are to administer this portion of the estate as part of the residue. That gave them a right, and imposed on them a duty to do something with this fund. That was certainly not to pay it to the Crown. It was to be administered as they were directed to administer the whole residue. If they endeavoured to comply with that direction literally, they would divide it into three equal parts, and pay one part to the one set of legatees remaining, and another part to the other set, and they would have a third part over, which again they would subject to the same process, and so on—a mode of administration which would result in the division of the whole share among the remaining fiars, and that by a process of division in literal compliance with the truster's directions. That consideration shows clearly that it was the intention of the truster that the whole residue should go to the legatees named, and it does not signify in what precise manner that result which I have no doubt the truster endeavoured to secure should be brought about.

"On these grounds I am of opinion that the claim of the Crown should be refused, and that the claim of the other claimants should be sustained."

The Lord Ordinary sustained the claim of the claimants William Elphinston and others, and ranked and preferred them accordingly, and repelled the plea and claim for the Lord Advocate.

Counsel for the Pursuers and Real Raisers—C. J. L. Boyd. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Claimants William Elphinston and Others—C. K. Mackenzie, Q.C.—Pitman. Agent—Ninian J. Finlay, W.S.

Counsel for the Lord Advocate—Sol.-Gen. (Dickson, Q.C.)—Guy. Agent—W. G. L. Winchester, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

LYON *v.* LYON'S TRUSTEES.

Trust—Unilateral Trust-Deed Executed by Woman before her Marriage for Behoof of Spouses in Liferent and Children in Fee—Revocation—Birth of Child—Contemporaneous Bond of Annuity Granted by Intended Husband.

By a deed executed immediately before her marriage, a woman, "in prospect of" her marriage, disponed the whole property which should accrue and pertain and belong to her during the subsistence of the intended marriage to trustees for certain purposes, and, *inter alia*, that they should during her life and the subsistence of the trust pay the annual proceeds to herself, and in the event of her predeceasing her husband leaving issue, to him in liferent, and that in the event of children or a child being born of the marriage, and such children or child or their issue surviving the dissolution of the marriage, the capital of the estate in the hands of the trustees should, on the death of the longest liver of the spouses, be paid over to such children or child or issue in such proportions as the spouses or the survivor of them might direct, and failing direction equally. The deed was declared to be irrevocable. The husband a few days previously had executed a bond of annuity in favour of his intended wife. The deed executed by the intended wife was delivered and registered in the Books of Council and Session for preservation, and the estate falling under the trust was handed over to the trustees, and was still held by them. A child was born of the marriage, who still survived. The wife, eleven years after the date of the marriage, and also after the birth of the child and the delivery and registration of the deed, with consent of her husband, executed a revocation of the deed.

Held, in an action at the instance of the wife with consent of the husband against the trustees, that the deed was irrevocable.

Watt v. *Watson*, January 16, 1897, 24 R. 330, *distinguished*.

Question—Whether the bond of annuity executed by the intended husband, and the deed executed by the intended wife, did not in effect together constitute an antenuptial marriage-contract.

Opinion (*per* the Lord President) that a marriage-contract might be constituted by two deeds as well as by one.

Trust—Unilateral Trust-Deed Executed by Woman before her Marriage for Behoof of Spouses in Liferent and Children in Fee—Essential Error—Reduction.

Circumstances in which *held* that a woman, who immediately before her marriage had executed a trust-deed for behoof of herself and her intended husband in liferent and the children of the marriage in fee, was not entitled to have it reduced upon the ground of essential error as to its tenor and effect.

Husband and Wife—Trust-Deed Granted by Woman before Marriage in fraudem of Rights of Husband—Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. c. 21).

A woman immediately before her marriage executed a unilateral trust-deed, to which her intended husband was not a party, whereby she disponed and made over to trustees the whole property which should accrue and pertain and belong to her during the subsistence of the marriage for behoof of herself in liferent, and after her decease, if there were issue, of her husband in liferent and the issue of the marriage in fee, and if she predeceased

the husband without issue for payment to him of an annuity. The intended husband had refused to be a party to any marriage settlement, but had granted a bond of annuity in favour of his intended wife. He was aware that his wife was making some settlement of her estate, and was willing that she should do so, but he was not aware of, and did not think it right to inquire as to the exact terms. *Held* that the deed executed by the wife was not reducible upon the ground that it was *in fraudem* of the rights of the husband.

Observations as to the effect of the Married Women's Property (Scotland) Act 1881 upon the law in questions of this kind.

This was an action at the instance of Mrs Jane Georgina Gilchrist or Lyon and her husband Alexander Lyon, as her curator and administrator-in-law, and for his own interest, against the trustees under a trust-disposition and assignation granted by the first-named pursuer in their favour, and dated 23rd April 1883. The pursuers concluded for declarator that this disposition, which was a unilateral deed executed by Mrs Lyon immediately before her marriage, was revocable by her, and that she was entitled to revoke and had revoked it, or otherwise for declarator that it was void and null, and of no force and effect, and alternatively for reduction of it. There were also conclusions for declarator that the trustees were bound to denude of the trust, and to reconvey the trust estate to Mrs Lyon, and for decree ordaining them to do so.

On 30th August 1894 Mrs Lyon with consent of her husband, had executed a revocation of the deed referred to.

The pursuers pleaded, *inter alia*—"(1) On a sound construction of the said deed it is revocable by the pursuer, and she is therefore entitled to decree in terms of the first alternative conclusion of the summons. (2) The said deed having been executed on the eve of the pursuer's marriage as condescended on, and without the consent of her husband, and being *in fraudem* of his rights as husband, the same is void and null, or otherwise should be reduced in terms of the reductive conclusions of the summons. (3) The said deed being gratuitous, and having been granted by the pursuer under essential error as to its tenor and effect, the same should be reduced."

The defenders pleaded, *inter alia*—"(2) The trust-deed sought to be reduced having been executed in centemplation of marriage, and for the protection of the female pursuer and her issue now in existence, the same is not revocable by her. (3) The trust-deed being in its nature and terms irrevocable, and having been delivered, registered, and acted upon, decree as concluded for should be refused. (4) The trust-deed having been granted by the female pursuer of her own free will in the full knowledge of its terms and effect, with the consent and approval of her intended husband, decree of reduction as concluded for should be refused."

The following narrative of the facts is taken from the opinion of the Lord President:—"The pursuers Mr and Mrs Lyon became engaged to be married on 12th March 1883, and they were married on 23rd April of that year.

"In contemplation of their marriage each of them executed a deed—Mr Lyon a bond of annuity dated 20th April 1883, and Mrs Lyon a disposition and assignation in trust dated 23rd April 1883.

"By the bond of annuity Mr Lyon, on the narrative that he was desirous of securing a suitable provision by way of annuity in favour of his intended wife, bound and obliged himself, his heirs, executors, and representatives whomsoever, to pay to her during all the days of her life after his decease, in the event of her surviving him, a free yearly annuity of £200, and he consented to registration for preservation and execution.

"By the disposition and assignation in trust, Mrs Lyon, in prospect of her marriage with Mr Lyon, disponed, conveyed, and made over to Mr Rose, her brother-in-law, and two other gentlemen therein named, and the acceptors or acceptor, survivors and survivor of them, the whole property which should accrue and pertain and belong to her during the subsistence of the intended marriage, for the following purposes:—(1) for payment during her life while the trust subsisted of the annual proceeds of the means and estate thereby conveyed to herself, exclusive of the *jus mariti* and right of administration of her intended husband; (2) that the trustees should, in the event of the intended marriage being dissolved by her death, and of her being survived by children or a child born of the marriage or their issue, pay to Mr Lyon, during the life of such children or child or their issue, the free interest or annual proceeds of the trust-estate in liferent for his liferent use, and the maintenance of the children or child or their issue; (3) that the trustees should, in the event of the dissolution of the marriage by Mrs Lyon's death without a child or the issue of a child of the marriage, pay to Mr Lyon a free yearly annuity of £200 during his life; (4) that in the event of children or a child being born of the marriage, and of such children or child or their issue surviving the dissolution of the marriage, the capital of the estate in the custody of the trustees should, on the death of the longest liver of Mr and Mrs Lyon, be paid over to such child or children in such proportions and under such conditions as Mr and Mrs Lyon or the survivor might direct, and failing such appointment equally; (5) that in the event of the marriage being dissolved by the death of Mr Lyon without a child born of the marriage or issue of a child surviving him, or although surviving him yet predeceasing Mrs Lyon, the trust should come to an end, and the trustees should forthwith make over the estate to her, her heirs, executors, or assignees whomsoever; (6) that the trustees should have power to pay to Mrs Lyon a sum not exceeding £1000 out of the capital of the estate con-

veyed, upon a written requisition by her; and (7) that in the event of no child born of the marriage surviving the longest liver of Mr Lyon and her, the trustees should make over the estate to such person or persons as she might direct, subject to the annuity provided to Mr Lyon. The disposition and assignation was declared to be irrevocable.

"The disposition and assignation in trust was executed by Mrs Lyon on the morning of 23rd April 1883, shortly before her marriage, and on the following day it was returned by Mr Rose, one of the trustees named in it, to Mr Donald Beith, W.S., who had prepared it and in whose custody it remained until 1889.

"The only child of the marriage, a daughter who still survives, was born on 5th June 1885. No property fell under the trust until 1888, when Mrs Lyon succeeded to a legacy of £431, 13s. 3d., and the trust-disposition and assignation was uplifted by the trustees named in it from the custody of Mr Beith on 21st June 1889. In the beginning of July 1889 the trustees accepted office, and on 9th July 1889 the trust-disposition and assignation was recorded for preservation in the Books of Council and Session by their law-agent. The legacy above mentioned and other legacies amounting to £2644, 4s. have been paid to the trustees, and are now held by them under the trust. . . .

"Mrs Lyon's father died long before the marriage, and it appears from the proof that Mrs Gilchrist, her mother, with whom she usually resided, held and expressed a strong opinion that a marriage settlement should be executed, but that Mr Lyon declined to make or be a party to any settlement.

"Mrs Gilchrist came to Edinburgh from Ospisdale, in Sutherlandshire, where she usually resided, on 4th April, and consulted her law-agent Mr Donald Beith, W.S., and he by her direction prepared a draft of the trust-disposition and assignation. Mrs Gilchrist, after seeing Mr Beith, went to London and stayed with Mr Rose, her son-in-law, from about 5th April till after the marriage, and during most of that time Mrs Lyon was also staying there. Mr Beith, also upon instructions given by Mrs Gilchrist, after communication with Mr Lyon, prepared a draft of the bond of annuity granted by him, and on 13th April 1883 Mr Beith sent the two drafts to Mr Rose's house in London, where they were received on Saturday, 14th April. It appears, however, that Mrs Lyon left London for Chester on that morning before the drafts arrived, and that she did not return to London until the 17th or 18th, and in the meantime the draft of the trust-disposition and assignation had been gone over by Mrs Gilchrist and Mr Rose, and returned to Mr Beith on the 16th. Mr Rose is under the impression that he went over the draft with Mrs Lyon, but I think he must be mistaken as to this, and that what he did was to go over along with her the first engrossment of the trust-disposition and assignation which Mr Beith sent to Mrs Gilchrist on 18th April. On the following day (the defenders say on the 20th) Mrs Lyon wrote to Mr Beith—'I see that my brother Mr Gilchrist's name has been mentioned in my settlement, a fact which I think may lead to difficulties,'—and then she suggested that if it would be peculiar to scratch out the name something might be added making it unnecessary to send papers to him for signature. Mr Beith caused the deed to be re-copied, giving effect to the alterations desired, and forwarded it to Mrs Lyon in a letter dated 21st April. That engrossment appears to have been received at Mr Rose's house on the morning of the marriage, 23rd April, and Mrs Lyon is under the impression that she then for the first time saw the deed. While I think that Mr Rose is mistaken in supposing that he went over the draft with Mrs Lyon, I believe that he did go over the first engrossment with her, giving such explanations as were necessary, and that she was made fully acquainted with its tenor and effect. In particular, I think that she knew that it did not comprehend the estate which she already had at the time of the marriage, but only property to be thereafter acquired, and that she was also aware that she would have right to demand £1000 and no more out of the trust-estate. Mrs Lyon says that before signing the deed she noticed a clause saying that the whole of the money that she should come into fell under it, and that she at first objected to sign it, but that as Mr Rose was put out at this, and said it would be wrong to be married without a settlement, she signed it. In a letter written by Mrs Lyon from New Zealand in the end of November 1888, on hearing that a legacy had been left to her, she said—'I do not know if this comes under my marriage settlement, but suppose so. But I am allowed by it to claim £1000 of the money I may inherit, and I therefore write to you as one of my trustees to say that I should wish to have this £500.' Mrs Lyon thinks that she must have learned this from a letter from her mother, but no such letter is produced, and it seems to me more probable that she knew it from having gone over the first engrossment with Mr Rose, and from the explanations which she received at and about that time. . . .

"Mr Lyon was, prior to the marriage, well aware that a settlement was to be executed by Mrs Lyon, and I think it sufficiently appears that he was quite willing that she should settle her estate as she might think fit, so long as he was not asked to put his estate in settlement. Mrs Gilchrist says that she told Mr Lyon that she wished for some settlement and that he made no objection. Mr Lyon says—'I had some idea that my wife was making some arrangement, but as I was not making any settlement upon her I considered it not good form to inquire into what arrangement she was making, and I never did so.' Again, when asked whether Miss Gilchrist told him it was proposed that she should grant a deed, he said—'I certainly understood some deed was being drawn up. She did not tell me what the terms of it were."

Mr and Mrs Lyon were married in the church of St Philip, Earl's Court, Middlesex, in pursuance of an ordinary licence for the solemisation of the marriage which was granted by the Bishop of London on 13th April 1883.

By interlocutor dated 2nd June 1900 the Lord Ordinary (KYLLACHY), before answer, allowed a proof, to proceed on a day to be afterwards fixed.

The pursuers reclaimed, and the First Division on 15th November 1900 recalled the interlocutor of the Lord Ordinary, allowed the parties a proof before answer, and appointed the proof to proceed before Lord Adam.

Proof was led accordingly before Lord Adam, the nature of the facts established by which sufficiently appears from the foregoing narrative, and thereafter counsel were heard in the Division.

Argued for the pursuer—(1) The real broad question was, whether Mrs Lyon was aware of the import of the deed, and it was clear on the evidence that she was not so aware, but was under essential error as to it. There was the further element to support its reduction that she was entirely without professional advice. (2) The deed was granted in fraud of the rights of Mr Lyon. While it was true that the Married Women's Property Act 1881 (44 and 45 Vict. cap. 21) had materially diminished these rights, he still retained the right of administration; and further, any alienation of her property by Mrs Lyon might diminish his possible *jus relicti* at her death. It was not necessary that there should be intentional deceit of a husband to justify reduction of a deed on this ground; it was enough if his rights were diminished by the deed being granted outwith his knowledge—Fraser on Husband and Wife, i. 680; *Auchinleck* v. *Williamson*, 1667, M. 6033; *Bute* v. *Bute*, 1665, M. 6030. (3) The deed was revocable. It was unilateral and to a large extent testamentary. It could only be held to be irrevocable if it amounted to a marriage contract, which it did not. The case was ruled directly by *Watt* v. *Watson*, January 16, 1897, 24 R. 330. The birth of a child did not make the deed irrevocable if prior to that event it had been revocable. The birth of a child could not affect the legal character of the deed. The child had no vested interest in her mother's estate but a mere *spes successionis* in the event of surviving her. The fact that the deed was declared to be irrevocable was of no importance — *Fernie* v. *Colquhoun's Trustees*, December 20, 1854, 17 D. 232; *Murison* v. *Dick*, February 10, 1864, 16 D. 529; *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027.

Argued for the defenders—(1) It was not necessary for Mrs Lyon to have understood every term of the deed provided she knew its material points, and in fact it was proved that she did understand them. It was not alleged that she was intentionally misled by her mother or by Mr Rose, or that she was coerced in any way. (2) The cases quoted from Fraser on Husband and Wife were all cases where a wife alienated her property to a third person to deceive her husband and evade his *jus mariti*, and had no application to the present case. There was nothing Mrs Lyon could do to reduce her husband's rights except to curtail his curatorial powers. (3) This case was clearly distinguishable from *Watt* v. *Watson, cit. supra*, because here there was a beneficiary in existence other than the spouses in the person of the child. It was accordingly unnecessary to review that case as to the distinction between a donation and a marriage-contract. In point of fact, however, this was one of two deeds which together constituted a marriage-contract, the other being Mr Lyon's bond of annuity. There was no case where such a deed had been held to be revocable when it had been delivered and the trustees were actually holding trust estate under it, and where a child of the marriage capable of taking a vested right under the deed was in existence—*Shedden* v. *Shedden's Trustees*, November 29, 1895, 23 R. 228; *Allan* v. *Kerr*, October 21, 1869, 8 Macph. 34; *Smitton* v. *Tod*, December 12, 1839, 2 D. 225.

At advising—

LORD PRESIDENT — [*After stating the facts*]—Three questions are raised in the present action—(1) Whether the trust-disposition and assignation is reducible on the ground that it was granted by Mrs Lyon under essential error as to its tenor and effect? (2) Whether it is reducible on the ground that it was granted without the consent of Mr Lyon *in fraudem* of his rights as a husband? and (3) Whether it is revocable by Mrs Lyon? . . .

Upon careful consideration of the evidence and the correspondence I am satisfied that Mrs Lyon was not under any error when she executed the trust-disposition and assignation, and that it is not reducible upon this ground. It was entirely in her interest and that of her prospective children that it was executed, and it was at the instance of her mother acting in her interest that it was prepared. Mr Rose, her brother-in-law, shared Mrs Gilchrist's opinion, and all that he did in the matter was also in the interest of Mrs Lyon. There can be no doubt that they both acted rightly in urging that her *acquirenda* should be so protected, and also that Mr Lyon should make some provision for her. I may add that even if I had thought that Mrs Lyon was not so fully cognisant of the nature and effect of the trust-assignation and settlement as I believe her to have been, I should not have thought that any ground for reducing it had been established. There is no suggestion of anything like fraud, misrepresentation, or of impetration on the part of anyone, and even if Mrs Lyon had chosen to waive examination and inquiry as to the precise terms of the deed, and had signed it without reading it, I do not think that it would have been now reducible at her instance.

The next ground of challenge of the trust-disposition and assignation is that it was granted *in fraudem* of Mr Lyon's rights as

Mrs Lyon's intended husband, and I consider that this ground of challenge also fails. . . .

The doctrine laid down in Fraser on Husband and Wife, vol. i. 680, appears to me to have no application to such a case as the present, and the decisions relied upon by the pursuer's counsel (*Auchinleck* v. *Williamson*, M. 6033, and *Bute* v. *Bute*, M. 6030) were cases of actual fraud. In the former the wife was possessed of the liferent of an estate which she, just before her marriage, secretly conveyed to her son by a former marriage, and the assignation was reduced at the instance of the husband; and in the latter the woman had renounced a liferent in favour of her son by a former marriage. The same remarks apply to the decision in *Strathmore* v. *Bowes* (1 Ves. jun. 22). It is further to be kept in view that the Married Women's Property (Scotland) Act 1881 makes a material difference upon questions of this class, because marriage no longer transfers the wife's moveable estate to the husband, so that a conveyance of that estate prior to marriage would not deprive him of what he would otherwise have taken. It is true that his right of administration still remains to a limited extent, but in so far as it remains, it is in the nature of a trust, which he could not with propriety use for his own benefit, and consequently an exclusion of it could not be properly characterised as being *in fraudem* of his rights. It was suggested in argument that an alienation by the wife might exclude or diminish the *jus relicti* to which he might be entitled at her death, but I think that this would be too remote an interest, looking to the powers which a wife now has of dealing with her moveable estate during the marriage.

The most important question therefore appears to me to be the third, viz., whether the conveyance contained in the trust-disposition and assignation is revocable by Mrs Lyon? It was maintained by the defenders that it is not so revocable, (1) because it is one of two deeds which in effect constitute a marriage settlement, the other being the bond of annuity by Mr Lyon. Both of these deeds were executed *intuitu matrimonii*, and each contains a provision by one spouse in favour of the other, so that there is some mutuality between them, and they seem to me to come very near to constituting a marriage-contract. They were prepared by the same agent on the same instructions, and drafts of both were sent together for consideration and revisal by Mrs Lyon, her mother, and her brother-in-law. Mr Lyon does not appear to have seen the draft of the trust-assignation and settlement, but he made material alterations on the draft of the bond of annuity, and effect was given to these alterations. Two deeds became necessary in consequence of the refusal of Mr Lyon to be a party to a settlement, as he desired to retain the control of the property which he had at the time of the marriage or which he might afterwards acquire. While I think that a marriage-contract might be constituted by two deeds as well as by one, it does not appear to me to be necessary to express an opinion upon the question whether the two deeds in question did or did not make a contract, as I consider that there are sufficient grounds for a decision apart from this point. Mrs Lyon's disposition and assignation was, as already stated, delivered to the trustees, who still hold the property settled under it (except the £1000 withdrawn by her in exercise of the reserved power to do so), and a child of the marriage is in existence. The trustees are thus holding the fee of the trust estate under a delivered deed for a person in existence. This, it seems to me, makes an essential distinction between the present case and that of *Watt* v. *Watson* (24 R. 330) and other cases referred to in the argument. Further, the deed to which the case of *Watt* v. *Watson* related was not declared to be irrevocable, as Mrs Lyon's trust-disposition and assignation is, and in that case no deed was granted by the husband which could introduce the element of mutuality. It was maintained on behalf of the pursuers that the trustees cannot be said to be holding the estate for the daughter in respect that she has not a vested interest in the settled fund, as she will not become entitled to it unless she shall survive her mother, or at all events the dissolution of the marriage. It is true that she has not as yet an indefeasible right to the fee, but I think that she has such a right as it is not within the power of her parents by any act of theirs to defeat. One of the leading objects of the trust-disposition and assignation was to provide for children, and it seems to me that the daughter has at all events a right to have the trust maintained, so that if she shall survive the dissolution of the marriage (and possibly also her mother), the settled funds shall be available for her. I think that upon principle her right is of such a character as to bar revocation of the trust-disposition and assignation, and I am not aware of any authority for holding such a deed to be revocable where (as here) the following conditions exist concurrently —(1) the deed was executed in immediate contemplation of marriage and for the purposes of the marriage; (2) marriage followed upon it; (3) the deed was declared irrevocable; (4) it was delivered, the estate was handed over to the trustees and is still held by them; and (5) a child born of the marriage is in existence.

For these reasons I am of opinion that the defenders should be assoilzied from the conclusions of the summons.

LORD ADAM concurred.

LORD M'LAREN — I also concur in the Lord President's opinion on the various points in the case. As regards the question of reduction on extrinsic grounds, I think there is not the shadow of a case. The husband knew that his spouse had settled her estate, and he acquiesced in her doing so. He did at the same time what he thought was incumbent on him in granting an obligation for an annuity to his wife. The more important question is the question of revocation. As to that, my opinion

is that as the trustees were in possession of the trust estate by the authority of the spouses the effect of the birth of a child was that the trustees then held for the child, and the right of the child was exactly the same as if the child after birth had received a disposition of estate through the medium of a trust.

There is no true resemblance between this case and the case of *Watt* v. *Watson*, where the ground of reduction was that the wife was entitled to revoke the settlement of her estate so long as there was no object in existence other than herself who had an interest in it. I may add, although it is perhaps of no great importance, that I do not attach weight to the declaration that the trust is irrevocable, because I think that if any person puts property into the hands of trustees in trust to be held for persons in existence, be they children or strangers, that deed is not revocable, because it amounts to a gift which may or may not take immediate effect but which cannot be recalled.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause, together with the proof adduced and whole cause, and heard counsel for the parties, Assoilzie the defenders, the trustees under the disposition and assignation in trust by the pursuer Mrs Jane Georgina Gilchrist or Lyon, dated 23rd April 1883, and recorded 9th July 1889, from the conclusions of the action, and decern: Find the said defenders entitled to expenses as between agent and client out of the trust estate as the same shall be taxed by the Auditor, and remit," &c.

Counsel for the Pursuers—Salvesen, K.C.—A. S. D. Thomson. Agents — Morton Smart, & Macdonald, W.S.

Counsel for the Defenders—W. Campbell, K.C. — Blackburn. Agents—Macandrew, Wright, & Murray, W.S.