

by granting an assignation, a question of a somewhat delicate nature would arise—a question namely, Whether, if a sub-tenant chooses to pay his rent before it is due, and has been made to pay twice over, he can demand from the landlord an assignation such as this? I think it extremely doubtful that he could make this demand, seeing that he has placed himself in this position by his own imprudence—I say by his own imprudence, because he has in the statute a distinct warning of the risk to which he made himself liable.

But I rather think it is unnecessary to decide this question, because the landlord has shown that he would be prejudiced. His hypothec was available for the rent of 1873, the second half of which was not payable till Whitsunday 1874, and he would have had an opportunity of sequestrating the principal tenant's stock over again for the second half-year. And that is a sufficient answer, because no right can be granted in equity which is not entirely without prejudice to the person granting it. I am therefore for recalling the Sheriff's interlocutor.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court pronounced the following interlocutor:—

“Recal the interlocutor of the Sheriff-Substitute of 27th February 1875, and all the subsequent interlocutors: Grant warrant to the appellant to uplift the consigned money mentioned in the interlocutor of the Sheriff-Substitute of 2d September 1873, without granting any assignation of the sequestration or of his right of hypothec: *Quoad ultra* dismiss the sequestration, and decern: Find the appellant entitled to expenses both in the Inferior Court and in this Court; Allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for the Petitioner (Appellant)—R. V. Campbell. Agent—George Andrew, S.S.C.

Counsel for Respondent—Asher—Moncreiff. Agent—A. Morison, S.S.C.

Wednesday, July 10.

SECOND DIVISION.

[Lord Young, Ordinary.

MACKENZIE v. MACKENZIE'S TRUSTEES.

Trust—Revocation of a Trust-Deed Executed by a Lady before Marriage—Equitable Powers of the Court.

A lady having, eight days previous to marriage, but (in the opinion of the majority of the Court) not in view thereof, executed a trust-deed dealing with funds over which she had absolute control, by which the income of her estate was to go to herself and the fee to her children if she had any, and any husband she might marry was strictly excluded from both interest and principal, afterwards upon her marriage, and previous to the birth of any child, desired to execute a renunciation of the trust to the extent of making a provision for her husband. She brought an

action (in which her husband sued along with her) against the trustees for declarator (1) that the deed of trust was revocable, or (2) that notwithstanding of that deed she was entitled “to execute a reasonable postnuptial contract” making provision for her husband. A child was subsequently born of the marriage.

The Court (after a report by a curator *ad litem* to the pursuer approving of the course desired) (*dub.* Lord Gifford) gave effect to the second conclusion of the summons, the deed having been when executed perfectly gratuitous, and no *jus crediti* having in their opinion been created in anyone.

Opinion (per Lord Justice-Clerk), in the view of the fact that the deed partook of the nature of a voluntary interdiction rather than of any other, that the prior birth of a child would not have barred revocation; and (2) that if the deed were truly irrevocable, there would have been no propriety or expediency in the Court interfering with it upon a subsequent marriage.

Opinion (per Lord Gifford) (1) that the deed, judging from the facts of the case, must be held to have been executed *intuitu matrimonii*, and that upon marriage it became irrevocable; and (2) that it was inexpedient for the Court to interfere to the effect of sanctioning the proposed postnuptial deed.

By his trust-disposition Mr Thomas Shepherd, who died in 1858, *inter alia* directed his trustees to divide the free residue of his estate among his children, and to pay over the shares to them on their respectively reaching twenty-one years of age. Mrs Mackenzie, the pursuer of this action, was a daughter of Mr Shepherd's, and attained majority on 27th January 1874, and her share of her father's estate, amounting to £21,145, was thereupon or shortly thereafter paid over to her. She was then unmarried. There was a provision in Mr Shepherd's trust-deed that the shares falling to his daughters were granted by him in their favour to the entire exclusion of the *jus mariti* of any husbands they might marry, but should be to his daughters an alimentary fund, and not affectable by their husbands' debts or deeds; and further, that all deeds granted by his daughters alone without their husbands' consent should be held sufficient.

After the pursuer's share had been paid over to her she lived more extravagantly than was prudent, the result being that within two years and a-half after she came of age she had spent, besides the interest of her money, a considerable part of the capital. In consequence of this, and acting upon the advice of her friends and her agents Messrs Leburn, Henderson, & Wilson, she on 5th September 1876 executed a trust-deed for the management of her affairs, the trustees under which were her brother Mr Thomas A. Shepherd and Mr Charles Henderson, S.S.C., her agent. These gentlemen were the defenders in the present action. By this trust-deed the pursuer assigned and disposed to the defenders as trustees, and to such other persons as might be assumed to act, heritable and irredeemably all her heritable and moveable estate, the trustees having under the deed all the powers, &c., granted by Act of Parliament, and also full powers of investment, &c. The purposes for which

the trust-deed was granted were as follows:—
 "1st, For payment of all my just and lawful debts incurred prior to the date hereof. 2d, For payment of all advances my trustees may make to me or on my account during the subsistence of this trust. 3d, For payment out of the first and readiest of the annual income and produce of the trust-funds, of the trust-expenses, including the expenses or allowances payable to the factor and agent foresaid. 4th, For payment to me during my life of the balance of the annual income and produce of the trust-funds for my own alimentary use, and in the event of my marriage, on my own separate receipt only, without the necessity for the consent of my husband, and exclusive of his *jus mariti*, right of administration, and all other marital or other rights of said husband, and such annual income shall be payable to me half-yearly or at such other periods as my trustees shall think proper, and shall be strictly alimentary, not assignable nor capable of anticipation, and shall in no way be liable for my debts other than strictly alimentary debts. 5th, In the event of my marriage, for payment to me or on my behalf of such part of the capital of said trust-property as my trustees shall think proper for my outfit. 6th, For payment of the fee or capital of said trust-funds on my own death to any children who may be born to me, in such shares and proportions as I shall appoint by any writing under my hand, and failing such appointment equally among such children, share and share alike, and each child's share shall be payable to him or her only on his or her attaining majority or being married, and until then my trustees shall hold such child's share and apply the whole or such part as my trustees shall think proper of the income thereof for his or her behoof. . . . And 7th, On my death, and in case there shall not be any child or issue of a child of my body then in life, for payment of the whole remaining trust-funds and property to such persons and for such uses and purposes as I shall appoint by any will, settlement, or writing signed by me, and failing thereof to my own nearest heirs whomsoever; and I bind myself to grant, execute, and deliver to my trustees all deeds and writings that may be found necessary or expedient for the proper carrying out of these presents, and whenever called on to do so; and I declare these presents to be irrevocable by me; and I consent to the registration hereof for preservation and execution."

On 13th September 1876, about a week after the execution of the trust-deed, the pursuer was married to Mr Mackenzie, who was then only seventeen years of age, and resident in England. The pursuer was engaged to Mr Mackenzie at the time of the execution of the trust-deed, but so far as was known they did not intend to marry for some years; but they met in London about a week after the granting of the deed by the pursuer, and the ceremony of marriage was gone through. It was not known to any of Mrs Mackenzie's relatives or friends till the 10th October following. On 5th October 1877 a child was born of the marriage.

The pursuer after her marriage was desirous of terminating the trust as constituted, and of entering into a postnuptial contract of marriage, but the defenders, as trustees under the trust-deed, refused their consent to this, on the ground that they had been advised that the trust-deed in

question if not *ab initio* irrevocable, at all events became so on Mrs Mackenzie's marriage.

Mrs Mackenzie then, with consent of her husband, and he for his own right and interest, brought this action asking for declarator that the deed of trust was revocable by her with consent of her husband, or at least that with his consent, notwithstanding the execution of the deed of trust, she was entitled to execute a reasonable postnuptial contract or settlement containing all usual and necessary powers, and in particular containing clauses (1) providing for the pursuer's concurrence with the trustees in regard to the investment of the estate; (2) conferring a life-rent interest in the trust-estate on Mr Mackenzie; and (3) containing a power to the pursuer to advance a sum not exceeding £3000 for the purpose of enabling Mr Mackenzie to engage in business. The summons asked that such a deed of revocation or alteration should if necessary be prepared and adjusted at the sight of the Court.

The pursuer averred that she had had no intention of executing an irrevocable deed when she signed the trust-deed; that she understood the object of the deed was to provide for the more economical management of her income, and that the granting of such a deed would in no way interfere with the settlement of her fortune upon marriage or by testament. She further averred that the deed was not submitted to her in draft, and that though read over to her, its purport was not explained, and that she had not authorised its delivery. It was in the custody of Mr Henderson, one of the trustees, and also then her agent.

This was denied by the defenders, who stated that the pursuer had given instructions for the preparation of the deed, was fully aware of its meaning, and had handed it to Mr Wilson, Mr Henderson's partner, in order that it should be acted on, and further that it was acted on for sometime after her marriage.

The pursuer, *inter alia*, pleaded—" (1) The said deed of trust being in its nature a voluntary deed, and not conferring benefit on any person but the grantor, and being moreover undelivered and in the possession of her law-agent, the principal pursuer is entitled to revoke the same. (3) On a sound construction of the said deed of trust the radical right therein remains vested in the pursuer Mrs Mackenzie, and she is entitled to execute a deed altering or adding to the purposes thereof. (4) The alterations proposed by the said pursuer are a fair exercise of her proprietary powers, and she is entitled to a decree declaratory of her right to execute such a deed of alterations."

The defenders pleaded, *inter alia*,—" (4) Even assuming that the said deed might have been revoked by Miss Shepherd had she remained unmarried, it became irrevocable on her marriage, or at least on the birth of a child. (5) If the said deed is irrevocable, the execution of any deed altering or modifying its terms would in effect be a revocation and incompetent even at the sight of the Court, and invalid, nor would Mr Mackenzie be effectually bound or his creditors effectually excluded by any such deed now to be executed."

The Lord Ordinary (YOUNG) pronounced this interlocutor:—"The Lord Ordinary . . . repels the fourth plea-in-law for the defenders: Declares that notwithstanding of the deed of

trust referred to in the conclusions of the summons the pursuer Mrs Mackenzie is entitled along with her husband to make and execute, subject to the approbation of this Court, a reasonable postnuptial contract or settlement comprehending her fortune, being the property held in trust under said deed of trust, and to that effect to revoke the said deed of trust: Allows the draft of the proposed contract or settlement to be lodged in process, and continues the cause."

He added this note:—

"*Note.*—In the view which I take of this case it is unnecessary to direct any inquiry at this stage. I assume that the pursuer Mrs Mackenzie intended the deed of 5th September 1876 to be exactly what it is, and that the question whether or not it is a bar to the execution of a reasonable marriage settlement must be judged of on that footing. Taking the case so, the defenders' counsel conceded, I think rightly, that the deed on its execution created no right whatever in any other, and was revocable by the granter prior to her marriage. The action is accordingly resisted on the fourth plea in defence, and on it only.

"The facts are these—Mrs Mackenzie (whom I shall call the pursuer) on attaining majority and while still unmarried (January 1874) came into possession of a fortune of about £20,000. She thereafter lived more extravagantly than seemed prudent to her friends or probably than was so, and with the result of encroaching on the capital. In 1876 she was persuaded by her friends—no doubt from proper and kindly motives—to put what might practically answer the purpose of a check upon herself by committing the management of her fortune to them as trustees, restricting her right to a life interest, and destining the capital to her children. The deed of 5th September was accordingly executed. It was an unusual deed for a young unmarried lady of twenty-three to execute, but it was recommended to her in what was believed to be her interest. Whether or not she had then resolved on the marriage which she entered into eight days thereafter does not appear, and is I think immaterial. She might before the marriage have made any contract she pleased with her husband respecting her estate without hindrance from the deed, although it may be that the trustees under it might have had sufficient title to invoke in her behalf the aid of this Court to prevent the accomplishment of anything unfair or extravagant to her prejudice. Very little title would probably be sufficient for such a purpose. What she herself now appeals to the Court to authorise is the execution of such a marriage-contract as the Court may approve of as fair and reasonable. I am of opinion that this is within the limits of her right. I need express no opinion upon the question whether she might absolutely revoke the deed and demand her money. To do so would probably not be for her interest, and she does not propose it. The proposal which she does make is, I think, reasonable, and such as we have jurisdiction to entertain and sanction. I am clearly of opinion that her child has no right as against her, or anything but a hope of benefit through her and by her voluntary gift. She desires to place her husband and children in such position as a proper marriage-contract may effect; and I have no difficulty in declaring that this is within her power notwithstanding the deed

of September 1876, and such a proper exercise of it as the Court may and ought to sanction. Should the defenders desire to reclaim now, they have my leave."

The defenders reclaimed.

The Court appointed Mr Donald Crawford, advocate, curator *ad litem* to Mrs Mackenzie, who reported that he approved of the course she proposed.

The arguments of the parties sufficiently appear from the opinions of the Judges.

Authorities—*Urquhart v. Douglas*, December 15, 1738, M. 10,403; *Murison v. Dick*, February 10, 1854, 16 D. 529; *Young v. Loudoun & Company*, June 26, 1855, 17 D. 998; *Torry Anderson v. Buchanan and Others*, June 2, 1837, 15 S. 1073; *Pringle v. Anderson*, July 3, 1868, 6 Macph. 982; *Fernie v. Colquhoun's Trustees*, December 20, 1854, 17 D. 233; *M'Leod v. Cuninghame*, July 20, 1841, 3 D. 1288; *Spalding v. Spalding's Trustees*, December 18, 1874, 2 R. 237; *Forrest v. Robertson's Trustees*, October 27, 1876, 4 R. 22; *Costine's Trustees v. Costine and Others*, March 19, 1878, 15 Scot. Law Rep. 446; *Smith v. Chambers' Trustees*, April 15, 1878, 15 Scot. Law Rep. (H. of L.) 541; *Menzies, &c. v. Murray*, March 5, 1875, 2 R. 507; *Slocombe*, February 24, 1789, 2 Brown's Ch. Cases, 545; Act 18 and 19 Vict. c. 43; Simpson on Law of Infants, 30.

At advising—

LORD ORMDALE—The constituting of a trust at the time and for the purposes the trust in question was constituted by the pursuer Mrs Mackenzie may have been, and I think was, prudent and advisable in the circumstances. But a very important change of circumstances has since taken place through her marriage. That event may no doubt, in certain views that may be taken of it, render a revocation of the trust undesirable, but it is certainly not unnatural that Mrs Mackenzie should wish to revoke the trust to the extent of merely settling a reasonable provision on her husband. This is all that she proposes to do, and all that she has been held entitled to do by the Lord Ordinary's judgment under review.

There can be no doubt, I think, that the trust in question having been entirely gratuitous, and not in favour of any existing beneficiary, was revocable by Mrs Mackenzie before her marriage, and before she had entered into any marriage-contract. So far there was no dispute, and at any rate the question I hold to be ruled by the authority of the case of *Murison v. Dick*, 16 D. 529.

Nor do I think that the exclusion of her husband's *jus mariti* by her father's settlement affects the matter, there having been no continuing trust or other machinery constituted by her father for rendering that provision of his settlement effectual. Accordingly she was entitled to have the whole funds left to her by her father paid over to her on her attaining majority without reservation; and it was on this assumption and footing that she granted the trust in question.

That Mrs Mackenzie was entitled to revoke the trust even after her marriage, so long as she had no children, is also, I think, free from serious doubt,—the more especially to revoke it to the modified extent proposed in the present action. And that she did revoke it before the only child she has had was born or even *in utero* is clear, I

think, from the terms of the letters which have been put in process between her and the trustee. In this view it is unnecessary to determine whether she could or could not revoke after the birth or conception of her child.

The only doubt which I have felt in regard to the soundness of the conclusion at which the Lord Ordinary has arrived arises from Mrs Mackenzie being under coverture. But as her husband sues along with her as a consentor and for his own interest, and as the curator *ad litem* appointed by the Court to Mrs Mackenzie has reported that he has had an interview with her and entirely approves of the course which she desires to be followed out, I can see no good reason why that should not now be done.

I am therefore of opinion that the Lord Ordinary's interlocutor ought to be adhered to, and the proposed deed of revocation executed.

LORD GIFFORD—It appears to me that the first question both in form and in substance which requires to be considered and determined in the present case is that raised by the first conclusion of this action of declarator. The first conclusion is that the trust-deed in virtue of which the defenders hold Mrs Mackenzie's estate is now revocable by Mrs Mackenzie herself with consent of her husband—that is, the pursuer seeks to have it declared that she is now entitled, with consent of her husband, to revoke and put an end to the trust-deed as if it had never been granted. No doubt there is an alternative conclusion, that failing this absolute power of revocation the pursuer and her husband are nevertheless entitled, notwithstanding the trust-deed, to make a reasonable postnuptial contract or settlement dealing with and disposing of the trust-funds. The power to make such a postnuptial settlement either with or without the supervision of the Court, forms the second question in the case, but before approaching the second question I feel it to be necessary—at least so the case strikes me—to consider and determine the first question, namely, Whether the trust-deed is or is not revocable by the pursuers in whole or in part. For if, on the one hand, the trust-deed is a revocable deed over which the pursuers themselves have complete power, it will raise a very delicate question how far the Court are entitled to interfere at all, either by way of dictation or of suggestion, with any postnuptial contract into which the parties may incline to enter. If the trust-deed is once revoked, either in whole or even in part, then the lady is absolute mistress of her own means so far as liberated from the trust, and she may do what she pleases with them, subject only to the ordinary protection which a wife who has no antenuptial contract and who is not under trust has in questions with her husband and his creditors. If, on the other hand, the trust-deed is not revocable, or if it has become irrevocable either by the marriage or by the existence of issue, then it will also be a delicate and a difficult question how far the Court can intervene to lessen the protection of the trust or to enlarge the powers of the spouses over the trust-funds. In any view, the first question is, Is the trust-deed revocable in whole or in part?

Now, I take it to be quite settled by a long series of cases cited at the bar, and most of which are noticed in the case of *Fletcher Menzies*

and *Others v. Murray*, decided by seven Judges, March 5, 1875, 2 *Rettie* 507, that by means of a trust constituted before marriage the separate estate of a wife may be effectually secured not only against the husband and against his deeds and creditors but against the acts of the wife herself, so that she shall not be entitled to revoke or put an end to the trust and to demand possession of the trust-funds even with the consent of her husband and of every other party beneficially interested in the succession. In short, a trust may be constituted for the benefit of a lady under coverture, so that the lady herself while she remains under coverture shall not be entitled to revoke it or to get possession of the trust-funds, although all parties interested consent, or although there be no party interested in the trust-funds but the lady herself. The principle of these cases—and they have occurred under a great variety of different circumstances—is I think this, that a lady under coverture, even with the consent of her husband, is not entitled to renounce protection for which she has stipulated or which has been given her before marriage, although such protection is for the benefit of herself alone, without any interest accruing either to the children of the marriage or to third parties. And thus—although the general rule is well founded that when all the parties actually or possibly interested in a trust concur, and when all are of full age and *sui juris*, they may by their united act terminate the trust and denude the trustees at pleasure—still, when the trust is for behoof of a married woman, she herself cannot, while the marriage subsists, deprive herself, with whatever consents, of the advantages or of the protection which the trust secures, the reason being that while the marriage subsists she is not *sui juris* and not entitled to bind herself by any acts directed against the trust, however deliberate or however assented to by the husband and by all others interested. The very object of such a trust is to secure the wife, not only against the fear and pressure of her husband or his creditors, but to secure her against such sacrifices as she might be anxious to make from love and affection to her husband, or from risks which she might be anxious to run with a view of promoting either her own or her husband's interests.

I think the same series of cases also establish that when such a trust is well constituted for the wife's behoof it is of no consequence whether the trust-funds came from the husband himself, from the parents of the spouses or either of them, from third parties, or even from the wife herself. I agree with the observation made by Lord Deas in *Menzies'* case, where he said—"If the provision be made or reserved from the wife's own estate, that appears to me to be rather *a fortiori* than otherwise in favour of its indefeasibility, because the object and effect of the law is not to lay a restraint on the wife to her prejudice, but to throw around her a protection for her benefit, and it would be very anomalous if that protection did not extend to what came from herself. Being thus of the nature of a protection against marital influence on the one hand and self-sacrifice on the other, it extends no further and lasts no longer than is necessary for the accomplishment of its purpose. Accordingly the subsistence of the marriage does not incapacitate the

wife from disposing of the fee, if it belongs to her, of the lifeferented fund by *mortis causa* deed, nor does the origin and nature of the provision prevent her after the marriage has been dissolved by the predecease of the husband from dealing either onerously or gratuitously with the income at her pleasure." In the present case the trust-funds have come from the wife herself, being part of her succession to her father, and although it was specially provided in her father's settlement that the shares of his estate devolving upon his daughters (of whom Mrs Mackenzie was one) should be exclusive of the *jus mariti* of any husband or husbands to whom the said daughters or any of them might be married, and that the shares should be preserved to the daughters as an alimentary fund, free from the debts or deeds of such husbands, still as he did not enforce this declaration in any way, but directed the money to be paid to the daughters themselves, I think it was in the power of Mrs Mackenzie at any time before her marriage to dispose of or even to squander her patrimony in any way she pleased.

The only question therefore is, Whether the trust-deed which Mrs Mackenzie (then Miss Mary Shepherd) granted on 5th September 1876, and which she then delivered to her trustees, and in virtue of which the trustees obtained full and complete possession of her whole estate, is now revocable by her with the concurrence and consent of her husband? In the view which I take of the case, the whole difficulty arises from the circumstance that Miss Shepherd's trust-deed was a gratuitous and unilateral deed granted by herself alone, and dealing with funds over which she herself had absolute and complete control. The question is, Is a deed like this revocable by the grantor after the grantor's marriage and after the existence of issue of such marriage?

Had the deed in question been an antenuptial contract of marriage entered into in the usual way, and to which the intended husband and his legal guardians were parties, I think there would have been no room for question. Such a deed would have become irrevocable by the mere fact of marriage following upon it, and it would have been irrevocable by the wife under coverture whether there was issue of the marriage or not. Nor would it, I think, have made any difference on the rights of the wife that her intended husband happened to be a minor at the date of such marriage-contract. The wife was past majority when the deed was granted, and the mere minority of her intended husband would not in any way have enlarged his rights. If indeed the minor husband had been defrauded, and the deed had been improperly impetrated, he might have had his redress by reducing or setting aside the deed. But this would be a totally different question, and would depend on totally different principles from a right in the husband and wife to revoke the deed during the subsistence of the marriage.

In like manner, had the trust-deed flowed from the late Mr Shepherd, Mrs Mackenzie's father, or from any other third party having full control of the funds, the deed would have been equally irrevocable by Mrs Mackenzie after marriage, although her father had died and she herself had become the sole beneficiary under the trust. It would be still a marriage-trust intended for the protection of a married woman during coverture, and as such would be irrevocable while the mar-

riage subsisted. This is clear upon the authorities to which I have referred.

Does it make any difference, then, that in the present case the trust is constituted by the lady herself by a unilateral and gratuitous deed to which her intended husband was not a party? Now, although this is a peculiarity which did not occur in any of the series of cases quoted, I do not think it makes any real difference in the result.

In the first place, I think I am justified in describing the trust-deed in question as granted by the lady *intuitu matrimonii*—that is, with a view to her then approaching marriage. The deed was dated and delivered on 5th September 1876. She was married in London on 13th September following—that is, within eight days of the deed. The deed itself makes provision for the pursuer's marriage, for not only is the income secured to Miss Shepherd herself in the event of her marriage, for her alimentary use, payable on her own separate receipt, and "exclusive of the *jus mariti*, right of administration, and all other marital or other rights of said husband," but it is a special purpose of the trust that the trustees are to advance a part of the capital for the grantor's marriage outfit, and then special provisions are made for any child or children who may be born to the grantor. It is alleged on record, and not denied, that there had been an engagement between the pursuer Miss Shepherd and her present husband Mr Mackenzie some considerable time before the date of the trust-deed, although her family disapproved of the suggested marriage, and I think it is impossible to read the trust-deed in the light of the surrounding circumstances without seeing that the pursuer's possible marriage with Mr Mackenzie was at least one of the inductive causes which led to the granting of the deed. There were other reasons of more or less weight, but certainly the contemplated or possible marriage with Mr Mackenzie was one reason inductive of the trust, and although Mr Mackenzie being then so young delay was thought very expedient, and was no doubt much urged, yet the marriage having actually followed within eight days of the date of the deed, I think I am warranted in reading it just as if Mr Mackenzie had been named in it as the grantor's proposed husband.

In the next place, I remark that we are not here in any question as to the validity of the trust-deed in itself. This is not an action to reduce or set aside the trust-deed as from the first invalid or ineffectual or null and void. The action assumes the validity of the deed, and only alleges its revocability. Neither Mr nor Mrs Mackenzie are here saying that they have been defrauded by the deed and that they are entitled to reduce it or set it aside on the ground of error or fraud or on any ground whatever. It is alleged that Mr Mackenzie knew of the deed at the date of the marriage, and although this is denied there is no attempt to set aside the deed as *ab initio* void and null. The whole pleas of the pursuers are directed to Mrs Mackenzie's power to revoke the deed, and not to set it aside as null. Its validity until revoked is admitted and assumed.

In the third place, I am of opinion that whatever view may be taken of the trust-deed in question, it was revocable by the grantors at any time before her actual marriage. So far as the deed was intended to protect Miss Shepherd against her

own improvidence while she continued an unmarried woman, I think she was entitled to put an end to it whenever she chose—that is, so long as she continued unmarried—and *sui juris* she always relieving her trustees against everything which they had lawfully done under the trust. No person, whether male or female, can secure his or her estate against lawful creditors or against lawful deeds. The power that gives anything for one's own behoof can always recal, no third party existing or possible having attained any vested interest. Nor could I sustain a deed of this kind as a sort of voluntary interdiction at Miss Shepherd's instance against herself. The remedy of interdiction is still in full force, but its effects are limited, and certain precautions and publication are essential. And then in so far as the deed was granted in the view of a contemplated or possible marriage, so long as the marriage had not actually taken place, so long did the deed remain in the entire power of the lady, who might change her mind or alter her views. This point seems established among other cases by that of *Murison v. Dick*, 10th February 1854, 16 D. 529, in which case a gratuitous trust-deed like the present was revoked and altered by the granter herself four days after its date because she wished to make other and different provisions in a formal antenuptial contract of marriage.

Even an antenuptial contract of marriage, no matter how formal, may be revoked or resiled from by either of the contracting spouses any time before marriage actually takes place. Either of them may resile from the promise of marriage itself, and of course the provisions of the marriage-contract must fall also, leaving only questions of damages behind. If, therefore, Miss Shepherd at any time before her actual marriage with Mr Mackenzie had revoked the trust-deed now in question, I can hardly doubt that such revocation would have been effectual, no interest having arisen to or vested in any third party.

But, fourth, I have come to be of opinion that the pursuer's marriage with Mr Mackenzie on 13th September 1876 bars the pursuer, even with the consent of her husband, from revoking the trust-deed in question, and that either in whole or in part. On her marriage the pursuer Mrs Mackenzie ceased to be *sui juris*—*quoad* her status she ceased to be the free and independent person she was the day before, and she required in the eye of law protection, and was subject to disabilities which are not needed by and do not attach to an unmarried lady, and it is upon this principle that the irrevocability of antenuptial protective deeds depends. The force and subsistence of such deeds does 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-funds, 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. A husband may indeed renounce rights which marriage apart from contract would give him; but it is not that renunciation which places the trust-funds in the hands of independent trustees for behoof of the wife. It necessarily must be the act of the person to whom the funds belong, and whether it be the husband, a father,

a stranger, or the wife herself, the act is effectual because it is the act of the proprietor, and it becomes irrevocable whenever the marriage follows. Hence, although an antenuptial marriage trust should make no provision for the issue of the marriage, or for the husband himself, it becomes effectual and irrevocable if it protects or secures any reasonable interest in the wife.

Hence 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. At the same time, and apart from the rights of issue, I see nothing to prevent Mrs Mackenzie from affecting the trust-estate by *mortis causa* deeds. If she does not interfere with her children's rights, such deeds would otherwise be effectual.

I am therefore of opinion that the trust-deed in question is not now revocable by Mrs Mackenzie either in whole or in part.

It was urged that the trust-deed was unreasonable in respect it did not make any provision for the intended husband Mr Mackenzie himself. Now, while this might possibly be a ground for reduction or partial reduction of the deed, I do not think it affects the question of revocation any more than it would have done had the deed been a formal and proper antenuptial contract of marriage. The wife has effectually reserved the whole annual income of her separate estate to herself. I do not think she can come to the Court and ask from it power to revoke this so that she may direct the trustees to hand part of the capital over to her husband. She may hand to her husband term by term the whole income which she herself receives. With this, of course, neither the Court nor the trustees have any concern. But the Court cannot under cover of giving the wife a partial power of revocation make a different trust from what the wife before marriage and while *sui juris* chose to make for herself. I do not see any medium between the trust-deed being wholly revocable or not revocable at all. I cannot draw any line and say that it is *pro parte* revocable and *pro parte* irrevocable.

And this leads me to what is the second great question in the case, namely, whether, assuming the trust-deed to be irrevocable by the parties themselves, the Court may nevertheless authorise them to trench upon it by executing a moderate and reasonable postnuptial settlement which shall finally and permanently fix the rights of both spouses in the trust-funds in question, and as it appears to me affecting to the same extent the rights of the issue of the present or of any future marriage into which Mrs Mackenzie may enter.

Now, I fully concur with the view taken by the Lord Ordinary and by both your Lordships as to the expediency of such an arrangement, and the more so that this view is now concurred in by the curator *ad litem* whom we appointed to consider the case on behalf of Mrs Mackenzie herself. I daresay it may be very reasonable, very ex-

pedient, and very proper that £3000 or some sum (and I really cannot well judge what the sum should be) should be taken from the capital of Mrs Mackenzie's estate and paid over to her husband, and I will not differ from the Lord Ordinary and from your Lordships if this can be done. But I feel the difficulty and the delicacy of doing it. The Court are now to make—at least this may be said—a postnuptial settlement for spouses who so far as the female pursuer is concerned have made an antenuptial settlement for themselves. I cannot be without some apprehension that the spouses, both of whom are very young and both of whom I think I see enough to enable me to say without offence may be not very prudent or provident, may again get into serious difficulties, and I should not be surprised at a renewed application still further to trench upon capital for the supposed advantage of the husband or even of the wife herself. Is there not room for fearing that if once you destroy the validity of the antenuptial trust in its entirety there may be a difficulty in telling where the amendment or variations are to stop? The husband is even yet a minor; if his rights are not excluded by the antenuptial trust, will they be better excluded by the postnuptial deed which, as I understand it, the parties themselves and not the Court are to execute in favour of new trustees who are to be named by the parties themselves, and not by the Court. The issue of the marriage actual or possible are no parties to these proceedings. What will happen when long after this they claim their shares of an undiminished fee. I doubt if they will be satisfied with the answer that the Court approved of a postnuptial contract whereby that fee was seriously trespassed upon. And then a postnuptial contract is always *sua natura* revocable except in so far as moderate and reasonable provisions are actually secured thereby. I hesitate to substitute a postnuptial contract and a postnuptial trust for what appears to me to be the far higher and better security created by the antenuptial trust-deed of 5th September 1876.

I have a further difficulty as to the powers of the Court. I know it is not uncommon for Courts of Equity elsewhere and in other countries to reform deeds and amend the provisions even of contracts, and I should be slow to say that the Supreme Courts of Scotland have not as large equitable powers as the varying exigencies of society require. But to alter the private contracts of parties or private trusts which flow from the absolute power and will of proprietors of property or estate must be always a matter of extremest delicacy. I am not aware of any cases forming precedents for what the Court is now asked to do, and though I do not formally dissent, I have thought it right to express as I have now done the difficulties which, had I been sitting alone, I should probably have found insuperable.

LORD JUSTICE-CLERK—I agree with the greater part of my brother Lord Gifford's exposition of the law, but I think it inapplicable to the present case.

I am of opinion that this deed when executed was entirely gratuitous and revocable, and created no *jus crediti* present or prospective in anyone, that it was in no sense a marriage settlement, nor was it executed in contemplation of marriage, and

that it was nothing but a voluntary interdiction intended to protect the granter against her own extravagance. That is admitted or rather stated by the trustees themselves. She did not contemplate marriage at that time for four years, and the execution of the deed had no immediate relation to it. It was therefore revocable by her at pleasure, and no interest was created by it which could bar revocation.

I do not regard this deed as a fulfilment of her father's will, as it is entirely in opposition to it. The father meant her to have an unrestricted fee, and to protect her only against any husband she might have. As far as I see, I should not have been prepared to hold that the birth of a child would have barred revocation, but the lady revoked her settlement long before the birth of a child, and I think it has ceased to be effectual in any sense. I am therefore of opinion that we may competently approve of the proposed postnuptial settlement, but I should not have thought there was either propriety or expediency in our interference if the deed was truly irrevocable.

I do not regard this case as coming within the category of the case of *Fletcher Menzies* and others of that class, in all of which the trust was either constituted by third parties, or was created in contemplation of marriage. And so far in these cases was it from being considered immaterial, that such was the source and cause of granting, it is the foundation of every judgment which ever has been pronounced in this branch of the law. There is no authority for holding that a voluntary trust-deed executed by an unmarried woman for temporary purposes of the granter alone, and not in immediate contemplation of marriage or in favour of anyone else, may not be revoked after marriage. It never was anything or could become anything, without some act of the granter, but a trust for herself.

The Court adhered and approved of the postnuptial contract or deed of trust already executed by the pursuers, and approved of by the curator *ad litem* to Mrs Mackenzie, and authorised the defenders to sign the same: "Of consent find both parties entitled to expenses out of the trust-funds as between agent and client; and remit to the Auditor to tax the same and to report, and decern."

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