms, that an antenuptial contract with a conveyance of *acquirenda* to the marriage trustees in language substantially equivalent to that which occurs here, did not comprehend the subject of a gift contrary to the expressed will and intention of the giver. I will not waste time by an examination of the case, but simply refer to the report of it and to Lord Deas' account of it in the subsequent case of *Douglas' Trustees* in 1879.

In the case of *Douglas' Trustees* the same question arose on a marriage-contract dated four years after the decision in the case of *Thurburn's Trustees*, and in precisely equivalent terms with respect to *acquirenda*. It came before me as Ordinary, and I of course decided it in accordance with the previous decision, which I thought sound, although that was perhaps immaterial. A majority of the Judges of the First Division, differing from me and from their predecessors, who had decided the case of *Thurburn*, reversed my judgment, against the vigorous protest of Lord Deas, the only survivor of the Judges who took part in the previous decision. His Lordship pointed out how mischievous and therefore undesirable it was in a question of conveyancing, which a question regarding the import and effect of a general conveyance of *acquirenda* in a marriage-contract clearly was, to disregard a judgment which he observed "was accepted as law by the parties and the profession, and had ruled the practice for fifteen years."

I have said so much of these two conflicting judgments only to account for our sending this case in which the question has again arisen for the consideration of our learned brethren. I shall not, I think, have occasion again to notice either of them at least otherwise than by very general reference. If the law of the question was settled by the case of *Thurburn*, as Lord Deas thought and as I thought, it was unsettled by the subsequent case of *Douglas*, and it was in the view that it was unsettled that we requested the opinions of our brethren in this case. I shall express my opinion on it in that view.

I have indicated, perhaps sufficiently, that in my opinion the question is one of conveyancing, regarding only the meaning and legal import of a contract in the terms of that before us respecting the wife's *acquirenda* during the marriage, and is a question in the law of debtor and creditor in no other sense than every question of conveyancing is. I have pointed out, as Lord Deas did in the case of *Douglas*, that it is important that contracting spouses and conveyancers, who aid them, should know what language to use or avoid according as it is intended or not to debar the wife from accepting of a gift except on the condition or footing that she shall not retain it, but instantly pass it on to the marriage trustees.

The contention of the third parties is that the language here used imports a contract between the spouses that the wife should not be at liberty to receive and retain a gift of property. It is a pure question of contract, and in dealing with it it is allowable and proper to have regard to the relation of the contracting parties, the nature and object of the contract, and the probable intention of the parties. Now, is it a probable or even rational intention to impute to the contracting parties that the wife should not be at liberty to accept of a gift on the footing of retaining it to her own use, and that it should be the duty of the marriage trustees to compel her absolutely to reject any gift tendered to her on that footing?

I do not fail to notice that in Miss Simson's will there is no ulterior destination or disposal of the estate given to Mrs Brown in the event of her intention that it should not pass to the marriage trustees being frustrated or held to be impossible consistently with the subsistence of the gift. It does not, however, occur to me that the presence or absence of such ulterior destination or disposal in Miss Simson's will can affect the construction of the marriage-contract. Let me therefore, for the purpose of illustration, suppose an ulterior disposal in the event I have stated, as, for example, that in that event the estate should go to A B or fall into residue. In that case it would I think be clear enough that the estate would not fall under the marriage trust, and that the marriage trustees could have no claim to it. The only possible competitors would be Mrs Brown and the residuary legatee. Would it be the duty of the marriage trustees to interfere in the competition and to aid the residuary legatee against Mrs Brown by urging that as matter of contract with her husband she was disabled from taking the estate? I doubt if the residuary legatee could found on the contract in his favour or as disabling Mrs Brown from taking. But if it be supposed that he could, and that successfully—the supposition implies the assumption of a very unlikely and I should say irrational meaning and intention on the part of the contracting spouses—such as is usually held fatal to any construction of a contract which necessarily imputes it. If, on the other hand, the claim of the residuary legatee was rejected, as I cannot doubt it would be, the estate must, in the case I have supposed, go to Mrs Brown as her absolute property and free of the marriage trust. The ulterior destination would thus be inoperative, in this substantial sense at least that nothing was taken by it, which indeed only fortifies the proposition that the presence or absence of ulterior destination in the will of the donor cannot affect the construction and effect of the marriage-contract. But if this be so, it is conclusive of the case, unless indeed it can be maintained that the insertion of an ulterior destination is necessary in point of conveyancing form in order to enable the Court to give effect to the testator's otherwise clearly expressed intention with respect to the prior or antecedent bequest.

I shall now examine the device suggested by seven of our learned brethren as one to which Miss Simson might in their opinion have effectually resorted in order to give Mrs Brown "a certain interest in her estate, and at the same time to prevent Mrs Brown's share from falling under the marriage trust."

I agree with our learned brethern in thinking that these directions could have been validly given, and with the effect of preventing "Mrs Brown's share from falling under the marriage trust." It follows that they could have been validly and effectually given as an alternative in case it should be found impossible to execute a prior direction which the testator preferred.

Now, suppose such prior, and to the testator preferable direction to be that which she in fact gave by the will now before us. In that case it is clear that the estate would not fall under the marriage trust—for if that result, which the testator desired to avoid, was not effectually prevented by the first direction, it certainly was by the alternative directions. The marriage trustees, therefore, could have no right to claim the estate. Would it, in the case supposed, be their duty nevertheless to interpose and insist that according to the contract with her husband Mrs Brown's right should be restricted to a liferent, with a power to dispose (as she pleased) of the capital after her death? The suggestion—which indeed has not been made—need not be pursued. There is, then, in the supposed case no interest whatever concerned to maintain that the marriage trust shall be excluded by the execution of the second alternative directions (whereby I assume, with our learned brethren, it would be effectually excluded) rather than by the execution of the first, which the testator preferred. There cannot possibly be any such interest unless it be that or those with which the marriage-contract trustees are charged. But with what interest are they charged which can be prejudiced by Mrs Brown taking the estate in fee-simple rather than in liferent with an absolute power of disposal of the capital?

I assume, therefore, that under a will with the alternative directions supposed, the preference would be given to that which the testator preferred, in the absence of any legitimate adverse interest. And here again I must say that I should repudiate the suggestion, if made, that the expression of the second alternative was, as matter of conveyancing form, necessary in order to effect the testator's intention according to the first.

The words of conveyance of *acquirenda* in the marriage-contract are undoubtedly as general and comprehensive as possible, and the generality is emphasised by the expression of some particular exceptions; but it is, I think, according to a principle of construction, of which there are numerous and various illustrations, that comprehensive general words of conveyance may be modified or limited with reference to the nature and purposes of the deed in which they occur, and the probable, or rather perhaps reasonably certain meaning and intention of the parties using them. On this principle I think we should hold that liferents and annuities are not within the scope of such general words occurring in an antenuptial marriage-contract. It has, Lord Hatherley says, been so decided in England, although liferents and annuities are (or very well may be) subject to the debts and deeds of the liferenter or annuitant, and so are means wherewith their debts may be paid. Again, with respect to corporeal moveables, such as carriages and horses, furniture, jewels, and such like, I do not think we could, having regard only to the nature and purpose of the deed and the intention of the parties, hold that these were included, although all of them are subject to be disposed of by the owner, and may be taken in execution by his or her creditors. Nor is the value of such cases put for the purpose of illustration affected by the circumstance that in the case before us liferents and corporeal moveables are expressly excepted. Neither is it, in my opinion, material to the question of construction of the general conveyance that the marriage trustees are directed to pay to the wife the annual income derived from property in their hands under her conveyance. The contention which the Court of Chancery rejected, and which, I think, we should reject, was that the estate for life or the annuity must pass to the marriage trustees, as it would to trustees for creditors under a conveyance in the same terms, and that their duty was to capitalise them and pay to the wife the annual income only. Suppose there had been no express exclusion of corporeal moveables, and that a friend or relative presented the wife with a carriage and pair, or a new suite of drawing-room furniture, or a diamond necklace, would these on becoming the wife's property by the gift have passed under the marriage trust so that it would have been the right and duty of the marriage trustees to take possession of them? I think not, although I cannot doubt that carriage, horses, furniture, and necklace might be used by the wife, the owner, to pay her debts, and were all subject to the diligence of her creditors. I should reach the one conclusion by construction of the marriage-contract, and the other on the common law of debtor and creditor.

The proposition which I have been endeavouring to support and illustrate is, that the general and comprehensive words of conveyance which we are now considering, are subject to such limitation by construction as may be necessary to avoid violation of the reasonably certain meaning and intention of the parties using them, and the illustrations which I have ventured to suggest are all cases (supposed cases no doubt) in which I think we should be warranted in making such modification or limitation.

The limitation, the possibility and propriety of which by such legal construction is immediately in question, is the exclusion of property gratuitously given for a purpose or with an intention on the part of the donor inconsistent with its falling under the general conveyance, such purpose or intention, clear and admitted as matter of fact, not being legally binding on and enforceable against the donee. In my opinion this is a possible and proper limitation.

Suppose the wife's father sends or hands to her £500 as a Christmas or birthday present, expressing to her in a note or by word of mouth that he meant to help her in taking an autumn holiday trip with her husband and children, which he thought would do them all good, or to take a house in London for the season for the gratification of her daughter who had just come out —would this sum fall under the marriage

trust, so that the marriage trustees could demand it, and would fail in their duty if they did not?

"Sensus moresque repugnant atque ipsa utilitas, justi prope mater et aequi." The idea of imputing to a couple about to be married the intention of contracting that the wife's father (or any other, even the husband himself) should not be at liberty to make her a present, or she to receive it, does not commend itself to my mind. In the case which I have just put I imagine that those who differ from my views and think the case is one of debtor and creditor would hold that the wife would not even be permitted to return the gift on finding that she could not use it as the giver intended, but must, if she kept it, dispose of it in a manner which would to her knowledge violate his wishes. The gift was complete, and the giver's intention not so expressed as to be legally binding on the donee.

In the case before us the donor (Miss Simson) is dead, and cannot have the money returned to her on its turning out that her donee not only may (without transgressing the law) violate her wishes if so minded—for she might very well have confidence that she would not—but must, on the compulsion of a contract between her and her husband. Suppose she were alive, and before making the gift—a *de præsenti* gift of the amount of that in question—desired to ascertain whether or not she could on the terms that her niece should have it for her own use, and that it should not pass to the marriage trustees, I think the marriage trustees if in doubt as to their rights and duties in the case supposed could have presented a case to the Court on the subject. The parties would have been the trustees on the one side, and the two spouses on the other, and the question would have been whether or not the spouses had irrevocably contracted that such a gift as that offered must be rejected, unless accepted with the unworthy, as I think, intention of violating the giver's intentions. It would of course be unworthy—perhaps discreditable—to encourage the intending giver to hand over the gift in the belief that her intentions would be respected, and then to seize it in violation of these intentions announced because they were not in binding form and available against creditors. The common law of debtor and creditor, which is clear and familiar enough, seems to me to have really no bearing on the case. It is not, I think, doubtful, nor has any doubt been, so far as I know, suggested that the estate in question if paid or conveyed to Mrs Brown will be subject to her debts and deeds, available for payment of her debts, and subject to the diligence of her creditors. The question before us is the very different one, in my judgment, whether her contract with her husband imparts an obligation respecting it whereby she is not enabled but compelled to outrage the giver's intentions, and to limit, or it might be to lose entirely, the benefit which the giver intended.

I venture again to refer to the mode whereby, in the opinion of seven of the consulted Judges, it would have been competent to Miss Simson by the constitution of a trust to give Mrs Brown a certain interest in her estate, and at the same time to prevent Mrs Brown's share from falling under the marriage trust. It is unnecessary again to recite it. The opinion of the learned Judges although expressed without doubt is only *obiter*, and it would, I assume, be competent for the spouses, for their own legitimate satisfaction, and the assurance of their friends who meditated gifts, to have its soundness, as being in accordance with the true meaning and import of the marriage-contract, authoritatively ascertained by declarator. No doubt of the competency of such declarator occurs to me, but if there is any, let me remove it by supposing such continuing trust and trust purposes as our learned brethren think without doubt would be valid to exclude the marriage trust, to be actually constituted, and that the declarator asked was that it was effectual to prevent the estate which Mrs Brown took under it "from falling under the marriage trust." Our learned brethren would of course assent, and without doubt, to such declarator. The estate taken by Mrs Brown under the continuing trust supposed is a right to the income of property during her life, and to dispose of the capital after her death at her absolute pleasure. Now, by the declarator which our learned brethren would concur in pronouncing, the estate would be prevented "from falling under the marriage trust." Then, suppose a second declaratory conclusion to the effect that "it being so found and declared," as in the first conclusion, "it should be further found and declared that the marriage trustees have no title as such trustees and as the guardians of any interests, existing or possible in the future, under the marriage trust to insist upon any limitation of Mrs Brown's right, or to prevent her taking the property in absolute property." It would of course be the duty of the trustees of Miss Simson's "permanent trust" to consider whether there were any interests under it and in their charge to prevent this result. But with these, if they existed—and I can imagine none—Mrs Brown's marriage trustees could have no concern. How then, or on what grounds, could they resist the declarator which I have suggested? They could not, I think, successfully maintain that the marriage-contract ought to be construed so as to operate merely as a self-denying ordinance, and so that Mrs Brown's estate should be limited or altogether hindered to her prejudice—and indeed to that of both the contracting spouses—without any advantage whatever to the other interests under the contract.

If Miss Simson had directed her trustees to convey the estate in question to her niece Mrs Brown, provided she could receive and retain it without passing it on to her marriage trustees, and otherwise to expend it in the erection of a monument in commemoration of the Flood or the Battle of Bannockburn, would it have been according to the duty and trust of the marriage

trustees to insist that Mrs Brown should not have the estate, and that it should go to the erection of the monument? It would be an affront to any man of sense to suppose that he doubted of the answer to this question. But what then? This, I imagine, that we are dealing not with a question of reason or sense but with the merest formality, and with a proposition so extravagant, in my opinion, as this—that while a gratuitous donor or testator cannot have his wishes and intentions fulfilled by virtue of the clear expression of them, he will, by the addition as a conveyancing formality of some such grotesque alternative as I have now suggested.

LORD RUTHERFURD CLARK—I agree with the opinions of the consulted Judges.

LORD LEE—I also have the misfortune to be unable to concur in the judgment about to be pronounced. I agree with Lord Young's grounds of dissent. But as I think that there is another ground, I may be allowed to state it. It is, that according to a sound construction of Miss Simson's settlement Mrs Brown takes a limited right or none at all. According to the opinions already delivered the judgment now to be pronounced will proceed exclusively upon the authority of the case of *Douglas' Trustees* v. *Kay's Trustees*. The first ground of my dissent is, that that case is inapplicable to the present. That case had reference to a different deed of settlement, and it was decided upon the ground that the settlement of Mr Kay gave to his daughter unconditionally an absolute fee in her share of his estate. This appears from the opinions of all the Judges. They hold it to be clear that a share of the estate had vested unconditionally *a morte testatoris* in Mrs Douglas, and therefore that a mere declaration of intention was insufficient to prevent it falling under her conveyance. But in the present case no such fee has been conferred on Mrs Brown, unless the codicil of Miss Simson can be read as giving her a right which falls under her conveyance to the marriage-contract trustees. For the directions of the trust-settlement of Miss Simson were "to hold in trust the shares original or accruing of my estate falling to my nieces . . . the interest and proceeds to be paid periodically to such as have attained majority or been married . . . and in case of the death of any one of my nieces without issue, or in the event of such issue all dying before attaining majority, I direct my trustees to divide the share of such niece equally among my surviving nephews and nieces, and the issue of any one who may have predeceased, in room of their parents."

I think it clear that this distinction to surviving nephews and nieces in the event of Mrs Brown's children (who are in pupillarity) all dying before attaining majority necessarily prevents vesting unless revoked or altered. It is not affected by the subsequent clause relative to the shares which may fall to the female issue of nephews or nieces, which the trustees are to continue to hold so long as they think it prudent to do so.

But it is supposed to be altered by the codicil. Now, as I read the codicil, while it expresses the truster's desire that her nieces who may become entitled to a share of her estate should be put into possession of their shares without the intervention of any trust, "and so that they may have it in their power to dispose of the capital sums in any way that may seem to them proper," I cannot find that it contains directions which in the case of Mrs Brown authorise the trustees to pay over her share to her marriage-contract trustees, or even to pay it to herself, or hold it as her property, unless this can be done free from the control of the marriage-contract trustees, and on the condition that these trustees "shall not be entitled to any part of my estate as in right of the said Margaret Romanes Rankine or Brown." It is only subject to this qualification, that her rights under the trust-deed are altered, and as the codicil contains no express clause of revocation, I think that the direction that her share shall be her own absolute property cannot be read as vesting a fee in her, which shall pass to the marriage-contract trustees. Indeed, it cannot be read as giving to her the absolute property of her share if it is to be subject to the conveyance in her marriage-contract. If therefore the effect of giving to Mrs Brown an absolute and unqualified fee is that the marriage trustees shall have right to it, I think that no such fee was given in this case by Miss Simson's will. It is directly contrary to her will as declared that any such right shall exist.

The result of this view would be that neither the marriage trustees nor Mrs Brown could take any right under the codicil, and that the original settlement remains unaltered so far as Mrs Brown's share is concerned.

I am aware that this is not Mrs Brown's contention, and the view I have stated is not presented in the case. The interests of those who would take under the destination in the trust-deed in favour of surviving nephews and nieces do not appear to be represented. The view suggested in the case of *Thurburn's Trustees*, that the codicil may give to Mrs Brown a conditional right "or none at all" does not appear to have been considered. But it appears to me impossible to avoid that question, if the effect of the marriage-contract conveyance is as contended for by the marriage trustees. It is raised by the questions stated for the opinion and judgment of the Court. For if no right is conferred by the codicil which Mrs Brown can take free from control, her claim fails and as the marriage-contract trustees can only claim in her right their claim fails also.

It was suggested in consultation that such a condition as that which I think is implied in this codicil would require to be made effectual by a clause of forfeiture. But in the view which I take no forfeiture was necessary. For if the purpose ex-

pressed in the codicil fails of effect, there is no revocation of the directions contained in the trust-deed.

II. But the question remains—Is it a necessary consequence of a general conveyance of *acquirenda* in an antenuptial contract of marriage that no separate estate can be given to a wife which shall not fall under that conveyance to the marriage trustees? It is admitted in the case of *Douglas' Trustees* (decided before the Married Women's Property Act of 1881) that something of the kind might have been done by means of a trust; and the consulted Judges are of opinion that a power of disposal of the fee might in this way have been given to Mrs Brown. But the question has now to be decided with reference to a marriage which took place subsequent to the passing of the Married Women's Property Act of 1881, and under a state of the law which enables a wife to hold separate personal estate in her own right and without any trust. It is not suggested here as it was by Lord Mure in the case of *Douglas' Trustees*, that the testator was under any disability to exclude the marriage-contract trustees. Miss Simson was no party to the marriage-contract. The point for consideration therefore is whether the execution of a marriage-contract to which she was no party put it beyond the power of Miss Simson to leave property to Miss Brown "free from the control of the marriage-contract trustees."

Upon this point I concur in the result arrived at by Lord Young. I think that the marriage-contract trustees are excluded by the terms of the codicil from claiming any right, and that they have no interest, to object to Mrs Brown receiving this legacy on the conditions attached to it by the testator.

I am therefore of opinion that the questions stated ought to be answered in favour of Mrs Brown, or otherwise that they must all be answered in the negative.

The Court answered the first and second questions in the negative, and the third question in the affirmative.

Counsel for the First and Second Parties — Low. Agents — Romanes & Simson, W.S.

Counsel for the Third Parties—C. K. Mackenzie. Agent — John Rutherfurd, W.S.

Tuesday, March 11.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WRIGHT & GREIG *v.* OUTRAM & COMPANY.

(*Ante*, vol. xxvi., p. 707, July 17, 1889; and 16 R. 1004.)

Reparation — Slander — Newspaper Report of Proceedings in Court of Justice— "Fair and Accurate"—New Trial.

A firm of merchants sued the proprietors of the *Glasgow Herald* newspaper for damages for slander contained in a report of proceedings in the London Bankruptcy Court, in the course of which a former agent of the pursuers, was, they averred, wrongly reported to have said "that they were very hard up, and he had financed them from time to time" by means of accommodation bills.

The defenders maintained that the report was fair and accurate, and therefore, being a report of judicial proceedings, was privileged. The case was tried on this issue—Whether the defenders published in the newspaper a paragraph in terms of the schedule annexed; and "whether the statements therein set forth are of or concerning the pursuers, and falsely and calumniously represent that the pursuers had been or were in financial difficulties, and had been or were being financed by means of accommodation bills and advances of money." The jury found for the pursuers, damages £500. The defenders moved for a new trial, on the ground that the verdict of the jury was contrary to the evidence, and that the damages allowed were excessive.

Held that the paragraph was not a fair and accurate report, as it consisted of an abridged account of the proceedings which conveyed an impression different from what an accurate report would have produced; that therefore the verdict was not contrary to evidence, but that a new trial should be granted unless the pursuers consented to the damages being reduced to £250.

Diss. Lord Young, who thought that there was nothing false or calumnious in the report, and that the pursuers had suffered no damage.

In this case the pursuers Messrs Wright & Greig, wine and spirit merchants, Glasgow, sued Messrs George Outram & Company, proprietors and publishers of the *Glasgow Herald* newspaper, Glasgow, for £3000 damages for slander contained in a report of the examination in bankruptcy in the London Bankruptcy Court of a former agent and traveller of the pursuers named Smyth.

The pursuers averred—"(Cond. 5) Upon the 22nd January 1889 an application was made by Smyth in the London Bankruptcy Court for an order of discharge. The pur-