

to the first parties by the firm of William M'Arthur & Company at the date of the trust-deed?" in the *negative*; and the *second* question, "Is the first parties' preference limited, in a question with the second parties, to the amount due by the said firm to the first parties on 18th August 1879, the date of the intimation of the said assignation?" in the *affirmative*.

Counsel for Union Bank (Appellants)—Horace Davey, Q.C.—Macnaghton, Q.C.—Low. Agents—Murray, Hutchins, & Co., for J. & F. Anderson. W.S.

Counsel for National Bank (Respondents)—J. B. Balfour, Q.C.—Graham Murray—J. F. Hamilton. Agents—Andrew Beveridge for Dove & Lockhart, S.S.C.

COURT OF SESSION.

Tuesday, December 14.

OUTER HOUSE.

[Lord Trayner.]

MACKENZIES v. BANKS AND OTHERS.

Husband and Wife—Postnuptial Contract—Revocation of Postnuptial Contract—Protection of Interest of Wife and Children.

Spouses (with the approval of the Court, interponed in an action relative to the wife's funds) executed a postnuptial contract under which the funds of the wife, the husband having none, were conveyed to trustees for the wife's *lifereit* alimentary use (a certain *lifereit* interest being also conferred on the husband if the survivor), and for payment of the fee to the children of the marriage and the children of the wife by any subsequent marriage. There was a child of the marriage at the date of the postnuptial contract, and another was born subsequently. The postnuptial contract was delivered to the trustees under it, and thereafter was acted upon for a number of years. *Held*, in an action by the spouses to have it found that the contract was revocable, at least in so far as not an onerous reasonable provision for the children of the marriage, that they were not entitled to revoke it, the wife having by the execution and delivery of the deed effectually protected herself against the actings of herself and her husband, which protection must be continued even against her own wish.

Miss Mary Shepherd attained majority in January 1874, and early in the year 1876 certain sums from the estates of her deceased father and brother were paid to her, amounting together to £21,145, 19s, 11d. After attaining majority she lived beyond her income. In consequence, on the advice of her law-agent, she executed a trust-deed in favour of him and her brother, Mr T. A. Shepherd, which she signed on 5th September 1876 and duly delivered. A schedule of trust-funds annexed to the deed showed that they amounted, as at its date, to £17,300. The objects of the trust were, *inter alia*, payment of her debts, payment of the balance of the annual income of the trust-funds for her ali-

mentary use; in the event of her marriage, payment of an outfit out of the capital, payment of the fee on her death to any children that might be born to her in such shares as she should appoint, or, on her death without issue, payment to such persons as she might by will direct. On 13th of the same month, without the knowledge of her advisers and near relatives, she married John A. C. Mackenzie. At the date of the marriage Mr Mackenzie was not of age. He had no means of his own, and he was thereafter supported entirely by his wife's funds. Charles Cochrane Sheridan Murray Mackenzie, born 5th October 1877, and John Arthur Kerr Mackenzie, born 18th April 1879, were at the date of this process the only children of the marriage.

Thereafter the spouses in October 1877 raised an action of declarator in the Court of Session against the trustees under the deed of 5th September 1876, to have it found and declared that the trust-deed was revocable by Mrs Mackenzie, or at least that she was entitled to make a reasonable postnuptial contract or settlement, *inter alia*, conferring a *lifereit* interest in the estate on her husband, or in such part thereof as she might think proper, and containing a power to her to advance from her estate a sum not exceeding £3000, as she might think proper, for the purpose of enabling her husband to engage in business. The summons in that action further concluded that "if necessary such deed of revocation or alteration should be prepared and adjusted at the sight of our said Lords in the process to follow thereon." The trustees defended the action, and a record was made up and closed therein on 28th November 1877. In that action the Lord Ordinary (Lord Young) found 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." The draft of a postnuptial contract was accordingly prepared by the agent for the spouses, and having been revised by a London solicitor who advised them, it was lodged in process. Thereafter the trustees under the trust-deed reclaimed to the Second Division, and the case having been heard, their Lordships appointed Mr Donald Crawford, advocate, curator *ad litem* to Mrs Mackenzie, and he reported to the Court that he had examined the proceedings in the case, and that in his opinion the provisions of the postnuptial contract were reasonable and proper in the peculiar circumstances of the case, and not prejudicial to the interest of Mrs Mackenzie, and that in his opinion it was for her interest, with the view to the permanent settlement of her affairs, that the deed should be executed without delay.

The draft having been extended, Mr and Mrs Mackenzie on 26th June 1878 signed the deed, and it was thereupon lodged in process, and *avizandum* made. Their Lordships of the Second Division pronounced this interlocutor [July 10, 1878, 5 R. 1027]—"The Lords having heard counsel on the reclaiming-note for the defenders against Lord Young's interlocutor of 21st December 1877,

refuse said note, and adhere to the interlocutor complained of: Approve of the postnuptial contract or deed of trust already executed by the pursuers, and approved of by Mr Donald Crawford, curator *ad litem* to Mrs Mackenzie, and authorise the defenders (the trustees under the trust-deed) to sign the same." Thereafter the trustees under the trust-deed signed the postnuptial contract on 24th July and 1st August 1878. This postnuptial contract narrated Mrs Mackenzie's desire of making provision for her husband. It also narrated the said action, and then set out that the spouses "do hereby revoke and recall the foresaid trust-deed granted by me the said Mary Shepherd, now Mackenzie, in favour of the said Thomas Alexander Shepherd and Charles Henderson, and whole clauses and purposes thereof," and they, with consent and concurrence of the trustees under the trust-deed, thereby assigned and disposed the whole estates of Mrs Mackenzie to trustees. The purposes of this postnuptial contract were payment of the spouses' debts as at 13th June 1878; payment to Mrs Mackenzie during her life, exclusive of the *jus mariti* and right of administration of her present or any future husband, of the free annual income of the trust-funds, such life interest being declared an alimentary provision, nor arrestable nor affectable by her husband's creditors, nor by her own debts, other than strictly alimentary debts; in the event of her predecease, payment to her husband during his life of the income of half the trust-estate, the other half to be held for behoof of the child or children, and, if none, for payment to the husband of the income of the whole; in the event of the wife surviving and there being no child of the marriage, for payment to her of the trust-funds, but in the event of there being issue of the marriage for payment of the capital to them and the children of any subsequent marriage at the mother's death; in the event of the husband surviving, there being a child of the marriage, half the trust-funds were to be paid to such child or children, and on the death of the husband the other half; on the termination of the life interests, if there were no children of the marriage, the funds were to be paid to the heirs, executors, and assignees of the wife; in the discretion of the trustees during the subsistence of the marriage they were to be entitled to pay the husband £3000 to set him up in a profession or in business.

The trust-estate, which at the date of the postnuptial contract amounted to £16,100, was handed over by the trustees under the deed of 1876 to the trustees under it, of whom the defender George Cameron Banks, S.S.C., Edinburgh, was at the date of this action the only acting trustee resident in this country.

The debts which the trustees were directed to pay (amounting to £3000) were paid.

On 6th October the spouses executed a deed of revocation, bearing to revoke and recall the postnuptial contract, and declaring it null and void, and this deed was recorded in the Books of Council and Session. They intimated this deed to the trustees under the postnuptial contract.

They brought the action now reported against the trustees under the postnuptial contract and against the children of the marriage for declarator that the postnuptial contract was revocable, and had been revoked by the deed of 6th

October 1886, and that the trustees under it were bound to denude of the trust-funds in favour of the spouses; or otherwise, that it was revocable, except in so far as the provisions in favour of the children of the marriage were reasonable and adequate, and that £4000 was reasonable and adequate for that purpose. Then followed conclusions to have the declaratory conclusions made operative, and for an accounting.

Mr Banks, as the only trustee in Scotland, defended the action. He averred—"Since the date of the said [postnuptial] deed the whole parties have acted under, acquiesced in, and recognised the said postnuptial deed, without any question or challenge being raised till October 1886. . . . The defender and the other trustees have held and still hold the trust-funds for behoof of said children and any other children that may be born, in fee. . . . Mrs Mackenzie has received every half-year the free income of the estate, and, as required by the terms of the dispositive clause of the postnuptial deed, she has given her formal consent to the investment of the capital of the estate on various occasions. Both she and her husband have maintained the deed in Court, and pleaded it in answer to claims by their creditors. . . . The defender believes and avers that if the pursuers got possession of the funds they would soon spend the whole of them, and nothing would be left either for them or their children. . . . The defender has no personal interest whatever in the trust, but he is advised that it is his duty to defend the same until he is judicially relieved from so doing." . . .

The pursuers pleaded—" (1) The postnuptial contract being revocable, and having been revoked, the defenders are bound to denude of the funds held by them. (2) In any view, the contract is revocable, except in so far as a reasonable provision is thereby secured to the children of the marriage, and *quoad* the excess of the funds, the pursuers are entitled to decree of payment, (3) Generally, the pursuers are entitled to one or other of the decrees concluded for."

The defender Banks pleaded—" (4) The pursuers' statements, so far as material, being unfounded in fact, the defenders should be assoilzied. (5) The said deed of 1878 having been delivered and acted upon, and being irrevocable, the defenders should be assoilzied. (6) The pursuers are barred from revoking the said deed by their proceedings in said action, by the actings of parties under the said deed, and by their having adopted and homologated the same. (7) The said deed having been granted by the pursuers for onerous causes and considerations, they cannot now revoke the same. (8) The terms of the deed of 6th September 1876 exclude the pursuers' claims, even if the deed of 1878 were revoked. (9) The deed in question having been acted on, and large sums having been paid on the faith of it, and *restitutio in integrum* being impossible, the defenders should be assoilzied. (10) The fee of the whole estate having vested in the children under the deed in question, the pursuers are not entitled to revoke the same to any extent."

The children of the marriage and Hugh Bruce Dewar, S.S.C., their curator *ad litem*, lodged the following defences:—" (1) The present defenders adopt the defences for the defender George Cameron Banks. (2) The curator *ad litem* is advised that it is his duty to reserve, as he now

does, the right of his two pupil wards to maintain the irrevocability of the original antenuptial trust-deed granted by the pursuer, their mother, of September 5th 1876, and recorded in the books of Council and Session 1876, referred to in the record of this action, notwithstanding the judgment of the Second Division of the Court of July 10th 1878, also referred to in the record in this action, to which judgment and the action in which it was pronounced neither of the pupils was a party. The elder of the two pupils was born October 5th 1877, and the younger April 18th 1879."

The pursuers relied on *Laidlaws v. Newlands*, February 1, 1884, 11 R. 481.

The defenders distinguished that case on the ground that there was here a matrimonial purpose for which the funds were required to be retained in trust.

The Lord Ordinary (TRAYNER) assolized the defenders.

"*Opinion.*—In the month of September 1876 the pursuer Mrs Mackenzie (then Miss Shepherd) executed a trust-deed whereby she conveyed her whole means and estate to certain trustees there named for the purposes therein stated. Within a few days after the execution and delivery of that deed Mrs Mackenzie married her present husband, who is also a pursuer. In the month of October 1877 (there being then issue of the marriage) the pursuers raised an action before this Court to have it declared that notwithstanding the said deed of trust they were 'entitled to make and execute a reasonable postnuptial contract or settlement containing all usual and necessary powers, and in particular containing clauses specially directed to confer benefits upon the husband. In that case the Court decided that the pursuers were entitled to execute such a postnuptial contract, and approved of the contract executed by the parties during the dependence of the process. Lord Gifford, who was of opinion that the trust-deed was not revocable, in delivering his opinion in the case I refer to, said—'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.' The 'renewed application' thus anticipated by Lord Gifford is presented in the present case. The pursuers now seek to have it declared that the postnuptial contract executed by them with the approval of the Court is revocable, and has been duly revoked, and that the defenders (the trustees under that contract) are bound forthwith to denude themselves in favour of the pursuers of the whole trust-estate; or otherwise that the postnuptial contract is revocable except in so far as it makes provisions for the children of the marriage, which ought now to be fixed at the sum of £4000, and *quoad ultra* the trust-estate should be reconveyed to the pursuers.

"There are now two children of the marriage alive, and they, through a curator *ad litem* appointed to them in the present action, along with the only acting trustees in this country, oppose the granting of the decree which the pursuers seek to obtain.

"By the postnuptial contract in question the pursuers conveyed to trustees the whole estate belonging to Mrs Mackenzie (her husband having no estate whatever) in trust for payment of the debts of the spouses then due; for payment of the expenses of the trust; for payment to Mrs Mackenzie during her life of the whole interest and produce of the estate 'exclusive of the *jus mariti* and right of administration' of her present husband or any other husband she may hereafter marry, such liferent interest being declared to be an alimentary provision for Mrs Mackenzie not assignable by her, nor of which she should have power to dispose or deprive herself by anticipation, nor arrestable, nor affectable by her husband's debts or creditors, nor by the debts of Mrs Mackenzie 'other than strictly alimentary debts'; for payment to Mr Mackenzie of the interest and produce of one-half of the estate in the event of his surviving his wife and there being children of the marriage, or of the interest and produce of the whole estate if he should survive his wife without existing issue of the marriage; and lastly, for payment of the fee of the trust-estate to the children of the marriage (or of any children Mrs Mackenzie might have by a subsequent marriage) after the death of the spouses, in the manner and according to the proportions set forth in the deed. I should also notice that there is a provision in the deed to the effect that the trustees may in their discretion advance a sum out of the trust funds not exceeding £3000 for the purpose of enabling Mr Mackenzie to engage in business or set him up in a profession, 'as he may prefer.' It does not appear that Mr Mackenzie has indicated as yet any preference for any kind of occupation.

"At the date of the execution of the postnuptial contract the trust-estate was of the value of rather more than £16,000, but it has since been reduced by over £3000, the amount of the debts due by the spouses at the date of the deed, which the trustees have paid as directed.

"As I understand the views of the pursuers, they maintain that they are entitled to revoke the postnuptial contract in question in so far as it concerns the provisions therein made in their own favour—(1) because it is a postnuptial contract; and (2) because they being the persons alone interested in such provisions are entitled to recal what is practically a voluntary trust for their own benefit.

"I regard it as already decided that in circumstances such as we have here the pursuers are not entitled on either of these grounds to revoke or recal their postnuptial contract—*Low v. Low's Trustees*, November 20, 1877, 5 R. 185.

"Mr Mackenzie cannot complain of the deed as unreasonable. He gets large benefits under its provisions, in return for which he gives nothing whatever, Mrs Mackenzie, on the other hand, does not complain of the deed as unreasonable either in regard to the benefits conferred on her husband or herself. The only object she can have by the revocation of the deed is to get rid of the protection afforded to herself by the clauses which limit her right to a liferent, which is declared alimentary. She has by the execution and delivery of the deed in question effectually protected herself in the liferent of her estate, and against the danger of the dissipation of that estate by her husband or herself. I think that

protection must be continued even against her wish—*Menzies v. Murray* [March 5, 1875], 2 R. 507.

“As regards the provisions in favour of the children of the marriage, it was conceded that the pursuers cannot revoke the deed in question without at all events making a reasonable provision for such children, and they propose to lay aside a sum of £4000 for that purpose. The right to revoke on making such a provision was based on the ground that under the deed in question the children had nothing more than a *spes successionis*. In the case of an ordinary post-nuptial contract, where provisions are made for children this view may be quite sound, because such provisions partake more or less of a testamentary character. But I cannot adopt that view in this case. The pursuers have already conveyed and delivered their estate away from themselves to trustees for behoof of the children under burden of certain liferent rights. The right of the children is therefore more than a mere *spes*. It is the same as if the children were already vested in the estate, and what has been given to them cannot be recalled—Fraser on Husband and Wife, vol. ii. p. 1503.”

Counsel for Pursuers—Graham Murray.
Agents—Paterson, Cameron, & Co., S.S.C.

Counsel for Defender G. C. Banks (Trustee under the Postnuptial Deed)—Dickson. Agent—Alexander Wardrop, L.A.

Counsel for the Curator *ad litem*—Salvesen.
Agents—H. B. & F. Dewar, W.S.

Tuesday, January 11, 1887.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

BREATCLIFF AND OTHERS v. BRANSBY'S
TRUSTEES.

Trust—Investment—Powers of Trustees—Real Security—Railway Mortgage—Liability of Trustees.

Held that an investment on a railway mortgage, giving the mortgagee the security of the railway company's undertaking, was “real security,” and therefore within the powers of testamentary trustees who were directed by the testator to place the trust-funds “upon Government or real securities.”

Mrs Mary Bransby of Bramham, in the county of York, died on 3d April 1845. She left a will dated 3d September 1844, by which she appointed as trustees two gentlemen residing in Bathgate. She directed certain specific legacies to be paid, and her whole estate to be turned into money, and the residue thereof to be held in trust, and “from time to time to invest or place out the same in or upon Government or real securities at interest, to be altered or varied as occasion may require at the discretion of my said trustees, until the same shall become payable by virtue of this my will.”

Mr Haldane and Mr Smith, the defenders in this action, were assumed as trustees on the 19th April 1867 by the survivor of the original trustees.

On 1st December 1876 Mr Smith and Mr Haldane, who were then the sole trustees, invested £800 in a mortgage of the Girvan and Portpatrick Junction Railway Company to bear five per cent. interest, and be repayable on 11th November 1879. The company afterwards got into difficulties, and no interest was received after Martinmas 1878. Benjamin Breatcliff, the nephew of the testatrix, and the last of the annuitants under the will, died on 15th December 1880, and the residue became payable to the residuary legatees. But the greater part of the estate consisted of the mortgage of £800, and there was thus no available residue for division.

The residuary legatees brought this action against the trustees, as such and as individuals, to have it declared that the said investment by the trustees “was not an investment authorised by the said will or by statute, and was *ultra vires* of the defenders as trustees foresaid;” that they should be found liable as individuals for all the loss occasioned by the investment; further, for count and reckoning of their intromissions with the estate, and payment of the residue on the footing that the investment was unauthorised, and that the money must be replaced.

The pursuers averred that the railway mortgage was much depreciated in value, if not unrealisable and that they had sustained loss through the investment having been made. The defenders averred that at the time of the purchase the mortgage was a perfectly good security, and that under the circumstances there was no residue available for division.

The pursuers pleaded—“(1) The said investment not being authorised by the said will or by statute was *ultra vires* of the defenders as trustees foresaid, and they are bound to make good the loss thereby occasioned.”

The defenders pleaded—“(1) The said investment being within the powers of the trustees, the defenders ought to be assoilzied from the declaratory conclusions of the summons.”

On 23d July 1886 the Lord Ordinary pronounced this interlocutor—“Sustains the first plea-in-law for the defenders, and assoilzies the defenders from the conclusions of the summons other than the conclusions for accounting, and decerns: Appoints the defenders to lodge in process an account of their intromissions, and that by the first box-day in vacation; grants leave to reclaim.”

“*Note.*—The only question argued was whether the investment of a portion of the trust-funds on the security of a mortgage by a railway company, assigning the undertaking in the usual form, was authorised by the trust-deed. The trustees are empowered to invest the estate upon Government or real securities, and the question is whether a mortgage of the Girvan and Portpatrick Railway Company is a real security within the meaning of the power. I think it is, because it gives to the mortgagee the security of the whole undertaking, that is, of the whole real and moveable property of the company. It is true that it is a security which cannot be made available to the creditor by the ordinary diligence of the law. But he has a different kind of diligence in his right to obtain the appointment of a judicial factor, through whose administration the undertaking may be managed or disposed of for