been "driven regularly in harness." The testimony of the pursuer's witnesses adduced in opposition to those of the defender, has been carefully considered by me. The result is, that I come to the conclusion that the description in the catalogue, —the statement to attract purchasers,—was not according to the truth. I cannot believe that this mare had been "driven regularly in double and single harness." The witnesses for the purchaser negative that altogether, and the witnesses for the seller have not by any means proved it to my satisfaction.

If the driving spoken of as taking place in Glasgow was in the course of breaking the mare, that driving was not within the fair and honest meaning of the words "driven regularly in double and single harness." That is not what was proclaimed by the description given. The Lord Ordinary is of opinion that she was sent to Findlays to be broken; and that is very probable—the more so that there is a charge for breaking in Findlay's account. But whether that was the case or not, no such regular driving in double and single harness as was stated in the description has been proved as to support the description given of the mare. She certainly did not answer the description.

On the other view of the case, and treating the description in the catalogue not as a warranty but as a representation of fact with a view to a sale, I agree with Lord Deas. Looking to all the proof, I am compelled to the conclusion that the pursuer did not and could not really believe that the description in the catalogue was according to the truth. That she was driven by a breaker, or in the course of breaking, does not satisfy the description. That is not what was meant to be proclaimed in the catalogue as an inducement to purchase. What was so stated was misleading, contrary to the fact, and inducing the contract.

Lord Mure—On the first question I think there is considerable nicety, whether under the Mercantile Law Amendment Act this was a warranty. It is clearly proved that the statement was not true in point of fact, but the question is, whether it can be considered a warranty. It is more a representation than a warranty, but there are words in section 5 which seem to bring it under the statute—I mean those which provide that if "the goods have been expressly sold for a specified and particular purpose. . . . the seller shall be considered without such warranty to warrant that the same are fit for such purpose." I am disposed to think that this statement falls under these words. If the mare was unfit for her purpose the pursuer is not entitled to recover. Taking it on the other view, however, I think the pursuer is not entitled to recover, because the statement was not true. There is no evidence that the mare was ever driven except by breakers, and the pursuer himself, whose recollection in the matter is not very accurate. I think he had no good ground for inferring that the horse had been regularly driven in double and single harness, and so had no right to put such a statement in the catalogue.

Lord President absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Reclaiming Note for James S. Rough against Lord Mackenzie's Interlocutor of 16th December 1874; adhere to the said Interlocutor, and refuse the Reclaiming Note; find the defenders entitled to additional expenses, and remit to the Auditor to tax the account thereof, and report."

Counsel for the Pursuers—Rhind. Agents—Ferguson & Junner, W.S.

Counsel for the Defenders—Mair. Agent—Robert Menzies, S.S.C.

Tuesday, March 9.

FIRST DIVISION.

(Heard before seven Judges).

SPECIAL CASE—MENZIES AND OTHERS.

Marriage-Contract—Provisions—Renunciation.

Rights secured to a wife by her antenuptial marriage-contract cannot be abandoned or renounced by her while the marriage subsists.

Marriage Contract—Revocation—Trust.

By antenuptial contract of marriage the wife conveyed her whole estate to trustees for the purposes—First, payment of the annual income to herself and her husband and the survivor of them; second, payment of the fee of the whole estate to the child or children of the marriage, whom failing, to the wife and her heirs and assignees. Then followed a declaration that the wife should have power to direct the trustees to invest the trust-funds in the purchase of lands, or in such other way as she might direct. There were children of the marriage, and after they had all attained majority their mother, who was then 65 years of age, called upon the trustees to make over to her the whole trust-estate, and bring the trust to an end on receiving a renunciation by the children of their rights under the marriage contract, and a discharge by the spouses. *Held* that the trustees were not entitled to denude of the trust-estate.

This was a Special Case for the opinion and judgment of the Court, brought by Fletcher Norton Menzies, Esq., and others, acting trustees under the antenuptial contract between Captain Jack Henry Murray and Miss Catherine Menzies, of the first part, the said Captain Jack Henry Murray and Mrs Catherine Menzies or Murray of the second part, and Mrs Emilyn Niel Murray or Baird and others, children of Captain and Mrs Murray, of the third part.

The following were the facts of the case:—

By antenuptial contract of marriage, dated 23d January 1845, between Captain Jack Henry Murray and Miss Catherine Menzies, Captain Murray disponed to himself and his intended spouse in conjunct fee and liferent, for his liferent use allenarly, and to the child or children of the marriage in fee, his whole estate heritable and moveable, with certain limitations in case of the second marriage of either party, and with a declaration that the wife's liferent should be in full satisfaction of her legal rights. Miss Catherine Menzies, on the other part, assigned to trustees all her estate, heritable or moveable, then belonging to her or which should be found to belong to her at the time of her death, for the following pur-

poses:—"*First*, for payment of the annual rent or revenue arising therefrom (under deduction of all necessary expenses) to the said Captain Jack Henry Murray and the said Catherine Menzies, and to the survivor of them, declaring, that in case the said Jack Henry Murray shall survive the said Catherine Menzies, and enter into a second marriage during the existence of a child or children of the marriage hereby contracted, or of the issue of such children, then and in that event the said Jack Henry Murray's liferent hereby provided to him shall be limited and restricted, and is hereby limited and restricted, during the existence of such issue, to one-half of the ascertained amount at the date of such second marriage; and *secondly*, for payment and transference of the fee of the whole of said trust-funds and effects generally and particularly before conveyed to the child or children of the said intended marriage, but always with and under the special reservations and declarations after written; whom failing, to the said Catherine Menzies, for her own sole and individual use and behoof, or to and for the use and behoof of any person or persons to be nominated and appointed under and by virtue of any will or letter of instructions she may hereafter leave; whom failing, to her own nearest and lawful heirs, executors, and assignees whomsoever; hereby expressly excluding from said fee the *jus mariti* of the said Jack Henry Murray, her intended husband, and declaring that no part of said trust-funds and effects shall be subject to his administration or affectable by his debts or deeds. But it is hereby farther expressly covenanted and declared by said contracting parties that said trustees shall be bound and obliged, whenever they may be so called upon or required by the said Catherine Menzies, without the consent or concurrence of the said Jack Henry Murray, to call up and apply the whole or such part of said trust-funds and effects, in order to their being laid out in the purchase of lands, or in such other way and manner as she, the said Catherine Menzies, may, by herself alone, will, direct, and appoint, either verbally or by letter under her hand individually, and that whether during the subsistence of said intended marriage or after its dissolution, full power and authority being hereby expressly reserved to the said Catherine Menzies so to do *per se* in the same manner as if she were an unmarried person; declaring always that the reinvestments by said trustees shall be made in conformity to and for the special trust purposes above written, and reserving to the said Catherine Menzies the power of division and apportionment of said fee among her children by said marriage in any way she may at any time hereafter think proper and direct, and likewise reserving to her, in the event of her surviving the said Jack Henry Murray, leaving an existing child or children by him, and afterwards entering into a second marriage, full power to settle a sum not exceeding £4000 sterling of said trust-funds upon the issue, if any, of such second marriage; declaring that in the event of there being no surviving issue of said second marriage, the said sum of £4000 shall revert to and pertain and belong to the children of the first marriage." Then followed a declaration that the above-written provisions in favour of the child or children of the marriage should be in full of their legal claims.

The trustees appointed by Mrs Murray accepted the office, and in the year 1857, on the requisition of Mrs Murray, they, in terms of the marriage-contract, applied the whole funds falling under the trust (amounting in all to £8953) in the purchase of the house and lands of Croftinloan, near Pitlochrie, in Perthshire. The title to the said property was taken in name of the trustees, but Captain and Mrs Jack Henry Murray were always in the personal occupation of the subjects. When the case was brought, Captain and Mrs Murray were both alive,—the age of the latter being 65 years. The only children of their marriage (the third parties) were all upwards of 21 years of age.

The fourth article of the Special Case was as follows:—"(4) Mrs Murray has made a requisition upon the parties of the first part, as acting trustees foresaid, to the effect that her son and youngest child, the said Jack George Murray, having come of age, the trustees should make over to her, the said Mrs Murray, the property of Croftinloan (which constitutes the whole trust-estate under their management), and bring the trust to an end on receiving a renunciation by the children of their rights under the said marriage-contract, and a discharge of all their actings and intromissions from herself and her husband, and from her son and her daughters, with consent of the married daughter's husband, Mr Baird. The parties hereto of the third part concur in said requisition."

The following question was submitted for the opinion and judgment of the Court:—"Whether the marriage-contract trustees, the parties hereto of the first part, are bound or entitled to denude of the trust-estate in favour of Mrs Murray on the joint requisition of the whole parties hereto of the second and third part, and on obtaining a renunciation and discharge as set forth in article four of all their trust actings and intromissions from these parties?"

The Court appointed the case to be argued before seven judges.

The first parties argued, they were fiars of the estate for the purposes of the marriage contract, and were not entitled to denude until the dissolution of the marriage, for until that event it could not be known who the ultimate fiars of the property were. The trust was created for the purpose of protecting Mrs Murray's interests during the subsistence of the marriage, and to that extent was irrevocable, even with the consent of Mrs Murray.

The second and third parties argued — The fee of the property had vested in the parties of the third part, Mrs Murray's age precluding the possibility of further issue of the marriage. Mrs Murray herself was now sole beneficiary under the trust, the children having granted a renunciation, and as she was the sole fiar creating the trust she was entitled to bring it to an end, with the consent of her husband, and to call upon the trustees to denude.

Authorities—*Ramsay and Others*, Nov. 24, 1871, 10 Macph. 120; *Anderson* v. *Buchanan*, June 2, 1837, 15 S. 1073; *Hope*, March 18, 1870, 8 Macph. 609; *Pretty* v. *Newbiggin*, March 2, 1854, 16 D. 667; *Foulis* v. *Foulis' Trs.* Feb. 2, 1857, 19 D. 362; *Shennan* v. *Wilson*, 6 S. 1019; *Burnett Craigie* v. *Gordon*, June 17, 1837, 15 S. 1157; *Robertson* v. *Davidson*, Nov. 24, 1846, 9 D. 152; *Tod* v. *Tod's Trs.*, 9 Macph. 728; *Romanes* v. *Riddell*, Jan. 13,

1865, 3 Macph. 348; *Smith Anstruther*, 10 Macph. H.L. 39; *Beattie* v. *Cooper* 24 D. 519; *Balderston* v. *Fulton*, Jan. 23, 1857, 9 D. 293; *Grant's Trs.* v. *Anderson's Trs.*, Feb. 1, 1866, 4 Macph. 336.

At advising—

LORD JUSTICE-CLERK—The assumption on which the advising in this case proceeds is, as I understand, that the fee or beneficial interest of Mrs Murray's property, conveyed by the antenuptial contract of marriage, is now fully vested in the parties of the third part to this case, and is effectually represented by them. On that assumption the devolution over to Mrs Murray herself under the destination in the settlement has failed. The husband, Captain Murray, is entitled along with his wife to the liferent of his wife's property during the subsistence of the marriage, the survivor of the spouses being entitled to the life-interest in its annual income. These three parties have agreed to terminate the trust, and as regards the wife's property, to convey it to Mrs Murray in fee, and the question is, whether, in these circumstances, the trustees are bound or entitled to comply with that request?

No question of revocation arises here in any proper sense of that term. The proposal to the trustees is founded on the assumption that all the interests created by the marriage-settlement have by this agreement been secured and provided for, either by actual fulfilment or by valid and competent renunciation. If that be so, the proposal is reasonable, and we must therefore consider, in the first place, Are there any interests provided for by the marriage-contract which are not secured, and, secondly, if there be, have these been validly renounced and extinguished? There thus arises in a very abstract form a question which, as far as I know, has not hitherto been specifically adjudged. If all the interests involved in the marriage-contract have been sufficiently satisfied, I should not think that there was any such sanctity in the machinery of a trust as to lead the Court to maintain it to the annoyance, and perhaps the injury, of those for whose benefit alone it was originally constituted. In one respect the present case differs from all the previous precedents. In most former cases the children of the marriage had failed, and the trust only subsisted as regarded the fee for the heirs or disponees of the wife. In this case, on the assumption I have already mentioned, the main purpose of the marriage-contract has been fulfilled, and the heirs of the marriage have succeeded to the beneficial interest provided for them, and now propose validly to dispose of it. The husband's life interest in the proceeds of the property is secured by the contract itself, and nothing remains which can be said to be unsatisfied but the wife's contingent liferent in the event of her survivance of her husband. She has now arrived at the age of sixty-five, and in mere money value the amount involved cannot be considerable. There has been no offer or undertaking, however, to provide for it, and we must now determine whether that interest was intended to be secured by the marriage-contract, and if so, whether, during the subsistence of the marriage the wife can validly discharge it.

This is a question of very considerable importance. It is true that the amount if valued by an actuary might be inconsiderable. But the right and interest itself arises precisely in the circumstances in which such a provision comes to be of the greatest value. In ordinary cases a provision to the wife in liferent and the children of the marriage in fee can never be anything but a right of liferent while the hope of children remains. It is only in cases in which that hope is past that such a question as this can arise; but a provision which secures to the wife in her declining years the benefit of a competency cannot be regarded as a trivial matter, however short may be the period for which, according to the calculations of an actuary, she is likely to enjoy it.

The first question, therefore, is, whether under this marriage-contract the provision to the wife of a liferent of her own property in the event of her surviving her husband was simply a restriction for the benefit of the heirs of the marriage, or whether the interposed trust was intended to preserve the fee of the property from which the liferent was drawn against any inducements that might arise during the marriage to part with it. This is a question to be solved on the construction of the marriage-settlement itself, and on the intention of the parties to it as expressed in that instrument. The mere fact of the provisions being contained in an antenuptial contract is not necessarily conclusive of this matter. In the authorities referred to instances were quoted in both directions. In the cases, for instance, of *Torry Anderson* and of *Pringle*, the clause which was contained in the marriage-settlements, which were the subject of construction in both cases, by which the intending spouses mutually contracted not to revoke, was held by the Court not so much to bar revocation as to indicate the intention of the contracting parties to provide for the protection of the wife. On the other hand, in the recent case of *Ramsay's Trustees*, in the First Division, it was held, on the terms of that deed, and I assume rightly held, that in so far as regarded the part of the property to which the judgment applied, the trust was one for administration only—that the property was entirely under the control of the wife, and was not intended to form part of the matrimonial settlement.

In considering to which of these two classes the present provision belongs, I have found no ground for thinking that it was intended for restriction merely and not for protection. The event which has happened of course was not within the contemplation of the parties when the contract was executed; but it is difficult to say that when the wife is secured in the contingent liferent of property worth no more than £8000 (or that amount in money), it was intended to leave her exposed to the hazard of the whole being carried off by the husband's creditors, or spent by him during the marriage. The contingency was one against which it was plainly prudent to provide, and in my opinion the contract did provide against it.

The second branch of the inquiry is that which has most importance and interest. It is whether, assuming that it was intended by this contract to protect the wife's contingent interest, it is now in her power, there being no interests involved but her own, to renounce that right to the effect of extinguishing the trust, and acquiring on the title of the fiars the absolute right to her own property. The demand is certainly made in the most favourable circumstances in which it could have come to be considered, and possibly it might be greatly for the advantage of the wife and the family that the arrangement should be made.

Nor am I at all insensible to the great authority which has been adduced in support of the affirmative of the proposition. The case of *Torry Anderson* was very keenly contested, but notwithstanding the fact that it may possibly be shown by an analysis of the opinions that a majority of the Judges in that case mainly rested their decision on the clause prohibiting revocation, I am of opinion, after careful study of it, that the judgment did involve a general principle, to which I think in this case still greater breadth and firmness ought to be given. I am of opinion that *stante matrimonio*, a wife has no power to alienate or diminish the rights secured to her under an antenuptial contract of marriage, unless such power is conferred by the contract itself. I assume that the interests are intended to be protected by the contract, and that the machinery provided is sufficient for the purpose. But if they are, I think that during the marriage the wife has no control over them. The case of *Pringle* was a very strong illustration of this principle, and a very hard one, for in that case there was no hope of children, yet the wife could not use any portion of the fee of her own property to liberate her husband from inconvenient claims. It is true that there was in that contract also a clause by which the spouses undertook not to revoke. But Lord Cowan's very clear opinion shows that he looked upon the case of *Torry Anderson* as establishing the general principle to which I think we ought now to give effect—that rights intended to be secured to a wife by her antenuptial marriage-contract cannot be abandoned or renounced by her while the marriage subsists. What she may do on the dissolution of the marriage is an entirely different matter. She is then a free agent. But the element which rules while the marriage subsists is, that she is not considered a free agent in matters in which her husband has or may have an adverse interest.

No doubt this rule may operate hardly in many cases, but in its general operation I believe it is the soundest and most salutory we can adopt. It would be hard to say that the relations of a bride who brings her husband a considerable fortune should have no power by any instrument a conveyancer could frame to place her means of future subsistence beyond the reach of matrimonial importunity. By deciding the reverse I believe we shall solve this important question in the way most convenient to sound principle and social expediency.

Lord Deas—I am of opinion that by the law of Scotland provisions may be made in favour of the wife in an antenuptial contract of marriage, which cannot be evacuated during the marriage. More particularly, I am of opinion that it is competent thereby to provide to the wife, in the event of her being the survivor, either in the way of liferent or annuity, and either out of the husband's estate or out of her own estate, or out of the estate of some friend or relative who becomes a party to the contract, a life income of the benefit of which it shall not be in her power to deprive herself by any gratuitous deed, although consented to by her husband, executed during the subsistence of the marriage. If this be so, it follows that she will be equally disabled from gratuitously discharging the fund or estate which is burdened with that income, or the trust by which her right to it is protected and secured, as from discharging her eventual right to the income itself.

I do not think it is material from whose means or estate the income flows, provided only it is clearly a marriage contract provision, the eventual right to which vests absolutely in the wife so soon as the contract is signed and the marriage celebrated. 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 liferented 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.

If the marriage contract declares the provision to be irrevocable, that may certainly afford a clear indication that, when entering into the contract, the parties meant it to be a marriage contract provision. But if, from the nature of the provision itself it be clearly a marriage contract provision, I do not think a declaration of irrevocability necessary. The marriage is irrevocable, and that which is so vital to the contract as the wife's means of livelihood after she has no longer the husband to provide for her, must necessarily be assumed to be in like manner irrevocable, if nothing appears to the contrary.

Nor could a clause of irrevocability prevent the parties from altering or evacuating the provision or the stipulated security for the provision, unless the law interposed for the protection of the wife. The only formidable plea in favour of the power to alter or evacuate, and it is undoubtedly a plea requiring great consideration, is that, where you have all parties interested concurring, they may do what they like with the fund. But if that were a good plea, it would be equally applicable where there was a clause of irrevocability as where there was not. An express clause of irrevocability could no more stand in the way than a clearly implied irrevocability. The triumphant observation, in either case, would be who can hinder them?

It is the law which interposes equally in both cases, by a wise and equitable protection, not unknown in other relations of society; as for instance in the case of persons under age—weak and facile individuals—persons who have voluntarily interdicted themselves, and so on; and this upon a principle which, in order to prevent gross wrong and injustice, it is peculiarly necessary to apply to stipulations made by or on behalf of a lady when about to surrender her liberty, and to some extent her will; to merge her wishes and her interests in those of her husband—to change her very character, and to be, in short, no longer mistress of herself in the sense in which she was so when these stipulations were made.

It may be fairly conceded that, as a general rule, all parties interested may do what they like with their own, and that this principle of protection to the wife by antenuptial contract is exceptional, just as the principle of protection to other parties in circumstances such as I have alluded to is exceptional. It may further be conceded that there may be stipulations in a marriage contract in favour of a wife which are not proper marriage contract provisions, and consequently do not fall within this principle of protection. A wife is, certainly, not deprived of all power of dealing, either gratuitously or onerously, with her separate means and estate, in favour of her husband, as well as in favour of other parties, by the mere fact of her means and estate being placed under trust by an antenuptial contract. For instance, the whole fortune of the wife may have been placed under trust simply with a view to the probability of their being issue of the marriage, but if there shall be no issue, the wife may dispose of her fortune at her pleasure. In such a case, if there be no exclusion of the *jus mariti*, and the trust subsists for administration merely, I see nothing to prevent the wife from *de presenti* revoking or evacuating the trust. It is just from the fact that the wife's disqualification to deal with her separate rights and estate is not universal, that the delicacy of such questions as the present arises. Hence also the inexpediency of any attempt to define the limits of this protection, or to specify the particular circumstances in which it will or will not be applicable.

The present is a case to which I think the protection very clearly applicable. By antenuptial contract, dated in January 1845, the husband, Captain Murray, in contemplation of the marriage (which followed), and in consideration of the liferent interest therein after conferred on him in his wife's estate, conveyed to himself and her, in conjunct fee and liferent, for her liferent use allenarly, and to the child and children of the marriage in fee, subject to certain reservations and powers which need not be here noticed, the whole means and estate then belonging or which should belong to him at his death.

On the other hand, the wife conveyed to her brother Sir Robert Menzies, who has resigned the trust, her uncle Fletcher Norton Menzies Esq., and Patrick Keir Esq. (who are parties to this case), and the survivors or survivor of them, as her trustees and executors, for the ends and purposes therein specified, the whole means and estate then belonging or which should belong to her at her death, and particularly a sum of £5000 to which she is stated to have had right in terms of an obligation granted by certain parties to her father and mother (the precise nature of which is not explained in the case, and does not seem to require to be so, for the purposes of the question now alone to be decided), as also her claims under a bond of provision executed by her father in July 1823, which claims are stated in the case to have made up the trust funds, including the £5000, to £8953, as in the year 1857. The first purpose of this trust is declared to be for payment of the annual rent or revenue arising therefrom to the husband and wife and survivor of them, subject to a certain eventual restriction of the husband's liferent, which it is likewise unnecessary to notice. The second purpose of the trust is for ultimate payment and transference to the children of the fee, whom failing to the wife or her *mortis causa* nominees, "whom failing," so the deed proceeds, "to her own nearest and lawful heirs, executors, and assignees whomsoever, hereby expressly excluding from said fee the *jus mariti* of the said Henry Jack Murray, her intended husband, and declaring that no part of said trust funds and effects shall be subject to his administration or affectable by his debts or deeds." The contract contains a clause to the effect that action and execution, if necessary, should pass upon it in favour of the wife, at the instance of any one of the trustees. The only further stipulation contained in the contract which it is necessary to notice is a stipulation that the trustees should be bound, when required by the wife, and without the consent of the husband, to call up the trust-funds and lay them out in the purchase of lands, or in such other way and manner as she might direct, either during the marriage or after its dissolution, "declaring always that the reinvestments by the said trustees shall be made in conformity to and for the special trust purposes above written." In accordance with this stipulation the trust-funds, amounting as already mentioned to £8953, were, upon the wife's requisition, invested in 1857 in the purchase of the house and lands of Croftinloan in Perthshire, and that investment has not hitherto been disturbed.

It is stated in the case that Mrs Murray is now 65 years of age, that the only children of the marriage are two daughters and a son, who have all attained majority, that Mrs Murray has made a requisition on the trustees to make over to her the property of Croftinloan, which constitutes the whole trust estate, "and bring the trust to an end on receiving a renunciation by the children of their whole rights under the said contract of marriage, and a discharge to the said trustees of all their actings and intromissions from herself and her husband, and from her son and her daughters, with consent of the married daughter's husband, Mr Baird." These parties all concur in the requisition. But the trustees decline to comply with that requisition on two grounds, either of which, if sustained, is sufficient. 1st, That Mrs Murray cannot competently divest herself of the protection of her eventual liferent interest stipulated by the marriage contract; and 2d, that the beneficial fee of the capital liferented does not vest under the contract till Mrs Murray's death, or, at all events not till the dissolution of the marriage, so that the necessary consent of the fiars to what is now proposed cannot be obtained.

The second of these objections is to a great extent special, as all questions of vesting generally are; and if that had been the only question in the case I think it probable that we should not have called in the aid of your Lordships, without consulting upon it further than we thought it necessary to do. I have formed no opinion upon that second objection, because assuming for the sake of argument (but for the sake of argument alone) that it might have been got over, I am of opinion that, applying to the case in hand the law I have stated in the outset, the first objection is of itself fatal to the demand now made.

It may be that none of the cases in the books are quite the same with this case. But they are important, nevertheless, as affirming the principle of protection to the wife for her marriage contract provisions, as a principle not unknown to our law, leaving only a question as to the applicability of that principle to the case before us.

The case first in date which falls to be noticed

—although by no means the most apposite—is that of *Torry Anderson*, 2d June 1837 (15 D. 1170). There was in that case an exclusion somewhat unusual, and certainly invidious, of the husband from all right and interest, not merely in the fee, but in the annual income and administration of the wife's extensive heritable estates during the subsistence of the marriage, and of his courtesy in the event of his survivance. It is perhaps not surprising that some of the Judges should have thought the light afforded by the clause of irrevocability necessary to show that the parties really intended such invidious stipulations to be irrevocable. But however that may be, the judgment in the case is important as recognising the existence in our law of the principle of protection in favour of a wife for her marriage contract provisions, although leaving, as I have said, a question under what circumstances that principle falls to be applied. If there had been no such principle the protection could not have been given, whether with or without the clause of irrevocability. An unmarried woman could undoubtedly have revoked a trust deed which she had declared to be irrevocable, and the effect of the judgment therefore necessarily was to displace the able arguments of the minority, who disputed the existence of any such principle.

The principle was again affirmed—at the distance of 30 years—by an unanimous judgment of the Second Division in the case of *Pringle* v. *Anderson*, July 3, 1868 (6 D. 982). Here, again, the estates of the wife were large, and there was a similar invidious exclusion of the husband from all pecuniary and administrative rights and interests in these estates during the subsistence of the marriage. True, there was the same declaration of irrevocability. But, of course, the remark applicable to the one case is equally applicable to the other, —that the judgment affirms the existence in the law of Scotland of a principle of protection peculiar to the case of a wife for her marriage contract provisions, although I admit that neither of these two judgments can be said to affirm that the principle will extend to provisions which are not expressly declared irrevocable.

The next case, however—that of *Hope* v. *Hope*, March 15, 1870 (8 Macph. 699)—does decide that the element of an express clause of irrevocability is not essential to the application of the principle of protection, although undoubtedly a different element was involved in that case which does not occur here, namely, that the husband's father became jointly and severally bound with him for the wife's eventual annuity, in security of which the trust conveyance was afterwards granted, which the spouses were found not entitled to evacuate. But the clear import of the case of *Hope* is that irrevocability may be inferred where there is no express clause of irrevocability; and if, in that case it was inferred from the nature of the provision, coupled with the joint and several obligation of the husband's father, it would be a narrow distinction to hold that the absence of that joint and several obligation would have been fatal to the inference that the provision was intended to be irrevocable.

As regards the case of *Ramsay*, Nov. 24, 1871 (1 Rettie 120), I shall only say that I do not regard the judgment of the majority (from which I dissented), as intended to interfere with the principle of protection applicable to a wife's marriage contract provisions. The Lord President, without whom there would not have been a majority, construed the contract as importing that the £5000 (which was not sought to be interfered with) was a marriage contract provision, that the other sums were intended to be placed at the wife's disposal absolutely, "both during the subsistence of the marriage and after its dissolution," that the interposition of the parents in the contract was intended to make the wife's position in this respect more clear and satisfactory, and that the fee of the £5000 being provided to the children and the eventual liferent of one-half of the balance to the husband, sufficiently accounted "for the constitution of the trust, without resorting to the speculation that it was constituted to make the exclusion of the *jus mariti* effectual." On these grounds his Lordship came to the conclusion that as the £5000 remained secured to the children, and the husband had renounced his liferent of the balance, the wife might dispose of the other funds at her pleasure. His Lordship, however, added—"But in coming to this conclusion, I desire to say that I do not think that this is any precedent for holding that a lady who has marriage contract provisions settled on her under antenuptial contract has power to renounce or give them away, because I do not look upon the trust settlement of the residue of Mrs Ramsay's property, in this case, as part of the marriage-contract provisions at all."

If I could have construed the contract in the case of *Ramsay* as his Lordship did, I should probably have come to the same conclusion. But it appeared to me—for reasons I need not resume—that the construction of the contract was all the other way; and, in particular, that the terms in which the parents became parties to the contract and dealt with the large sums practically at their disposal was favourable to the inference that the amount was intended to form a marriage contract provision, or, as I see I expressed it in my opinion, "that the object was to preserve this sum as a provision for the lady in case of her surviving her husband." The material observation to be made on the case of *Ramsay*, therefore, is that nothing adverse to the doctrine now proposed to be affirmed can be held to have been there decided.

I observe one passage in my opinion in that case which, to prevent misconception, it may be as well to explain. In saying that had the contract been simply between the spouses themselves I should have been disposed to come to the same conclusion with their Lordships, I was following up what I had just said—that a destination, failing issue of the marriage, to the heirs or heirs and assignees of the lady, was in effect no destination at all, and could not have restrained her free action, although occurring in a contract which created a trust. I did not however mean to say that if in such a contract there was an exclusion of the *jus mariti*, the trust could be revoked at the will of the spouses. My opinion upon that point was and is the other way.

Having thus three well considered cases—*Torry Anderson*, *Pringle*, and *Hope*—decided at intervals during the last forty years, each of which, whatever may be said of it otherwise, affirmed that the principle of protection to a wife for her marriage contract provisions is not unknown to our law, it would, I think, be very unfortunate if any doubt could now be supposed to rest upon the existence and soundness of that principle. It appears to me that it is founded in nature—that the admirable subjugation of the will of the one sex to the pleasure

of the other for the mutual benefit of both, calls for it in return on the ground of humanity; and that, if not already universally received, it can only be a question of time its being recognised in some form or other, and with whatever modifications, in the law and practice of every civilized country.

In the present case the income reserved by the wife for her eventual widowhood is what, to a person in her position, must be regarded as the very moderate income to be derived from a capital under £9000, the husband being entitled to the enjoyment of that income during the marriage. It is proposed to revoke and withdraw the trust constituted for securing to her that eventual income. I think it must be conceded that, if the principle of protection to a wife for her marriage contract provisions is to receive effect at all, it must be given effect to in such a case as this; and I am, therefore, of opinion that the question put to us must be answered in the negative.

LORD NEAVES concurred.

LORD ARDMILLAN—After the opinion which Lord Deas has just delivered I would not say anything if it had not been that at one time I was of a contrary opinion. After the most anxious consideration, however, I have come to the clear conclusion that the opinion expressed by your Lordships is the right one, and I concur in every word which Lord Deas has said, and have nothing more to add.

LORD MURE concurred.

LORD GIFFORD—I am of opinion that the question put in this Special Case ought to be answered in the negative. It appears to me that the trustees acting under the antenuptial contract of marriage between Captain and Mrs Murray are not bound, and are not entitled, to denude of the trust-estate in favour of Mrs Murray, even although Captain and Mrs Murray and the whole children of the marriage concur in requiring them to do so, and although all parties offer to renounce all their respective rights in favour of Mrs Murray, and tender to the trustees a full and complete discharge of the trust itself and of all their actings under it.

I do not dispute the general proposition that if all the parties who are or who may be interested in a trust, or in the purposes for which it has been created, concur in desiring to terminate the trust and to distribute the trust-funds, they are entitled to do so, provided the parties are all *sui juris* and in a position effectually to bind themselves, and also provided that there is no possibility of any other party coming into existence or coming forward who may have an interest in the trust. A trust can only subsist for behoof of beneficiaries, and if every possible beneficiary is capable of consenting, and actually consents, to its extinction, there is no reason why the trust should not come to an end.

It is essential, however, before terminating and extinguishing a trust, to make perfectly sure either that its purposes are completely fulfilled, or, if this is not so, then that every possible beneficiary not only concurs in its extinction, but is in such circumstances and in such a position as to be capable of so concurring.

In the present case there might be questions whether all the possible children of the marriage are now in existence, and also, whether a possible contingent fee may not yet vest in the grandchildren of the marriage. It is not necessary, however, to decide these questions (indeed, I understand we are wished to assume them in favour of the second and third parties), for there is another ground which appears quite sufficient for the decision of the case, and to this the argument has been confined. It is this, that Mrs Murray although a party to the present case, is not entitled, even with the consent of her husband and of all her children, to put an end to the trust, so as to deprive herself—I do not say of her provisions under the marriage-contract—but of the security which the marriage-contract trust gives that these provisions will be available at the dissolution of the marriage. This security I think she is not entitled to renounce *stante matrimonio*, and therefore the trust must continue to subsist.

By the antenuptial contract of marriage the wife Mrs Murray conveyed to the marriage-contract trustees her whole estate, heritable and moveable, belonging or that may belong to her at the time of her death. The purpose of this trust was the administration of the wife's separate estate and the payment of the liferent thereof to Mr and Mrs Murray and the survivor of them, and for payment of the fee of said estate to the children of the marriage. Captain Murray's *jus mariti* over the fee is excluded, but not over the liferent arising during the subsistence of the marriage. The effect of these provisions is to secure Mrs Murray, in the event of her surviving her husband, in the free liferent of her separate estate, and this provision, along with a contingent liferent in any estate her husband might leave, form Mrs Murray's jointure or rights secured by the marriage-contract. So far as the husband's estate is concerned there is no trust, and the husband is placed under no restraint whatever, and so the wife has no security for this part of her eventual liferent; but so far as regards the wife's estate a trust is interposed, the husband's right over the fee being excluded, and thus a security is given, and a very valuable security, that to this extent at least the wife's jointure shall be effectual.

Now, I am of opinion that according to the sound construction of this antenuptial marriage-contract the bride intended to stipulate, and did stipulate, that at all events the liferent of her own estate should be absolutely secured to her in case of her viduity, and to make her security complete she placed her estate out of her own hands and power, and out of her intended husband's hands and power, into the hands and under the administration of marriage-contract trustees. I am clearly of opinion that it was competent for her to do so, and having done so I think it also clear that she has no power during marriage—no matter with what consents—to deprive herself of the security for which she so carefully stipulated before the marriage was entered into.

It seems to me that the very condition of the marriage was that the wife's contingent liferent should be put absolutely beyond the power of both the spouses, so that there should be no risk of the wife being persuaded either by the love or through the fear of her husband to give up her provision. I cannot doubt the lawfulness of this arrangement, and I cannot doubt that this was its true nature.

If the marriage-contract in the present case had contained a clause that the trust, so far as the wife was concerned, should be irrevocable, then, apply-

ing the principle fixed in *Torry Anderson's* case, effect would be given to this declaration; but I think the same result must follow wherever it can be shown from the deed that this was the true intention of the parties. It is only in this view that a clause of irrevocability is of any importance, for it is plain that if no interests forbid, a clause of irrevocability may be itself revoked by the parties who made it. A deed in its nature revocable can never cease to be so by a clause of irrevocability if there is no interest to secure thereby.

A wife after marriage is not in the same position as the bride was before marriage, and so long as the coverture subsists she will never be in the free condition which she enjoyed before marriage. There is the strongest expediency in a rule which shall enable a woman before coverture to stipulate that during her coverture she shall not be asked to do, and shall not have power to do, certain acts which may prejudicially affect her interests. I think this is a lawful stipulation, and that it was really made in the present case. The whole cases which have been referred to seem to me to be in entire accordance with the principle upon which I rest my opinion. Any seeming inconsistency in the judgments disappears when the true construction of the particular deeds is attended to. Thus in the case of *Ramsay* v. *Ramsay's Trs.*, 24th November 1871, the ground of the judgment was not that a wife could not secure her marriage-contract provisions by means of an irrevocable trust, but that according to the sound construction of the marriage-contract in that special case she did not do so except to the extent of £5000. The other cases founded on are all in favour of the irrevocable nature of a marriage-contract trust, that is, that it is irrevocable during marriage; and I do not think any sound distinction can be taken between the cases where the wife's provisions, secured by antenuptial contract, flow from her parents or from strangers and those in which her provisions come from the husband or from the wife herself.

If I am right in the view which I have taken of the wife's interest under the present marriage contract, it follows that the question put must, on this ground alone, be answered in the negative.

The LORD PRESIDENT was not present, but the LORD JUSTICE-CLERK intimated that he concurred in the result arrived at by their Lordships.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the amended Special Case, with the assistance of three Judges of the Second Division, and heard counsel for the parties, after consultation with the said other Judges, and in conformity with the opinion of all the seven Judges present at the said hearing: Find and declare, in answer to the question in the said case, that the marriage-contract trustees, parties of the first part, are not bound nor entitled under the circumstances stated in the case, to denude of the trust-estate in favour of Mrs Murray, one of the parties of the second part, and decern."

Counsel for the First parties—Dean of Faculty (Clark) and Thomson. Agents—Tod, Murray, & Jamieson, W.S.

Counsel for Second and Third parties—Solicitor-General (Watson) and Darling. Agent—J. Stormouth Darling, W.S.

Wednesday, March 10.

FIRST DIVISION.

[Lord Young, Ordinary.

ALLANS *v.* GILCHRIST.

Proof—Heritable Property—Parole—Competency.

Held that it is incompetent to prove an agreement for the sale of heritage by parole.

Agreement—Implement—Damages—Relevancy,

In an action for implement of an alleged agreement to purchase certain premises with the goodwill of the business carried on therein, and for damages for breach of said agreement, proof *prout de jure* being refused, the pursuers put in a minute abandoning the conclusions for implement. The action was *dismissed*, there being no specific damage alleged except loss incurred by preparing certain writings on the faith of the alleged agreement, but reserving any right which the pursuers might instruct in reference to the goodwill of the business.

Agreement—Damages—Relevancy.

Circumstances in which an action for damages for breach of an alleged agreement to purchase the goodwill of a business *dismissed.*

This was an action at the instance of John Allan, solicitor, Banff, and Alexander Allan, his father, baker there, against James Gilchrist, who was also a baker in Banff. The object of the action was for recovery of the price of dwelling-house and bake-house and shop belonging to the pursuer John Allan, in which the pursuer Alexander Allan carried on business, and for the price of the goodwill and stock in trade of the said business.

The pursuers averred that John Allan had by verbal agreement sold the heritable subjects to the defender for the price of £450, and that at the same time he had, as acting for his father Alexander Allan, sold the defender the shop-fittings, goodwill, and stock-in-trade, at a valuation to be afterwards made. It was also agreed that a formal disposition should be prepared in terms of the verbal agreement, and that it should be arranged that a loan for £250, which existed over the property, should be continued. The defender afterwards agreed that the pursuer Alexander Allan should occupy a portion of the dwelling-house as his tenant, until the following Whitsunday, and should take care of any flour or stock which might be sent in by the defender. On the 23rd of November 1874 the pursuer John Allan received a letter from Mr G. M. Hossack, solicitor, Banff, in the following terms:—"*Banff, 23d Nov.* 1874.—My Dear Sir,—I had a call from Mr Gilchrist this forenoon with reference to the communings which he has had with you as to taking up your father's business in the sea-town. He has come to the conclusion that it will be his wise course to refrain from taking it up in the meantime, as, with the means prosently at his disposal for the carrying on of his present business, he would be too hampered. He asked me to write and intimate this resolution to you.—Yours truly, GARDEN M. HOSSACK." Immediately on receipt of this letter Mr John Allan wrote Mr Hossack an answer in the following terms:—"*Banff, 23d Nov.* 1874.—My Dear Sir—I have just now your letter of to-day, the contents of which astonish me. Mr Gilchrist purchased the property and business so long ago as 10th inst., and the