defender would be deprived of his right of relief against Gillespie as the person jointly responsible for the pursuer's injuries. He cited *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, June 5, 1894, 21 R. (H.L.) 39, 31 S.L.R. 937.

Argued for the pursuer and appellant—If the present defender had a good claim of relief against Gillespie, that could not be affected by any transaction between Gillespie and the pursuer. The pursuer was therefore entitled to an issue. He was willing to restrict his claim by deducting the amount which he had received from Gillespie.

LORD JUSTICE-CLERK—The facts here are that one of the defenders having made a settlement has been assoilzied; and the remaining defender maintains that the action cannot now be allowed to proceed as against him, on the ground that in the event of a verdict against him he will be deprived by the settlement which has been come to of his right of relief against the other defender. I do not think that any such question arises at this stage. The question whether or not this defender is responsible does not depend upon whether or not someone else is responsible. If a relevant case has been stated against this defender—and I think it has—the case must go to trial as against him. The only difficulty which might have arisen is occasioned by the pursuer having already got some of the compensation which he sues for: but that difficulty is removed by the pursuer having agreed to restrict the sum sued for by the amount which he has received.

LORD YOUNG—I am of the same opinion. There is no objection to the relevancy of the pursuer's case against Hogarth, and therefore it must go to trial. We are not concerned with the pursuer's case against Gillespie, whether he has a relevant and true case against him, because the claim which he makes against him has been settled and discharged. But that settlement can in no way prejudice the defender Hogarth.

LORD TRAYNER—I agree with your Lordship that the pursuer has stated a relevant case against the defender Hogarth, and I therefore think that his first plea-in-law should be repelled. The other question raised by the defender Hogarth is of some importance, viz,, whether the pursuer having discharged his claim against one defender that necessarily discharges the other. The main argument offered in support of that view is, that by this settlement the pursuer has deprived Hogarth of the legal right of relief which he would otherwise have had against the other defender. I desired some authority for that proposition, for I am unable to see how the pursuer's discharge to Gillespie could affect any right of relief that Hogarth might have against him. Any rights that Hogarth has are rights vested in himself, and he alone can discharge them; and I therefore can see no reason for holding that the pursuer has deprived him by compromising his claim against Gillespie of any right of relief that he may have against the latter. The case would have been different if this had been an action against two defenders jointly and severally alone, because then both must be held liable or neither. But this petition is framed so as to entitle the pursuer to take action against one of the defenders, and therefore there is no principle for holding that he is excluded from going against either. It is said that if the pursuer obtains a verdict against Hogarth for the full amount which he claims he will be getting more than he sues for, having already had his claim satisfied to the extent of £15 by Gillespie. But that difficulty is avoided by the pursuer having consented to restrict his claim to the sum sued for less what he had already received.

I therefore think that we should repel the first, fifth, and sixth pleas stated by Hogarth and approve of the issue proposed.

LORD MONCREIFF—The pursuer proceeded originally against two defenders, but has now thought fit not to proceed against one of them. It is immaterial that a sum of money has been paid by that defender. The case is the same as if the pursuer had brought his action against Hogarth alone. If Hogarth is found liable in damages, and has a good claim of relief against his alleged fellow wrongdoer (as to which I express no opinion), I am satisfied that no transaction between the pursuer and Gillespie will prevent the defender Hogarth making good that claim of relief. I therefore think that the case must go to trial. No doubt the jury, if they award damages to the pursuer, will take into account the amount that he has already received from Gillespie.

The pursuer having amended his issue by altering the damages claimed from £300 to £285 the Court repelled the first, fifth and sixth pleas-in-law for the defender Hogarth, and approved of the issue as amended.

Counsel for the Pursuer and Appellant—Younger. Agents — Oliphant & Murray, W.S.

Counsel for the Defender and Respondent—Salvesen, K.C.—Constable. Agents —J. B. Douglas & Mitchell, W.S.

Thursday, November 21.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

ANGUS' TRUSTEE *v.* ANGUS.

Bankruptcy—Illegal Preference—Cash Payment in Ordinary Course of Business—Fraudulent Preference—Fraud—Husband and Wife—Marriage-Contract.

By antenuptial contract of marriage a husband bound himself within five years to pay £5000 to the trustees for behoof of his wife and himself and the

children of the marriage. During the ensuing fifteen years no payment was made in implement of this obligation, but thereafter the husband paid to his law-agent in cash on various dates sums amounting to £2300, which were placed on deposit-receipt in name of two of the trustees nominated in the marriage-contract. Within sixty days after the first of these payments the husband and his firm were sequestrated. None of the trustees had regularly accepted office, or attended any meeting, or done anything as trustees under the trust. The husband's law-agent had received no appointment to act as law-agent under the trust. The money so paid to the husband's law-agent was withdrawn from the coffers of the husband's firm, with the connivance of his partner, who was his brother and one of the trustees, when both of them knew that no funds were legitimately available for the purpose. *Held* (1) that as there was no one authorised to receive payment under the obligation in the marriage-contract there had been no valid payment into the trust; (2) that the payments were not cash payments in the ordinary course of business; and (3) that they were made fraudulently and collusively; (4) that consequently they were inept and invalid both under the Act 1696 cap. 5, and at common law; and (5) that the husband's trustee in bankruptcy was entitled to be ranked and preferred to the sums in the deposit-receipts.

Robert Reid, C.A., Glasgow, trustee on the sequestrated estates of Robert Struthers Angus, produce merchant, Glasgow, as real raiser, brought an action of multiplepoinding in the name of the Commercial Bank of Scotland, Limited, as pursuers and nominal raisers, in order to decide competing claims to a sum of £2300 lying in the bank on deposit-receipts in the names of James Angus and James Macmillan, both merchants in Glasgow, as trustees under the antenuptial contract of Mr and Mrs Robert S. Angus.

Claims to be ranked and preferred to the whole sum were lodged (1) by Robert Reid, trustee on the sequestrated estates of Angus Brothers, produce merchants, Glasgow, as a company, and Robert Struthers Angus and James Angus the sole partners of said firm, as such partners and as individuals; and (2) by James Angus as trustee under the antenuptial settlement of Mr and Mrs Robert Struthers Angus, Mrs Jessie Muir Reid or Angus, with consent of her husband Robert Struthers Angus, and Robert Struthers Angus as tutor and administrator-in-law to his pupil child Christian Lilian Struthers Angus, the only child of the marriage between Mr and Mrs Angus.

Robert Reid, as trustee foresaid, pleaded —"(1) The funds contained in the deposit-receipts in question having been the property of the firm of Angus Brothers, form part of the sequestrated estates on which this claimant is trustee, and fall to be made over to him; (2) The said funds not having been validly paid over or transferred to the persons named as trustees in the said marriage-contract, belong to this claimant, who is entitled to be ranked and preferred accordingly. (3) The deposit of said funds in bank in the names of said marriage-contract trustees being an illegal preference under the Act 1696, cap. 5, or otherwise being fraudulent and collusive, and inept and invalid at common law, this claimant is entitled to be ranked and preferred in terms of his claim."

James Angus and others pleaded—"(2) The payments in question having been made in specific implement of the onerous obligations undertaken by the said Robert Struthers Angus in the marriage settlement condescended on, are not challengeable either under the Act 1696, cap. 5, or at common law. (4) In the circumstances condescended on, the payments in question being valid and effectual and not open to challenge either under the bankruptcy statutes or at common law, these claimants are entitled to the ranking and preference claimed by them."

Proof was led, the import of which sufficiently appears from the following extract taken from the opinion of the Lord Ordinary (Stormonth Darling)—"Mr Robert Struthers Angus, senior partner of the firm of Angus Brothers, produce merchants, Glasgow, in 1884 entered into an antenuptial marriage-contract whereby he, *inter alia*, bound himself within five years from the date thereof to pay to three trustees the sum of £5000, or to make over to them property or investments of a like value. The income of this sum was to be paid to Mrs Angus during her life, both during the subsistence of the marriage and after the death of the said Robert Angus, and in the event of her predecease, to himself as a liferent alimentary provision not assignable nor attachable by his creditors. The capital was to be paid subject to a power of appointment to and among such of the children of the marriage as should survive the longest liver of the spouses. There is at present one child of the marriage.

"For sixteen years this obligation on the part of Robert Angus remained unfulfilled; and there being no other provision in the contract requiring the trust to be set up during the life of the spouses, the deed lay inoperative in the hands of the law-agent who had drawn it and his successors in business. In 1895, on the joint requisition of husband and wife, the deed was handed over to Mr Macdonald, the husband's law-agent, with a view of his advising them as to a provision relating to furniture. Mr Macdonald says, that after reading the deed he called the attention of Robert Angus to his obligation with regard to the sum of £5000, and urged him to fulfil it. He adds that he several times recurred to the subject. There is also evidence, which I see no reason to doubt, that Robert Angus' brother and partner, James, once or twice in casual conversation referred to the obligation in the same sense. But it remained unfulfilled till the events which I am about to notice, and no steps were

taken to set up the trust. The three persons named as trustees (of whom James Angus was one) were never even asked to accept office.

"On 16th June 1900 Robert Angus appeared at his agent's office and asked whether anything required to be done by the trustees if he began to pay the money up. Macdonald very properly advised him that the regular course would be to call a meeting of trustees and have a written acceptance from each of them. But Robert Angus seemed to be 'in a great hurry'—these are Mr Macdonald's words—and insisted on knowing whether that was absolutely necessary. Macdonald replied that he might, if he chose, make the payment at once, and that the money could be placed in bank in the names of the trustees. Angus then handed to Macdonald a sum of £500 in bank notes, and the money was forthwith sent to the Commercial Bank and placed on deposit-receipt in the names of James Angus and James Macmillan and the survivor of them, as trustees under the marriage-contract. Subsequent sums were paid by Robert Angus to Macdonald and placed by the latter on deposit-receipt in identical terms on 19th, 23rd, 24th, and 25th July 1900, the whole sums so dealt with amounting to £2300, and the deposit-receipts themselves being retained in the hands of Macdonald. The name of Mr Macmillan was used in the receipts without his knowledge or consent. Macmillan says (and I believe him) that on 25th or 26th July, after all the money had been deposited, he had a meeting with Robert Angus, by desire of the latter, at which Angus said that he was in financial trouble, that there was some money on deposit-receipt which would have to be invested under his marriage-contract, and that Macmillan would shortly be called upon as a trustee to take part in investing it. Macmillan says that he had never heard of the subject since 1884, when Angus had casually informed him that he proposed to name him as one of his marriage-contract trustees, and that he closed the conversation by saying that he would be glad to be of any service to Angus 'provided everything was right.' Shortly afterwards Macmillan was asked by Angus to go to Macdonald's office and sign some claim on behalf of the marriage-contract trustees, about which he had not been consulted. Instead of going to Macdonald's office he consulted his own agent, who wrote on 18th August 1900 that Macmillan declined to accept office as a trustee. To this position he adhered when asked in September to attend a meeting of trustees, and as he declined even to endorse the deposit-receipts with a view to their being transferred to James Angus alone, it became necessary to bring this action of multiplepoinding in name of the Commercial Bank.

"The other facts which must be taken along with those which I have mentioned are these:—Early in June 1900 the firm of Angus Brothers was pressed for payment by Mr Johnstone, a creditor in the sum of £1547. Some small payments were made to account, bringing the debt a little below £1300, and on 14th June, two days before the date of the first deposit-receipt, the firm made an arrangement in writing with Johnstone for the gradual liquidation of this debt by bills. In the month of May the Bank of Scotland, which had for a long time been bolstering up the firm by discounting bills and allowing large overdrafts, became urgent that matters should be put on a more satisfactory footing. The bank's representative, Mr M'Glashan, insisted on the production of some kind of balance-sheet, and the result was the letter of 17th May, written by Robert Angus, in which he represented the firm as having an excess of assets over liabilities to the extent of £27,839. It now appears that he had made this balance-sheet entirely out of his own head, without reference to his books, which contained nothing at all resembling it. Encouraged by this the bank went on as before, but in July they again became dissatisfied, and on the 20th of that month they refused to pay a cheque by the firm for £1900. Robert Angus was sent for, and he said (for there I accept the evidence of Mr M'Glashan) that if the cheque was not paid he would require to stop. Next day he sent to the bank a paper showing how the money was to be disposed of in paying bills and pressing obligations, and Mr M'Glashan, with the alleged surplus of £27,000 still in his mind, paid the cheque.

"I hold it proved that to the extent of £787 this money was not used as Angus had promised, but was pocketed by Angus himself. He was also about this time laying his hands upon all the ready money his clerks could collect, with the result that between 14th June and 28th July he drew out of the firm's coffers a sum of £2757, including the sum of £2300 which is here in question. He directed his bookkeeper M'Call not to enter these drawings in the books until further orders, but M'Call did enter them in pencil. On 27th July the firm called in Messrs Reid & Mair as accountants to examine their books. Reid & Mair on 31st July issued the circular, No. 54 of process, intimating that Angus Brothers had been compelled to suspend payment, and the state of affairs prepared by the accountants as at that date showed liabilities £24,134 and assets £4387, thus bringing out a deficiency of £19,747. Sequestration followed on the debtors' own petition on 7th August, and the only dividends paid have been 2s. on the firm's estate and 1s. on the estate of Robert Angus. Any further dividend the trustee says will depend upon the result of this action."

On 1st June 1901 the Lord Ordinary repelled the claim of James Angus and others, and ranked and preferred the claimant Robert Reid to the whole fund *in medio* in terms of his claim.

Note.—"I am of opinion that the claimant Robert Reid has made out his case, both under the Act of 1696, cap. 5, and at common law."

[*His Lordship then stated the facts as set forth supra.*]

"In these circumstances I have no doubt that the Act 1696, cap. 5, applies. The object

of that Act, as stated by Lord Wynford in *Cranstoun* v. *Bontine*, 6 W. and S. at pp. 94-5, was 'to prevent the bankrupt's estate being disposed of to favourite creditors to the prejudice of others,' and this transaction was eminently of that character. It is true that any transaction to be struck at must be of the nature of a voluntary deed for the satisfaction or further security of the favoured creditor. But 'deed is a wide word,' as Lord Mackenzie observed in *Mitchell* v. *Rodger*, 12 S., at p. 809; and it has been interpreted by the decisions on the Act as covering such alienations as the delivery of moveables. It is also true that a favourite creditor receives a preference over the rest more effectually by payment of his debt in cash than in any other way, and yet that cash payments have always been treated as unaffected by the Act. But then I think it is the result of the decisions that in order to give a so-called cash payment the benefit of exemption from the Act, it must be made in the ordinary course of business. It may be made either in coin of the realm or by cheque on the debtor's bank account, because these are the ordinary ways of paying debts. But it must not be made by endorsing the cheque of a third party, or by endorsing bills (except in the case of a creditor living at a distance) or by setting aside money which remains under the debtor's control, because none of these are ordinary methods of paying debts. The principle is thus expressed by Mr Bell (Com. ii. 201)—'It is not sufficient to characterise a transaction as a payment that money or cash has been paid to one who is a creditor, unless he be a creditor entitled at that time to demand payment or who may be supposed *bona fide* to receive it in extinction of his debt, as in the ordinary course of dealings.'"

"Applying these principles to the transactions here, it is impossible to say that the payment in bank notes by Robert Angus to Macdonald was a cash payment to the creditor. Macdonald received the money in no other character than that of the bankrupt's agent, and he would have had no answer in law to a demand by the bankrupt for its return. The creditors in the obligation were the marriage-contract trustees, and Macdonald had received no authority to represent them, for the sufficient reason that none of them had accepted or acted. Nor do I think it possible to say that the act of Macdonald as the bankrupt's agent in placing the money on deposit-receipt was a cash payment to the creditor. Lodging money on deposit-receipt may be the equivalent of a cash payment, but it is not a cash payment in ordinary course. I do not suggest that it might not have been a sufficient way of fulfilling the bankrupt's obligation under the contract if the trustees had been in office and had consented to accept that mode of fulfilment as a temporary investment. But the circumstance that at the moment of the alienation there was no creditor *in titulo* to grant a discharge is that which takes the transaction out of the category of ordinary business. The debt was due, and had been due for many years, but there was no creditor in a position to demand payment, and it was plainly for that reason that the bankrupt, disregarding the advice of his agent as to the regular way of going about it, insisted on the transaction taking this altogether unusual shape. He was, I think, 'in a great hurry,' for more reasons than one.

"The case for the claimant Reid at common law differs from his case under the Act only in this respect, that at common law it must be shown that the bankrupt was conscious of his insolvency. A good deal was said both in evidence and in argument about the business of Angus Brothers having been an old and at one time a prosperous one. At one time perhaps it was. But for some time it had been subsisting on accommodation both by bills and overdrafts, and if the partners were ignorant of the true state of their affairs, they were, in my opinion, wilfully ignorant. For ten years they had not attempted to bring their books to a balance; they had recklessly supplied the bank with false information; they had pleaded for time to a creditor whose debt amounted to far less than the total sum in the deposit-receipts; and within a couple of days of the last deposit-receipt they showed their consciousness that something was wrong by calling in the accountants, for I do not believe the suggestion that this was done merely in order to satisfy their new bank. Both to M'Glashan and Macmillan Robert Angus used expressions which indicated, to say the least of it, such suspicion of his own solvency as to be quite inconsistent with an honest alienation of any material part of his assets. But, in truth, it seems to me that the circumstances in which the alienation was made are themselves conclusive of its character as an attempt on the part of the bankrupt to favour his family and himself at the expense of the general body of his creditors."

The claimants James Angus and others reclaimed, and argued—This was a good payment in implement of an obligation to a creditor entitled to receive it. A cash payment by an insolvent debtor to a creditor was effectual even if the debtor and creditor were both aware that the debtor was insolvent at the time, unless fraud was made out—*Coutt's Trustee* v. *Webster*, July 8, 1886, 13 R. 1112, 23 S.L.R. 810. And payment was held to be in cash if the debtor had authorised a person holding money due to him to pay the debt due by him, and that person had undertaken to do so—opinion of Lord Cottenham in *Macintosh* v. *Brierley*, February 19, 1846, 5 Bell's App. 11. In the present case the creditor was the marriage-contract trust. James Angus acted as trustee under it, but the true creditor was the trust only. Macdonald in taking the money and putting it in the bank acted as agent on behalf of the marriage-contract trust. The payment to Macdonald was a payment to the marriage-contract trust, and it was a cash payment. It did not matter that Macdonald was also agent for R. S. Angus. Where an agent acted both for a creditor and a debtor it must be pre-

sumed that he received the money in his capacity of agent for the creditor—*Maule* v. *Ramsay*, March 25, 1830, 4 W. & S. 58, opinion of Lord Wynford, 73; *M'Creath* v. *Borland*, July 20, 1860, 22 D. 1551, opinion of Lord Benholme, 1556. And although they contended that James Angus had accepted office and represented the trust, it did not matter if the Court were of opinion that he had not. The marriage-contract trust was the true creditor, and it always had existed. Persons to represent it could be appointed at any time when that became necessary—*Tovey* v. *Tennent*, March 11, 1854, 16 D. 866; *Newlands* v. *Miller*, July 14, 1882, 9 R. 1104, 19 S.L.R. 819. The present was an eminently onerous transaction.

Argued for the real raiser, claimant, and respondent Robert Reid—There had been no payment at all. The bankrupt had never been divested. None of the trustees had ever accepted office. Until they did so there was no creditor in whom a title could vest, and there was no *jus quæsitum* in any of them. The money had never passed out of the custody of Robert Angus, and could have been recalled by him at any time—*Baird* v. *Murray*, January 4, 1744, M. 7737; *Macintosh* v. *Brierley*, February 19, 1846, 5 Bell's Appeals 1. Even assuming there had been a cash payment made by Robert Angus to Macdonald as agent for his marriage-contract trustees, the transaction was reducible both under the statute and at common law. This was so, because (1) it was not a cash payment made in ordinary course of business, and (2) it was not a *bona fide* payment—Bell's Comm. ii. 201; *Speir* v. *Dunlop*, May 30, 1827, 5 S. 729. Further, James Angus, who, if he was held to represent the marriage-contract trust, was the creditor in the transaction, had by his actings enabled his brother to get hold of the cash which was paid over to the trust. This alone was sufficient ground for reducing the payment—*Mitchell* v. *Rodger*, June 26, 1834, 12 S. 802.

At advising—

Lord Justice-Clerk—I am of opinion that the decision at which the Lord Ordinary has arrived is right. The evidence satisfies me that the trust set forth in the antenuptial deed was never at any time set up as an operative trust. It was never in any way constituted by proper acceptance and entering on duty by the trustees. There is nothing in the evidence beyond general expression of willingness to act, but the trustees were never called together, no business was done, and Mr Macdonald, into whose hands the money came, had never been made an official of the trust. No trust record of any kind was made. In these circumstances I cannot hold that what was done by the bankrupt Robert Angus in taking sums out of the business in which he was engaged at a time when his firm was undoubtedly insolvent, and dealing with them as he did, can be held to be a bringing of them into trust for the purposes of a marriage provision. He was evidently, upon the evidence before us, in very great straits, and conceived the idea of getting any funds he could lay his hands on to remove them from the reach of his creditors. What he did I cannot hold was a true paying of funds under his obligation into his marriage trust. I hold this to have been an attempt to evade the operation of the bankruptcy law which cannot stand.

But further, I am of opinion that at common law what was done must be held to be a fraudulent attempt entered into by the brothers Angus to put a large sum of money out of the reach of their creditors. Both of them knew quite well that they were in desperate straits. I cannot take it off Mr James Angus's hands that he was ignorant of the true position of affairs as he says he was. I cannot doubt that he knew perfectly well that what was being done was in consequence of the hopeless state of the firm's affairs, and with the direct intention of fraudulently dealing with the funds realised, while they were, as was well known to them, unable to pay their lawful debts.

Lord Trayner—I concur. I see no ground for differing from the opinion of the Lord Ordinary.

Lord Moncreiff—Whatever may be the law which is strictly applicable to this case the transaction which is challenged is an attempt, whether successful or not, to confer a most unfair advantage upon the bankrupt Robert Angus's marriage-contract trust (that is, on the bankrupt himself and his wife and family) at the expense of the general body of his creditors.

The transaction is sought to be reduced upon two grounds—one, that it is struck at by the Act 1696, cap. 5, and secondly, that it is reducible as a fraud at common law.

1. As regards the first ground, I think that if at the date of the payments which are objected to there had been in existence a trustee or trustees accepting and acting under Robert Angus's marriage-contract trust, payments made by Robert Angus to them would in the absence of fraud have been proper payments in cash to them, and would not have been reducible under the Act, although both Robert Angus and the trustees knew that he was insolvent. The deposit in bank in their names, and the delivery to them of the deposit-receipt, would have been sufficient payment in cash. But having regard to the state of matters as disclosed in the evidence I think it is plain that at the date of the payments there was no proper representative of the trust. Messrs Reid and M'Millan admittedly had not accepted and acted, and although James Angus says that he accepted and acted as trustee he never formally accepted, and I cannot find any evidence of actings on his part as trustee which can be held to obviate the necessity for a formal acceptance. No meeting of trustees was ever called, and Mr Macdonald was never appointed agent for the trust. The matter may be well tested in this way. Supposing that instead of making these payments Robert Angus had become bankrupt and his whole assets had

gone to pay his creditors, if James Angus was a trustee it was his duty long before 1900 to have taken steps to compel his brother to pay the £5000 to the trust. Would a claim at the instance of the wife or children against him personally for neglect of duty have been successful? I apprehend that his answer would have been, that although he was willing to accept he had never accepted or acted as trustee.

The result therefore is, that in making these deposits or causing them to be made through his own agent Mr Macdonald, Robert Angus merely tried to earmark the money as belonging to his marriage-contract trust. This, I think, does not amount to payment to Robert Angus's marriage-contract trustees.

2. As regards the charge of fraud at common law, the law seems to stand thus. While it is not sufficient to warrant reduction of a preference by payment in cash to a creditor made in the ordinary course of business, that both the debtor and creditor knew that the debtor was insolvent at the time of the payment, a very little interference on the part of the creditor and want of good faith in procuring the payment to himself will be sufficient to invalidate it even although payment may be made in cash. Now, in the present case, according to James Angus's own showing, the money with which those six payments were made was withdrawn with his knowledge and connivance from the firm's funds when both he and his brother knew that the firm was hopelessly insolvent, and that his brother Robert Angus had no fund at his credit which he could honestly or legitimately withdraw. I think that this amounts to fraud, and is of itself sufficient to invalidate the transaction.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Real Raiser and Claimant Robert Reid—Solicitor-General (Dickson, K.C.)—C. D. Murray. Agents—Drummond & Reid, S.S.C.

Counsel for the Claimants James Angus and Others—Shaw, K.C.—Orr. Agents—Auld & Macdonald, W.S.

Friday, November 22.

SECOND DIVISION.

[Lord Pearson, Ordinary.

HEDDERWICK *v.* MORISON.

Husband and Wife—Divorce—Postnuptial Provision Granted for Onerous Causes.

A husband who had been married in 1894, upon succeeding to between £4000 and £5000 left him by his father, granted a trust assignation whereby, upon the narrative that he had "at various times received large sums of money from" his wife, and that it was "right and proper" he "should make some provision for her" and his family, he made over £1000 to trustees, directing them to pay the income thereof to his wife during all the days and years of her life, and on her death to pay the fee to her children. Prior to the date of this deed the wife's private estate, amounting to £1000, had been gradually spent, and at least the major portion of it was shown to have been expended upon household expenses. The husband had given the wife an I O U for £200. The wife was subsequently divorced for adultery. She claimed and received payment of the sum of £200 as due under the I O U. She also claimed payment of the provision in her favour contained in the trust-deed, and maintained that it was not a matrimonial provision but was granted to her in lieu of the payment of a debt. *Held* (*affirming* judgment of Lord Pearson, Ordinary—*diss.* Lord Young) that although the advances made by the wife might have been the motive cause of the provision being made in her favour, it was in nature and effect a matrimonial provision granted by a husband in favour of his wife, and that it had been forfeited in consequence of the decree of divorce.

Mrs Annie Eliza Jane Fleeming Matthews or Hedderwick, wife of and residing with John Hedderwick, with consent and concurrence of the said John Hedderwick as her curator and administrator-in-law, raised an action against Andrew Smith, William Annan, and James Matthews, the trustees under a trust-assignation in their favour granted by Alexander Morison, writer in Lanark, dated 22nd December 1898, as such trustees, and also against the said Alexander Morison. The pursuer concluded for declarator that the trustees were bound to pay her during her life the free annual proceeds and profits of £1000, assigned to them as trustees foresaid by the said trust-assignation, in terms of the deed; that the trust-assignation was of full force and effect; and that the trustees were bound to implement the whole purposes thereof.

The pursuer Mrs Hedderwick was married to the defender Alexander Morison on 3rd February 1891, and was divorced by him on 13th January 1900 on account of adultery with her present husband, whom she married a few weeks after the decree of divorce was pronounced.

By the deed upon which the pursuer based her claim in this action the defender Alexander Morison, upon the narrative that he had "at various times received large sums of money from my wife" (the pursuer in the present action), "and that it is right and proper I" "should make some provision for her and my family," gave, granted, assigned, disponed, and made over to the trustees mentioned in the deed all and whole the sum of £1000 in trust for the trust purposes therein mentioned. By the deed the trustees were directed, *inter alia*,