judgment upon it. Admittedly, notice was not given within the six weeks prescribed by the statute, and the only question is, whether there is a relevant averment of reasonable excuse for the want of such notice. In my opinion there is not. There is no circumstantial statement of reasonable excuse at all. What is said about the pursuer might be said probably of any and every father of a miner, viz., that he is an old man, and is illiterate. To sustain this as an excuse would be to nullify the enactment requiring notice, and no literature is required to get a letter sent to the employer, stating, as the Act says, "in ordinary language," the cause of the injury, and the date at which it was sustained.

Again, the statement that a fatal result of the injury was not apprehended, if it has any significance, is merely a criticism on the statute, which prescribes the same period for notice whether the man lives and himself sues, or dies and some relative sues.

Holding, as I do, that the action cannot be maintained by reason of the absence of any averment of reasonable excuse for the want of the statutory notice, I find no occasion to consider the more difficult question decided by the Sheriff-Substitute. I am for recalling his interlocutor and dismissing the action.

LORD M'LAREN—Your Lordships are all of opinion that the injury referred to in the statute means, not the injury which the pursuer has sustained, but the injury which the deceased person has sustained. The result of that view would seem to be that wherever the person who was mortally injured survives the period allowed for notice, it would be impossible to give the notice required by the statute. It may be that in such a case the Court would hold that there was a reasonable excuse if notice of action had been given by the deceased within the prescribed time. But supposing that the deceased had not given notice, is the father to lose his right of action? I should have thought that in the case supposed, as it would be impossible for the father to give notice of the death of his son within the time required by the statute, the fact that the son had survived the period of notice, and that the right of action did not arise until after the expiration of the period of notice, was in itself a reasonable excuse, and that the same principle would apply to the case of the death of the injured party while the period of notice was running. But I cannot say that I hold this opinion with any confidence after the view taken by your Lordships, and I do not desire to dissent from the decision. The difficulty is that the right of action which the father has for the death of his son is a different right of action from that which the son had himself during the period of his survivance. The father's right only arose on the death of his son. He might not be able to give the notice which is required by the statute if the statute be strictly interpreted as proposed.

LORD ADAM and LORD KINNEAR concurred with the Lord President.

The Court recalled the interlocutor of the Sheriff-Substitute and dismissed the action.

Counsel for the Pursuer—A. J. Young—A. S. D. Thomson. Agents—Patrick & James, S.S.C.

Counsel for the Defenders—Balfour, Q.C.—Salvesen. Agents—Gill & Pringle, W.S.

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*Saturday, January* 16.

## FIRST DIVISION.

(Before Seven Judges.)

[Lord Stormonth Darling, Ordinary.

## WATT *v.* WATSON AND OTHERS.

*Trust—Revocation—Husband and Wife—Revocation by Wife of Unilateral Trust-Deed Executed Prior to Marriage.*

By deed of provision and trust executed on the day before her marriage, a woman of full age, on the narrative that "there is a purpose of marriage between X and me, and that in contemplation thereof, and as a provision for myself and my said intended spouse, and the issue, if any, of the said intended marriage," she had transferred certain securities to trustees, conveyed to the said trustees certain additional estate, the whole to be held, *inter alia*, "for payment to me during my life, on my own separate receipt and discharge, and after my death to the said X, if he shall survive me, of the free annual income or revenue of the said trust-estate, for the liferent use allenarly of me and him respectively, declaring that the said income shall not be affectable by the debts and deeds of either of me and the said X and the diligence of our creditors; (*third*) after the death of me and the said X, for behoof of the child or children of the intended marriage in fee."

There were no children of the marriage.

*Held*, by a majority of seven Judges (*diss.* Lord Moncreiff, and *rev.* judgment of Lord Stormonth Darling), that the deed was revocable by the granter with consent of her husband on the ground that it was unilateral, that it formed no part of the contract of marriage, and that no parties beneficially interested were in existence except the spouses.

*Trust—Revocation—Husband and Wife—Married Women's Property Act* 1881 (44 *and* 45 *Vict. cap.* 21).

*Opinion* (*per* Lord M'Laren) that the Married Women's Property Act 1881 had not altered the law as to the revocability after marriage of a voluntary trust-deed executed by a woman before marriage.

This was an action raised by Mrs Margaret Watson or Watt against Daniel Macneil

Watson, Glasgow, and others, concluding for reduction of a deed of provision and trust granted by her under which the defenders were the trustees, or alternatively for declarator that the said deed was revocable by the granter, and that the trustees were bound to reinvest the pursuer in the estate conveyed by her to them, and execute all deeds necessary to complete her title thereto.

The deed in question was executed by the pursuer on 21st August 1894, being the day preceding her marriage, and the essential provisions thereof were as follows:—"I, Miss Margaret Watson ... Considering that there is a purpose of marriage between John Kennedy Watt, produce merchant, Glasgow, and me, and that in contemplation thereof, and as a provision for myself and my said intended spouse, and the issue, if any, of the said intended marriage, I have of even date herewith transferred to the persons after named and designed—(*First*) £680 Glasgow Corporation Three per Cent. Stock, redeemable 15th May 1921; and (*Second*) £267 Glasgow Corporation Irredeemable Stock: And I have resolved to transfer my right and interest in the estate of my father the deceased John Watson, stationer, Glasgow, to the extent after specified, and also the sum of money contained in the deposit-receipt after mentioned, to be held upon the trusts after specified: Therefore I do hereby assign and transfer to and in favour of Daniel Macneil Watson, papermaker, Glasgow, my uncle, and John Warden Watson, engineer, Glasgow, and George Cockburn Watson, stationer there, my brothers, and the survivors and survivor of them, and to the heir of the survivor, as trustees and trustee for the purposes after mentioned, All and whole [part of the granter's interest in her father's estate and a sum of £35 on deposit-receipt]: But these presents and the said transfers of the said Glasgow Corporation stocks are granted in trust, and the said trust-estate shall be held, for the following purposes, viz.—(*First*) For payment of the expenses of executing this trust: (*Second*) For payment to me during my life, on my own separate receipt and discharge, and after my death to the said John Kennedy Watt, if he shall survive me, of the free annual income or revenue of the said trust-estate for the liferent use allenarly of me and him respectively; declaring that the said income shall not be affectable by the debts and deeds of either of me and the said John Kennedy Watt or the diligence of our creditors: (*Third*) After the death of the survivor of me and the said John Kennedy Watt, for behoof of the child or children of the intended marriage, in fee, divisible among them in such proportions, and payable at such times and in such manner as I shall appoint by any writing under my hand: and in case of no such appointment, for the said children equally, share and share alike; and, unless otherwise directed, the trustees shall pay and convey to the said children their respective shares of the said trust-funds and estate on the youngest child attaining majority; and until that event the trustees shall apply the income towards the maintenance and education of such of the children as are in minority and unable to support themselves; with power to the trustees for that purpose to apply such part of the capital as they may deem necessary, and that even during the subsistence of the foresaid liferents; declaring that the above provisions in favour of children shall not become vested interests until the period of payment above mentioned, and that the lawful issue of children predeceasing the period of payment shall take equally amongst them the share which would have fallen to their parent had he or she survived: (*Fourth*) In the event of the death of the said John Kennedy Watt, survived by me, without any child or children, or the issue of a child or children of the said intended marriage, or on the death of all of such children without any interest in the trust-estate having vested in any of them, the trustees shall pay over the trust-estate to me absolutely for my own behoof: (*Fifth*) In the event of the said John Kennedy Watt surviving me, and of there being no child or children, or the issue of a child or children, of the said intended marriage, or on the death of all such children without any interest in the trust-estate having vested in any of them, the trustees shall on the death of the said John Kennedy Watt hold the trust-estate for and shall pay over the same to my own nearest of kin."

The pursuer averred—"The pursuer has intimated to the trustees that she desires to terminate the trust and resume possession of her estate, but they allege that the trust constituted in their persons is irrevocable and that they are not entitled to denude."

The pursuer also made numerous averments to support the plea of essential error on which the conclusion for reduction was founded, but it is unnecessary to set these forth here.

The defenders, besides making certain averments to meet the pursuer's case of essential error, admitted that they declined without the authority of the Court to denude themselves of the trust created by the deed of provision.

The pursuer pleaded, *inter alia*—"On a sound construction of the said deed it is revocable by the pursuer the said Mrs Margaret Watson or Watt at will, and she is entitled to decree as craved.

The defenders pleaded, *inter alia*—"(2) The said deed having been executed by the female pursuer in full knowledge of its import and effect, and for the protection of herself and of her children, if any, it is irrevocable, and ought not to be reduced. (5) The said deed having been delivered and acted upon, is irrevocable."

After a proof had been taken on the question whether the pursuer had granted the deed under essential error, the Lord Ordinary (STORMONTH DARLING) on 4th March 1896 sustained the defences, and in respect thereof assoilzied the defenders.

*Opinion.*—"The purpose of this action is

to get rid of a trust-deed which the pursuer Mrs Watt executed on 21st August 1894, the day before her marriage, and she proposes to effect this either by having it declared that the deed is in its own nature revocable, or by reducing it on the ground that she granted it under essential error as to its import and effect.

"On the second of these grounds I allowed a proof. The record contains plentiful averments that Mrs Watt was induced to grant the deed by misrepresentation and concealment on the part of her brother and the family agent, who led her (she says) to believe that it was intended merely for the management of her estate, and that it would not prevent her from resuming possession of her estate at any time she chose. The result of the proof is, in my opinion, entirely to disprove these allegations. . . .

[*After dealing with the evidence his Lordship proceeded*]—"The second question is, whether the deed is in its own nature revocable. I am of opinion that it is not.

"I do not found that opinion upon the fact that the trustees hold the fee for the children of the marriage, because, as yet at least, there are none. The case does not therefore fall within the category of which *Shedden* v. *Wilson*, November 29, 1895, 33 S.L.R. 154, is the latest example.

"The principle which seems to me to bar revocation is that to which effect was given in the leading case of *Menzies* v. *Murray*, 2 R. 507—the principle, namely, that *stante matrimonio* a wife has no power to alienate or diminish the rights secured to her by an antenuptial trust made in contemplation of marriage. It was argued that this principle had been rendered obsolete by the statutory exclusion of the *jus mariti*. It might be enough to reply that *Menzies* v. *Murray* was followed by the Second Division only a few weeks ago in the case of *Ker's Trustees* v. *Ker*, 33 S.L.R. 212. But the truth is that the argument involves an entire misapprehension of the principle of *Menzies*' case, which is to protect the wife, not against the diligence of the husband's creditors, but (to use the words of Lord Deas), 'against marital influence on the one hand, and self-sacrifice on the other.' It is precisely where there *is* an exclusion of the *jus mariti* that this kind of danger arises.

"I am quite aware that the trust in *Menzies* v. *Murray*, which the wife was held not entitled to bring to an end, even with the consent of all the beneficiaries, was a trust created by antenuptial contract. But I am unable to see that there is any difference in principle, so far as this question is concerned, between a trust so created and a trust set up by the wife herself in a unilateral deed made *intuitu matrimonii*. What Mrs Murray proposed to give up was not her marriage-contract provisions, but the trust which secured them, and that was a trust entirely of her own creation. The husband had no part in creating it, for he placed nothing under it. His accession to the deed therefore, while it made the provisions contractual, and therefore onerous, added nothing to the sanctity of the trust.

"'The force and substance of such deeds (*i.e.*, antenuptial protective deeds), says Lord Gifford in 5 R. 1039, 'do not flow from the consent of the intended husband, although such consent is usually adhibited. They draw their real efficacy, and their real strength and finality, from the will of the person who dedicates the trust fund, and if this be the intended wife herself, then it is her act, and not the act of her intended husband, which places the fund beyond even her own power while she remains under coverture.'

"It would be absurd to say that every kind of trust-deed executed by a wife before marriage is rendered irrevocable by the mere fact of marriage supervening. The deed might be merely administrative or merely testamentary. To become irrevocable on the principle of *Menzies* v. *Murray*, it must have been made in contemplation of marriage, and must contain provisions for the wife's own protection. Here these conditions are satisfied. The deed declares that it is granted in contemplation of the pursuer's marriage with Mr Watt, and as a provision for herself and him, and the issue, if any. It secures the pursuer's liferent, present and prospective. In so far as its provisions are properly matrimonial provisions it must therefore stand. In so far as it merely provides for the destination of the estate to third parties after the death of the spouses without leaving issue, it is testamentary, and therefore revocable.

"The cases relied on by the pursuer seem to me inapplicable. In *Murison* v. *Dick*, 16 D. 529, the deed was revoked before marriage, while the granter was still mistress of her own fortune. In *Mackenzie* v. *Mackenzie's Trustees*, 5 R. 1027, the lady was only allowed to revoke an antenuptial trust-deed on executing a postnuptial contract approved of by the Court, and even this limited kind of revocation might not have been permitted if the antenuptial deed had been held to have been granted in contemplation of marriage. But the Lord Justice-Clerk (without whom there would not have been a majority in the Inner House) characterised the deed as not executed in contemplation of marriage, and as nothing but a voluntary interdiction intended to protect the granter against her own extravagance. Lord Young in the Outer House seems to have taken very much the same view."

The pursuer reclaimed, and on 14th November 1896 the cause was appointed to be argued before seven Judges.

Argued for the pursuer—The deed was revocable. (1) It was not expressly declared to be irrevocable, the liferent was not declared to be alimentary, and there was no sufficient protection of the liferenter against creditors—*Rogerson* v. *Rogerson's Trustees*, November 6, 1885, 13 R. 154. It was a well-settled principle that no one could by a unilateral deed put his property beyond the reach of his creditors—*Corbet* v. *Waddell*, November 13, 1879, 7 R. 200. (2) No children had yet been born of the marriage, and therefore there was no

*jus quæsitum* in anyone. This consideration had received great support in some of the opinions in *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027. The present case was, in truth, ruled by *Murison* v. *Dick*, February 10, 1854, 16 D. 529, which the Lord Ordinary attempted to distinguish on the ground that there revocation took place before marriage. But that made no difference, for here it could not be contended that marriage had taken place on the faith of the deed, or that the deed had been truly executed in contemplation of marriage—see opinion of Lord Justice-Clerk (Moncreiff) in *Mackenzie, ut sup.*, p. 1041. It was said that *Menzies* v. *Murray*, March 5, 1075, 2 R. 507, and *Williamson* v. *Boothby*, June 11, 1890, 17 R. 927, were conclusive authorities against the pursuer. But the former was a case of a bilateral marriage-contract with a strictly alimentary liferent, and the latter was also a case of a marriage-contract in the strict sense of the term, which the deed in question here was not. In any event, assuming that under the old law the deed was irrevocable, a change had been effected by the Married Women's Property Act 1881 (44 and 45 Vict. cap. 21). Since the date of that Act men and women had been placed on an equal footing, and the reasons which existed for protecting a wife and for refusing her permission to revoke at a time when by law her moveable property became her husband's by the very fact of marriage, had now ceased to exist.

Argued for the defenders—The deed was irrevocable. It made no difference that the liferent was not declared to be alimentary, that the deed was not expressly declared to be irrevocable, that the deed was unilateral, that no children had come into existence, or that the common law as to the *jus mariti* had been altered. *Torry Anderson* v. *Buchanan*, June 2, 1837, 15 S. 1073, was the first of a chain of decisions to the effect that when in an antenuptial marriage contract a wife dedicated a sum for her own liferent, she could not revoke that deed though the liferent was not declared to be alimentary and no other interest was in existence. It was true that in that case the deed was expressly declared to be irrevocable, but as Lord Neaves pointed out in *Pringle* v. *Anderson*, July 3, 1868, 6 Macph. 982, at p. 991, that was not the ground on which the case was decided. The same principle had been affirmed in *Menzies* v. *Murray*, March 5, 1875, 2 R. 507, and while *Mackenzie* v. *Mackenzie*, July 10, 1878, 5 R. 1027, seemed an authority to the contrary, it was to be observed that Lord Gifford had asserted the principle very strongly in his dissenting opinion, that the judges in that case were evenly divided, and that the Lord Justice-Clerk had based his judgment upon the view that the deed was not truly executed in contemplation of marriage. No weight was attached to the fact that the deed was unilateral. *The Standard Property Investment Co.* v. *Cowe*, March 20, 1877, 4 R. 695, was another authority in favour of the defenders, while the most recent case, *Ker's Trustees* v. *Ker*, December 13, 1895, 23 R. 317, where the decision was also in favour of irrevocability, was significant for three reasons—the deed there was not declared to be irrevocable, the children beneficially interested all gave their consent to the proposal to revoke, and the case was decided subsequently to the Married Women's Property Act of 1881. If a declaration that the liferent was alimentary were indeed essential, the clause protecting it against creditors was a sufficient equivalent—*Irvine* v. *M'Laren*, January 24, 1829, 7 S. 317, per Lord Glenlee, p. 318; *Martin* v. *Bannatyne*, March 8, 1861, 23 D. 705, per Lord Neaves, p. 707, per L. J.-C. Inglis, pp. 708, 709. The result of the decisions was that three points were essential to the irrevocability of such a deed is this—(1) *Intuitus matrimonii;* (2) the creation of a trust; (3) the direction to apply the money to marriage-trust purposes. These elements were all present here—Fraser on Husband and Wife, p. 1489, also referred to.

On Tuesday, 12th January, the following opinions were delivered by the Seven Judges:—

At advising--

LORD M'LAREN—In this action Mrs Watt, with her husband's consent, concludes first for reduction, on extrinsic grounds, of a deed of trust which she executed on the day preceding her marriage, and alternatively for a decree declaring that the trust is revocable. The second conclusion was alone referred to the Court of Seven Judges, and it is this branch of the case on which we are now to give judgment. I shall therefore leave out of view all considerations founded on the facts which have been the subject of proof, and consider only the legal effect of Mrs Watt's deed as a settlement of her estate.

The trust-deed is dated 21st August 1894, and it begins with the following narrative:—"Considering that there is purpose of marriage between John Kennedy Watt, produce merchant, Glasgow, and me, and that in contemplation thereof, and as a provision for myself and my said intended spouse, and the issue if any of the said intended marriage, I have, of even date herewith, transferred to the persons after named" (the trustees of the settlement), certain stocks, also the truster's interest in the estate of her father, and a sum of money in bank. The deed then conveys these securities to the trustees in trust for payment of their expenses, and thereafter for payment of the income of the trust-funds to Mrs Watt for life, and to her intended husband, if he should survive her, for life, excluding assignment and the diligence of creditors. The trustees are directed to hold the fee for the child or children of the marriage, whom failing, as mentioned in the deed.

The deed was therefore executed in contemplation of marriage, and the purposes are such as are not unusual in contracts of marriage, but the husband was not a party to the deed, and it must be taken to have been executed without his consent. Also, as the husband gave nothing, and came

under no pecuniary obligation on the occasion of the marriage, the elements of mutual consideration and contract are absent. If the deed be irrevocable, this result must depend on the mere fact that the execution of the deed was followed by marriage.

It is, of course, indisputable that an effective settlement may be made in the form of a contract of marriage containing a trust of the wife's estate for the spouses in liferent and the issue of the marriage in fee. Under such a deed it is recognised that the trustees are protectors of the interests of the wife and children; their title is preferable to that of any donee to whom the wife may attempt to convey the estate in derogation of the trust, and to that of the wife herself should she attempt to revoke the trust. The main purpose of such deeds—the protection of the wife against her own voluntary acts during the marriage—is carried out in England and Scotland by means of a trust, and while there are differences of form and expression in the English and Scottish trusts, as was pointed out by Lord Cottenham in *Rennie* v. *Ritchie*, 4 Bell, 242, there is, I think, substantial identity in the main elements, which are, first, the consent of the spouses, and secondly, the withdrawal of the estate from their control by the interposition of a trust. I notice in passing that a contract of marriage may incidentally dispose of estate which the spouses do not desire to settle, and the disposal of which is not a term of the treaty of marriage. This was the ground of decision in *Ramsay's* case, 10 Macph. 120, and if the judgment in that case has any bearing on the case before us, it only proves that the mere execution of a trust-conveyance upon marriage does not of itself amount to an irrevocable settlement if the element of contract is awanting.

Before considering the effect of the series of cases ending in *Menzies* v. *Murray*, with reference to their bearing on the present question, it may be proper to notice that this question could not well have arisen before the year 1881, when the Married Women's Property (Scotland) Act came into operation. Until that time the *jus mariti* was in full vigour; and by what has been termed the assignation of marriage, the wife's personal estate, and the income of her heritable estate, passed to the husband. I think it is consistent with all the authorities that the husband could not be deprived of these rights except by his own consent. It is hardly necessary to elaborate this point, which indeed has only an indirect bearing on the matter in issue; but I may be permitted to refer to a passage in Erskine's Institutes (i. 6. 14) which has been judicially approved. In this statement of the law the learned author begins by referring to the erroneous opinions of previous writers, including Lord Stair, who held that the husband's renunciation of his rights fell itself under the *jus mariti* as a moveable right conceived in favour of the wife; and then he proceeds:—"This doctrine, which springs from a mere subtlety, is irreconcileable to that *bona fides* which ought to prevail in marriage-contracts, and indeed to common sense; for all rights not inalienable may be renounced by those entitled to them, and the husband's right of administering his wife's moveable estate is not accounted by the law of any other country so essential to him but that he may divest himself of it." In the important case of *Macdougall* v. *City of Glasgow Bank*, 6 R. 1089, relating to the effect of an exclusion of the husband's rights in relation to *acquirenda* this passage is cited by Lord Mure and the Lord President as being a correct statement of the law, and the principle on which it is founded; and if, as Mr Erskine states, and this Court has found, the exclusion of the *jus mariti* in relation to wife's estate depends on the husband's renunciation, it is impossible to maintain that in the state of the law which existed prior to 1881 an unmarried woman could, by putting her moveable estate under trust, prevent it from falling under her husband's dominion upon her supervening marriage. I am not here considering the effect of the exclusion of the *jus mariti* from property coming to the wife by will or gift, which depends on different principles, but I think it is clear on the authorities that the husband was a necessary party to a deed in contemplation of marriage which was intended to exclude or restrict his rights in relation to the wife's estate.

Accordingly, in the two cases in which the effect of the wife's unilateral deed was considered, the deed was held to be revocable. I refer to the cases of *Murison* (16 D. 259) and *Mackenzie* (5 R. 1027). It is true that other elements entered into the decision of these cases, the judgments being rested largely on a consideration of the circumstances in which the deeds were granted, and as I think also on the ground that in the particular cases the trust was a purely voluntary conveyance for the benefit of the lady herself—a conveyance which could not and did not divest her of the right of resuming the administration of her estate. But the cases are at least illustrations of the principle that the wife's estate cannot be tied up during the subsistence of a marriage by a deed to which the husband is not a party.

Passing to the cases in which trust-conveyances of the wife's estate have been held effectual and irrevocable, I observe that in every one of these cases from *Anderson* v. *Buchanan*, 15 S. 1073, to *Menzies* v. *Murray*, 2 R. 507, the trust was contained in or executed with reference to an antenuptial contract of marriage. In these cases it was not necessary to consider the element of the husband's consent, because it was common ground that the mere exclusion of the *jus mariti* by contract would not prevent the spouses from disposing of the estate by their joint act. The question in these cases related to the measure of the higher protection which might be given by means of a trust. But I observe that in the reported opinions of the Court of Seven Judges who advised *Menzies* v. *Murray*, all the Judges are at pains to state

that their opinions are given with reference to a trust constituted by antenuptial contract of marriage. I do not think that in fair construction any of the opinions there given as to the inviolable nature of a trust so constituted can be extended so as to cover the case of a trust constituted by the act of the wife alone. It may be that in their opinions the principle of contract is made to support consequences which do not directly flow from it, because the effect of the decision is that a trust constituted by matrimonial contract cannot be revoked by the same authority which created it. But this effect has been given to matrimonial contracts for reasons of social expediency, and when it is remembered that by the law of Scotland a married woman is incapable of undertaking a personal obligation, it can hardly be said to be a very anomalous rule that a settlement of property which is made a term of the treaty of marriage should be as indissoluble as the marriage itself. But if it should be thought that in *Menzies* v. *Murray*, and the cases which preceded it, the Court took a step in the direction of protecting the wife against herself which it is difficult to refer to the combined effect of contract and trust, or to justify in principle, that criticism would not furnish a valid reason for extending the rule to cases to which it has not hitherto been applied. And again, if we are to treat the case of a trust contained in an antenuptial contract as a case governed by an arbitrary rule founded on custom and convenience, the result would seem to be the same, because the means of securing the wife's interest are known and settled, and no sufficient reason can be given for re-opening the question. I think I can find indications of the view which I now express in the opinions of the Judges constituting the majority in the case of *Mackenzie*. It is at least clear that they considered the decision in *Menzies* v. *Murray* to be inapplicable to the case of a voluntary trust.

I come, then, to the conclusion that if this case is to be decided in conformity with the law existing prior to 1881, the decision must be that the trust was revocable before marriage, and that its character was not altered by the supervening marriage, because the trust-conveyance was not a term of the contract or treaty of marriage. I must add that in my opinion the Act of 1881 leaves this question unaffected. It is right to notice in this connection that while the Married Women's Property Act deprives the husband of the administration of the wife's estate during the subsistence of the marriage, it leaves him in possession of important rights at the dissolution of the marriage, and it does not take away the curatorial power.

Now, in the deed under consideration the husband is to get a liferent of the estate in case of his survivance—a right which may not be so valuable as the right secured to him by the statute. This consideration, however, is not conclusive, because it may be said that in so far as the deed is prejudicial to the husband's interests he is not bound by it, and that it will be open to him to claim his *jus relicti* if he survives. Accordingly, I do not base my opinion upon anything in the terms or provisions of the Married Women's Property Act, 1881, except that I keep in view that the effect of marriage-contracts is saved by the 8th section of the Act.

I look at the question rather in this light—If the views which I have expressed be well founded, the operation of the common law on the estates of married women was liable to be modified or completely excluded by the device of a trust-conveyance executed before marriage, containing clauses effectual for the protection of the wife's interest, and especially for restricting her interest to a usufruct during the subsistence of the marriage. But this object could only be accomplished by a marriage-contract or equivalent deed to which the husband was a party. In this way the rights of both spouses were reconciled, the wife's estate was protected, the husband's legitimate interests were not interfered with, because he was a party to the deed, and the settlement was deemed irrevocable *stante matrimonio* because it was recognised that during marriage the powers of the wife to enter into a new contract were suspended. The Married Women's Property Act 1881 preserved the then existing law in relation to settlements of the wife's estate by marriage-contract, but gave no new right. It follows, in my opinion, that an effectual trust of the wife's estate can only be made under the conditions which existed prior to 1881, and one of these conditions is, that the future husband must be a party to the deed. There is no reason to suppose that any change in this respect was within the scope of the Married Women's Property Act. If it had been, I should have expected to find the change clearly expressed in that measure. While I venture to think it is beyond the power of the Court to sanction an alteration of the conditions of an effectual trust of the wife's estate, I should not be disposed to exercise the power if we had it, because I think that the project of tying up the wife's estate by a deed not communicated to her intended husband would not be conducive to the peace of families, and would not be consistent with the confidence that ought to subsist between persons who are entering into the relation of marriage. I may observe, in conclusion, that our decision will not necessarily affect any question that may arise in other cases as to the rights of children under a unilateral trust-deed. The condition of the present case is that there are no beneficiaries in existence other than the spouses, and in these circumstances I think that Mrs Watt has an unqualified right to revoke the deed of trust. It might be otherwise if there were children born before the power of revocation was exercised.

LORD TRAYNER — I think the question presented to us for determination is attended with difficulty, but I have come to

be of opinion that the pursuer is entitled to succeed. I shall state as briefly as I can the grounds on which I have arrived at that conclusion.

I take it to be settled on authority that a married woman cannot *stante matrimonio* discharge or revoke any provision made in her favour by her antenuptial marriage-contract. Accordingly, if the deed in question came within that rule the defenders would be entitled to our judgment. They say it does. They do not maintain that the deed in question is an antenuptial contract, for that it plainly is not. It is not a contract, compact, or agreement at all; it is an unilateral deed imposing obligation on no one except upon the granter, if indeed upon her. But the defenders say that the deed under consideration is equivalent in material respects to a marriage-contract, and that its effect, so far at least as its revocability is concerned, is the same. They therefore maintain that the rule I have referred to should be here applied. With regard to that rule I shall only now say that I feel bound to follow it in respect of the authority by which it has been settled, but that I am not prepared to extend the limits of its application. If the deed in question, then, is to be regarded as equivalent to a marriage-contract, it is not, according to the authorities, revocable by the pursuer; if it is not to be so regarded, then its revocability will depend on considerations as to the character and effect of the deed taken along with the circumstances under which it was executed.

The defenders argued that the deed in question must be regarded as equivalent to an antenuptial contract of marriage, because (1) it was executed in anticipation or contemplation of marriage; (2) that it constitutes a trust; and (3) that the purposes of the trust are matrimonial purposes. These are said to be the essential features of an antenuptial contract of marriage, and it is further said that the deed in question possesses or presents the whole three. Now does it?

1. The deed in question undoubtedly proceeds upon the narrative that there is a purpose of marriage between the pursuer and her husband, and "that in contemplation thereof" she has executed the deed. The language so far is similar with that usually employed in the narrative of an antenuptial contract of marriage. But it is not the same. An antenuptial contract of marriage sets out that the parties to it have agreed to marry, and in prospect of that agreement being carried out, have resolved upon certain conditions which it is the purpose of the antenuptial contract to express. The conditions are almost invariably conditions mutually binding, but whether so or not, are the conditions on which the marriage has been agreed to, and on the faith of which the marriage has been solemnised. Here it is different. The deed sets out no contract or agreement to marry, but merely that there is a purpose of marriage, in contemplation of which the granter of the deed makes a certain disposition of her estates. The proposed or contemplated marriage is not conditional on her granting such a deed, the non-execution of it would not have prevented the marriage, which had been agreed to unconditionally. The marriage followed the execution of the deed in point of time; it did not follow on the faith of the deed. But I do not think this difference in the narrative of the deed of very great importance, because it is not the narrative of a deed so much as its substantive provisions which gave it its character. The narrative expresses the reason or inducing cause of granting, nothing more. For example, a man might, on the narrative of his failing health, or of his labouring under a fatal disease, and in view of his approaching death, dispone to his son a certain property or estate. But notwithstanding such a narrative, if the deed was a conveyance *per verba de præsenti* duly delivered, it would not be, in the technical sense a *mortis causa* deed. So here, the narrative that the deed was granted in contemplation of marriage would not of itself make it a marriage-contract or equivalent to a marriage-contract, unless its provisions otherwise gave it that character.

The second ground on which the defenders maintain that this deed is equivalent to an antenuptial contract of marriage is, that it constitutes a trust for carrying out its purposes. In this, no doubt, it resembles a marriage-contract, but not more than it resembles a trust settlement. The mere constitution of a trust in itself is plainly of no importance in this question. The purposes for which the trust was constituted are important, and must be considered. And this leads me to the defenders' third point. They say that the purposes of this deed were matrimonial purposes. Briefly stated, the purposes of this deed were as follows—(1) that the income of the estate conveyed should during her lifetime be paid to the granter (the pursuer) on her own separate receipt and discharge; (2) on her death the income of the estate to be paid to her husband if he survived; (3) on the death of both, the fee to be divided among their children; and (4) failing children, the estate to go to the granter's own heirs. The only one of these purposes which could possibly be carried out during the existence of the marriage was the first. It was not matrimonial. To give the granter of the deed the income of her own estate, "on her own separate receipt," was simply giving her what she had before; it was making no change in respect of the marriage. If the income of the estate had been directed to be paid to the spouses in aid of the *onera matrimonii*, that might have been described as a matrimonial purpose — a dedication of the granter's means to a matrimonial purpose. But where is the matrimonial purpose in dedicating the granter's means to herself, to do with them what she pleases, just as she did when there was no matrimonial relation existing? In like manner the grant of the income to the surviving husband is not to enable him to educate or maintain the family, or for any purpose

properly matrimonial. It is simply a legacy to himself, after the marriage has been dissolved and when no matrimonial purpose could be served. The destination of the fee to the children, and failing them to the granter's heirs, being the act of the pursuer alone, and not a condition binding on her by contract with her husband, I regard as testamentary, not matrimonial.

If I am right so far, it follows that this deed, not being an antenuptial contract of marriage, or equivalent to such a contract, the question of whether it is revocable or not is not foreclosed by the authority to which I referred at the outset of my opinion.

I think the deed in question is revocable, because it was a conveyance in trust for the administration or management of the granter's estate for her own behoof, and by the execution and delivery of which no right was constituted which forms a bar to the revocation of that deed by the granter, in whom, notwithstanding of the execution and delivery of the deed, the radical right to the estate conveyed still remained vested. If by the execution and delivery of the deed a *jus quæsitum tertio* had been conferred, the pursuer could not have revoked or recalled her conveyance standing such a right. But I think there is no such right in question. The conveyance of the fee of the estate to be held for the children of the marriage is not such a right, for there are no children of the marriage. Even if there had been, I should have difficulty in holding that under this deed there was anything more conferred on them than a mere *spes*. But there are no children, and therefore as regards the fee there is no *jus quæsitum*. The husband's right to the liferent after his wife's death may be in a different position. I do not say it is, but if it is, it does not bar the revocation of the deed, as he is a consenter to that being done, and his right to renounce or discharge such a liferent right is not disputed.

I think, therefore, that the pursuer is entitled to our judgment.

LORD MONCREIFF—I regret to differ from the view which all of your Lordships take of this case, but at the conclusion of the argument it seemed to me that the Lord Ordinary's interlocutor was well founded, and further consideration has not altered that opinion.

We are not called upon to consider whether the deed of provision and trust which was executed by Mrs Watt on the eve of her marriage is reducible on the head of essential error or force and fear, or on the ground (which is not pleaded on record) that it was executed in fraud of the husband's rights. There is no question with creditors; and the one question upon which our opinion is asked, is that raised by the pursuer's first plea-in-law, viz., whether the deed is revocable by Mrs Watt at will. These being the admitted conditions of the argument, I am of opinion with the Lord Ordinary, and substantially for the same reasons, that the deed cannot be revoked *stante matrimonio*.

Whatever may be thought of the original soundness of the decision in *Anderson* v. *Buchanan*, 7th June 1837, 15 Sh. 1073, I do not think that the authority of that case can now be disputed. It has never been successfully impugned, and it has been followed in a series of cases, the latest of which is *Ker's Trustees* v. *Ker*, 13th Dec. 1895, 23 R. 317.

But it is said that *Anderson* v. *Buchanan* ran counter to the well-established rule of law that a voluntary and gratuitous trust, the sole interest in which is or comes to be vested in one individual, and by which no separate and independent interests are created, can at any time be put an end to at the desire of that individual; that it is not desirable that the principle of *Anderson* v. *Buchanan* should be further extended; and that therefore, while it must receive effect where the provisions for the wife's benefit sought to be revoked are contained in an antenuptial marriage-contract, it should not be applied to a unilateral trust-deed. This assumes that, as regards the irrevocability of a trust created by a wife solely for her own benefit and protection, there is a distinction between a trust contained in a marriage-contract and one created by unilateral deed. In my opinion there is no such distinction, and the decided cases give no countenance to any such distinction.

In considering this question it is desirable to extract from the decisions what matters have or have not been held material in deciding as to the irrevocability of an antenuptial trust. I think that the cases when examined establish the proposition maintained by the defender's counsel that the only elements that are required in order to render such a trust irrevocable are—(1) that it should be executed in immediate contemplation of marriage, and for the purposes of the marriage; (2) that marriage shall follow upon it; and (3) that the deed shall be delivered and the funds handed to the trustees.

All these requisites exist in the present case, and they will be found to have been combined in all the cases in which a trust has been held irrevocable—for instance, in *Anderson* v. *Buchanan*, *Menzies* v. *Murray*, 2 R. 507, *Pringle* v. *Anderson*, 6 Macph. 982, *Williamson* v. *Boothby*, 17 R. 297, *Ker's Trustees* v. *Ker*, and other cases.

Again, in those cases in which revocation has been allowed, it will be found that one at least of these elements was awanting. For instance, in *Murison* v. *Dick*, 16 D. 529, although the deed, which was unilateral, was executed in contemplation of marriage and delivered, it was revoked before the marriage took place and while the lady was mistress of her own fortune.

In *Ramsay* v. *Ramsay's Trustees*, 10 Macph. 120, although the provision in question was contained in an antenuptial contract of marriage, and marriage followed, it appeared from the terms of the deed that it was intended that the residue of the wife's property (as distinguished from a sum of £5000 settled for the purposes of the marriage) should be at the wife's disposal both during the subsistence of the marriage and

after its dissolution—in short, that *quoad* the residue the trust was one for management or administration only. I observe in passing that in that case the fact that the provision as to residue was contained in a marriage-contract to which the husband was a party did not prevent revocation. What was considered material was not the character of the deed but the nature of the provision.

In the next place, there are certain matters which have been held to be immaterial. In order to render a trust irrevocable, it is not necessary that the funds should come from a third party. In *Anderson* v. *Buchanan* and *Menzies* v. *Murray*, and other cases, the funds came from the wife herself.

Neither is it necessary that a *jus quæsitum* should be conferred by the deed on a third party. This question was fully before the Court in *Anderson* v. *Buchanan*. The Judges who formed the minority laid special stress upon the absence of ulterior interests. I refer particularly to the opinions of Lord Moncreiff and Lord Fullerton, 15 Sh. 1080, 1081. Notwithstanding the opinions of those eminent Judges the majority of the Court decided that the trust could not be revoked, although the only interests affected were those of Mrs Anderson herself, for whose individual benefit alone the provisions were made.

Lastly, although most of the decisions to which we were referred apply to trusts created by marriage-contract, I do not find that, whichever way they were decided, anything turned upon the fact that the provisions were contained in a contract and not in a unilateral deed.

The pursuers naturally rely upon the absence of decisions in which a unilateral deed has been held to be irrevocable, and they found upon two cases in which such deeds were held to be revocable. The first is *Murison* v. *Dick*, the ratio of which decision I have already explained, viz., that the trust was revoked before marriage, while the lady was still *sui juris*. The second is *Mackenzie* v. *Mackenzie's Trustees* (10th July 1878, 5 R. 1027). If that case were an authority in the pursuer's favour it would be of importance, because the deed which the Court held that the pursuers were entitled to revoke was unilateral, and marriage had followed upon it. But the case cannot be so regarded. Of the three Judges who took part in the decision in the Inner House Lord Gifford dissented, and Lord Justice-Clerk Moncreiff, while he concurred in the judgment, did so solely and expressly on the ground that in his opinion the deed was not executed in immediate contemplation of marriage, and was thus distinguishable from *Anderson* v. *Buchanan* and *Menzies* v. *Murray*, and other cases. Lord Ormidale seems to have been partly influenced in his opinion by the fact that the spouses were willing to execute a postnuptial contract, and Lord Young also proceeded mainly on that ground, and expressed no opinion as to the wife's right to revoke absolutely.

It is not necessary to consider here whether it is within the powers of the Court to remodel such a deed; that is not proposed by the pursuers. I think I have said enough to show that *Mackenzie* v. *Mackenzie's Trustees*, when the grounds of judgment are examined, is not an authority in the pursuers' favour.

I have already pointed out that the mere fact that the trust is contained in a marriage-contract, will not make it irrevocable if its provisions are not in their nature necessarily connected with the purposes of the marriage; and this indicates that the revocability of trusts created *intuitu matrimonii* depends upon other considerations. The provisions made by a woman in her own favour are distinct and separable whether they occur in a contract or in a unilateral deed. If the provisions are in their nature revocable, the husband's signature does not add the sanction of irrevocability; and, on the other hand, the absence of his consent will not make them revocable if in their nature they are in the circumstances irrevocable.

In the absence of express decision I may refer to Lord Gifford's remarks on this point. He expressed a strong opinion that it made no difference that there a trust was constituted by a unilateral deed to which the husband was not a party. His opinion was that while the trust could undoubtedly have been revoked before marriage, marriage barred Mrs Mackenzie from revoking, because upon that occurrence she ceased to be *sui juris*, and then he adds the words quoted by the Lord Ordinary—"The force and subsistence of such deeds do not flow from the consent of the intended husband, although such consent is usually adhibited. They draw their real efficacy and their real strength and finality from the will of the person who dedicates the trust-fund, and if this be the intended wife herself, then it is her act and not the act of her intended husband which places the fund beyond even her own power while she remains under coverture."

Lord Ormidale had said—"That Mrs Mackenzie was entitled to revoke the trust even after the marriage so long as she had no children, is also I think free from serious doubt." In regard to this Lord Gifford says—"I am of opinion that the true point when the deed now in question became irrevocable was not the existence of issue, but the date of the marriage itself. Of course the existence of issue of such a marriage was highly probable, and it may strengthen the case against revocation of the trust that such issue now exists, but the deed will not become revocable because existing issue fail. It is the marriage itself that created the irrevocability, and not till the marriage be dissolved will the wife, if she survive her husband, recover the independent position which she originally held."

I agree in the views expressed by Lord Gifford. I think that the true ground on which irrevocability rests is that after marriage the wife is not in this matter a free agent, and therefore cannot go back on the trust which while a free agent she created for her own protection during

marriage. The unanimous decision of the Court in *Menzies* v. *Murray* necessarily involves this. The case was decided on the assumption that all parties in any way interested in the trust funds consented to the termination of the trust; and therefore the trust was kept up solely for the protection of Mrs Murray, and against her wish.

In the present case I agree with the Lord Ordinary that where the provisions sought to be revoked are made by a woman before marriage in regard to her own funds, and solely for her own benefit and protection during marriage, the fact that the husband is not a consenting party to the deed cannot enhance the wife's right to revoke it.

I do not think that the statutory provisions for the protection of the property of married women affect the question. While the wife's separate estate remains distinct and unmixed with that of her husband, those provisions afford protection against the husband's creditors in the event of his bankruptcy. They also afford protection against the husband himself when his wife is living separate from him. But they do not afford any effectual protection to her against his solicitations and her own inclinations, when she is on good terms and living with him; and that is exactly the case for which such a trust is required.

I have said nothing as to the expediency of holding a married woman to such self-interdiction against her will, because the decisions by which I hold we are bound, and which in my opinion apply equally to marriage-contracts and unilateral deeds, are based upon and recognise the policy of such a rule.

But even if the question were still open, I am not satisfied that the balance of considerations is in favour of freedom of revoke. There may no doubt be individual cases in which to hold such a trust irrevocable may cause inconvenience and hardship, but this to my mind is more than compensated in the great majority of cases by the security afforded of the wife's separate estate. The alternative to holding such a trust irrevocable would be that when the intending husband did not consent there would be no means by which a woman could protect her property during marriage without conferring an indefeasible right upon third parties, which would continue even after the marriage was dissolved by the death of the husband.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

The LORD PRESIDENT, The LORD JUSTICE-CLERK, LORD ADAM, and LORD KINNEAR concurred with Lord M'Laren.

At advising, the LORD PRESIDENT delivered the judgment of the Court to the following effect—In terms of the opinions delivered, we recal the interlocutor of the Lord Ordinary and grant decree of declarator in terms of the declaratory conclusions. As to the reductive conclusions, they were supported by averments that were sent to proof, but we did not find it necessary to submit that matter to the consideration of the Seven Judges. As proof was allowed on that matter, and the question was fully argued, and as it involves character and conduct, and furnishes an independent ground for attacking the deed, it is right that it should be known that the Court grant absolvitor from the reductive conclusions. Therefore we assoilzie from the reductive conclusions of the action. Then we declare that the deed is revocable by Mrs Watt with the consent of her husband, and that she is entitled to revoke the said deed accordingly, and that the defenders are bound to reinvest the pursuer in her estate, and to execute all deeds that are necessary to complete her title to the estate. We find the trustees entitled to their expenses out of the trust-estate as between agent and client, and we do not find it necessary to make any finding as regards expenses for the pursuer, since we have granted decree in terms of the declaratory conclusions. It is also proper to add, that while we find that the trustees are bound to execute all necessary deeds to reinvest the pursuer in her estate, these deeds will be paid for by the pursuer.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Assoilzie the defenders from the reductive conclusions of the summons: Find and declare that the deed of provision and trust libelled is revocable by the pursuer Mrs Watt with consent of her husband, and that she is entitled to revoke the said deed accordingly; also that the defenders are bound to reinvest the pursuer in the estate conveyed to them by her, and to execute all deeds necessary for the purpose of completing her title to said estate, and decern: Find the trustees, defenders, entitled to their expenses out of the trust-estate as between agent and client, and remit," &c.

Counsel for the Pursuer—Salvesen—Findlay. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Defenders — Sol.-Gen. Dickson—Ure—J. C. Watt. Agent—J. Gordon Mason, S.S.C.

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*Friday, January* 15.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

## W. M. BARKLEY & SONS *v.* SIMPSON.

*Reparation—Agent and Principal—Breach of Mandate—Relief—Measure of Damages.*

A, a coal merchant in Belfast, instructed B, a shipping agent in Glasgow, to charter a vessel to convey a cargo of coal from Glasgow to Belfast. A charter-party was therefore entered into between B and C, a shipowner in Glasgow. By the charter-party C was taken bound to deliver "as customary."