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

deeds have been prepared and are all ready. I cannot agree to relieve Mr Gilchrist of his purchase, and am very much surprised that this should be attempted. I trust you will at once see Mr Gilchrist, and advise him to do justice to himself and all concerned by fulfilling his bargain.—Yours truly, JOHN ALLAN."

In these circumstances the pursuers averred that they had incurred loss and damage, in the first place on account of the expense and trouble to which they had been put to carry out the agreement with the defender; in the second place through having broken off negotiations with other offerers; and in the third place through Alexander Allan having to resume business, although in delicate health, and after having intimated to his customers his retirement from business.

The defender admitted that certain verbal arrangements had been made between him and the pursuers as to the purchase of the property, but averred that the arrangement was that for the £450 the defender was to get not only the heritable subjects but the fittings of the shop and goodwill of the business.

The pursuers pleaded—"(1) The defender having entered into the contract of sale libelled, and the same being a valid and effectual contract of sale, he is liable to implement his part thereof, and the pursuers are entitled to decree to this effect, as concluded for in the summons. (2) The defender is barred by *rei interventus*, and by the actings which followed on the contract libelled, from now resiling from it. (3) In the event of the pursuers not being held entitled to implement, they are entitled to damages as concluded for, with expenses."

The defender pleaded—"(1) The pursuers' statements are not relevant or sufficient in law to support the conclusions of the summons. (2) The defender ought to be assoilzied, in respect that he never entered into any agreements of the tenor alleged by the pursuers. (3) The action cannot be maintained, or at least it cannot be maintained in so far as it relates to the heritable subjects libelled, in respect that no written agreement for the purchase and sale of the said subjects was ever entered into between the pursuers, or either of them, and the defender. (4) In respect that no such written agreement was entered into, the defender was entitled to resile from the verbal arrangement relative to the heritage entered into between him and the pursuer John Allan, as above set forth. (5) *Separatim.* The defender was entitled to resile in respect that the pursuer Alexander Allan, on 21st November, intimated claims at variance with and in violation of the only verbal arrangement truly entered into. (6) The pursuers' whole material statements being unfounded in fact, the defender ought to be assoilzied, with expenses."

The Lord Ordinary (YOUNG) pronounced this interlocutor:—

"*Edinburgh, January* 27, 1875.—The Lord Ordinary having heard counsel for the parties, allows them a proof of their respective averments so far as not admitted, the pursuer to lead in the proof: Appoints the proof to take place before the Lord Ordinary, within the Parliament House, Edinburgh, upon Friday, the 26th day of February next, at half-past ten o'clock forenoon, and grants diligence at the instance of each of the parties for citing witnesses and havers."

After this interlocutor was pronounced, but while the case was still in the Outer House, the pursuers put in a minute abandoning the conclusions for implement, and restricting their claims to damages.

The defender reclaimed.

At advising—

LORD DEAS—The question which arises on the interlocutor of the Lord Ordinary is, Is it competent to allow a proof *prout de jure* of a sale of heritable property? I am of opinion that it is quite incompetent, and that the proof can only be by writ or oath. I think that is quite clear from the case of *Walker* v. *Flint*, Feb. 20, 1863, 1 Macph. 417, and also from the case of *Gowans* v. *Carstairs*, July 18, 1862, 24 D. 1382. In this case there is no offer of a reference to oath, and what the Lord Ordinary finds is that the sale may be proved by parole, which is against all authority; so I do not think we can adhere to his interlocutor. It appears that the pursuer has abandoned his conclusion for implement by the minute which he has put in. That minute is said to have been put in in the Outer House, to have been lodged the day after the Lord Ordinary pronounced judgment, but there is no allusion to it in his interlocutor, and we cannot tell whether or not he knew of it. But though it is not dealt with by him it is now before us, and raises the question whether there are averments on record competent to be proved by parole with a view to damages. I am of opinion that there are not. The only damage alleged by the pursuer is that in consequence of the verbal bargain he has been put to expense. I am clearly of opinion that damages of that kind cannot be claimed. There have been a few cases in which it has been held competent for a party relying on an informal written bargain to get compensation for outlay made on reliance that the bargain would be carried through. There are, I think, just three such cases, but those were not questions of damages but of reimbursement of outlay. The first is the case of *Sir Patrick Walker* v. *Milne*, June 10, 1823, 2 S. 379. The rubric is this:—"A party is bound to indemnify another for any actual loss sustained relative to a contract for the purchase of heritage, although *locus pœnitentiæ* remains entire." The decision in that case has been sometimes doubted, but anyhow it was not such a claim as this, and is no authority here. The next case was that of *Bell*, July 9, 1841, 3 D. 1201. That was a much stronger case than Sir P. Walker's. It was where a party alleged that he had expended a sum of money in erecting a dwelling-house upon a piece of ground, with the knowledge of the proprietor of the ground, and on the faith of his verbal promise to convey it to him, but that it had been subsequently conveyed to a third party. The Court "held that an action was relevant against the proprietor of the ground for payment of the money so expended, and that the rule that writing is essential to prove an agreement respecting heritages did not apply to such a case." The next case was *Heddle* v. *Baikie*, Jan. 14, 1846, 8 D. 376. "The pursuer of an action, concluding for implement of an alleged agreement to grant him a lease of a farm for 19 years, and for declarator that such a lease should be executed and be binding, gave in a minute passing from this conclusion, but reserving to himself his action of damages for breach of the agreement; a judgment was upon this pronounced, which bore to proceed 'in respect of the minute,'

and 'sustained the defences against the declaratory conclusions of the libel for a lease of 19 years,' the defences being (*inter alia*) that the defender had never agreed to grant a lease to the pursuer. *Held* that the judgment was not *res judicata* barring the pursuer from insisting in an action of damages founded on the same allegation of the agreement to grant a lease, the *conclusion* of the second action being expressly for damages for breach of the alleged agreement." Now, those cases being so far exceptional, the fact that money expended in that way may be recovered gives no precedent for allowing a claim of damages by the seller, and the only damage he alleges is some expenses about writings. It is clear that is not in the least the kind of claim which can be sustained, and so, on the case as it now stands, I am of opinion that the Lord Ordinary's judgment must be recalled. There is a little embarrassment as to one point. It does not follow that parole proof is incompetent as to the goodwill and shop fittings, and if the pursuer Alexander Allan wants to go on with that part of his case I am not disposed to stop him, but it is for him to consider whether he will bring a fresh action or go on under the present one. If he decides on the latter, however, he must take his risk of being met on the ground of relevancy.

LORD ARDMILLAN—This action is laid on the footing that one contract was made for the sale of heritable subjects, and another contract for sale of goodwill of business, and stock-in-trade. The price of the perishable subjects is said to be £450, and that sum is said to be due, and judgment is concluded for, and damages are due in place of implement.

That is the case on the summons and on the record. I do not think there are averments relevant and sufficient to support a conclusion for damages to the pursuers on any other footing. The record is not here framed to meet a case like the case of *Walker* v. *Milne*, June 10, 1823, which has been founded on. That decision is not in point. The circumstances in that case of *Walker* were peculiar, and were stated on record, and important admissions were there made. It appears to me that the case of *Walker* was very special, and that nothing but the very special and exceptional circumstances of the case can support the judgment. It is on its facts so peculiar that it is not a safe authority where the circumstances are different, and I think they are different in the case before us. Neither is the case of *Bell*, nor the case of *Heddle* v. *Baikie*, in point. On the pursuers' own averments the case before us and the cases referred to are quite different. The law applicable to the case as here stated is clear. A contract for sale of heritable property cannot be proved by parole. No other proof has been offered, and even if a verbal contract were proved, nothing really of the nature of *rei interventus* has been averred. A proof at large of the allegation of a contract for sale of heritage cannot, in my opinion, be allowed. That is well settled. I need only mention the case of *Gowans* v. *Carstairs*, 18 July 1862; but there are many authorities to the same effect. Then there being no proof of contract, written or verbal, there is no room for applying the principle that resiling is barred *rei interventu*. I concur in the views on that point expressed by all the Judges in this Division who decided the case of *Gowans*.

I think the interlocutor of the Lord Ordinary, allowing proof, should be recalled. No reference to oath has been proposed; and no *rei interventus* has been relevantly averred, and no foundation is laid for a claim of damages, unless on the assumption that a contract has been proved, and that implement is due.

In so far as regards the alleged sale of heritable property, or as regards the demand for damages in relation to that contract, I concur in the opinion just delivered, and in recalling the interlocutor of the Lord Ordinary.

In regard to an alleged separate, or separable, contract for sale of goodwill, and of stock-in-trade, it is possible that the pursuer Alexander Allan may be in a different position. It occurs to me that if this pursuer Alexander Allan has, on this subject, a separate case which he can establish, he will succeed better in a separate action. But if he prefers to lodge a minute in this action to meet an objection to relevancy, and to undertake a separate proof apart from the alleged sale of heritage, I am disposed to allow him an opportunity of doing so.

LORD MURE concurred.

The LORD PRESIDENT was not present.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Lord Ordinary reclaimed against; find that so far as regards the heritable property libelled, parole proof of the alleged verbal contract is incompetent; find that no reference to oath is offered by the pursuer John Allan in regard to that alleged contract; find that no relevant claim of damages is stated in the record in respect of or arising out of a breach of that alleged contract; assoilzie the defender from the conclusions of the action for implement and damages in so far as relates to that alleged contract, and decern; but before answer as to the claim made by or for behoof of the pursuer Alexander Allan for fulfilment of the alleged verbal bargain as to the goodwill of the business and other articles libelled, appoint a minute to be lodged for the said Alexander Allan stating what course is now intended to be pursued with reference to that claim, and for that purpose continue the cause in the roll till Tuesday next; find the pursuer John Allan liable to the defender in the expenses hitherto incurred, and remit the account, when lodged, to the Auditor to tax the same and to report."

The pursuer Alexander Allan put in a minute stating that he still insisted in his claim for damages so far as regarded the goodwill of the business, shop fittings, &c.

At advising—

LORD PRESIDENT—In considering this question, we must keep in view the interlocutor pronounced on the 5th of March. I was not present on that occasion, but I have the interlocutor before me, which is in these terms:—[*reads*].

A minute has accordingly been put in, in which the pursuer Alexander Allan states that he insists in his claim for damages in so far as regards the goodwill of the business, shop fittings, &c.

The restriction in the minute put in in the Outer House was a restriction to damages, and

therefore the conclusion insisted in by Allan is one for damages—damages for breach of that part of the contract which is relative to the moveable subjects. Now, there can't be a claim for damages for non-implement of that part of the contract, unless he could also have brought an action for implement thereof. The result of doing so would be this, that the pursuer would demand that the defender should buy the goodwill and fittings of the business without getting any right whatever to the premises in which the business was conducted.

That would be a very strange result, especially looking to the nature of the contract as stated by the pursuer on record. He says in article four of the condescendence:—"Immediately on the advertisement appearing, the defender put himself into communication with both pursuers, and various communings took place among them as to the sale of the subjects and effects. In the course of their communings the pursuer, the said John Allan, explained to the defender that he would under no circumstances accept him as a tenant, and that he would only transact with him on the footing of his proposing to acquire the property of the subjects and the goodwill of the business. This the defender stated to be his sole intention and desire."

Now, here the property of the subjects and the goodwill of the business are inseparably tied together, and we see the same thing through the whole record, and in the communings through which the transaction was completed.

In these circumstances, I have no doubt that the claim of damages for Alexander Allan cannot be supported. I am therefore of opinion that the defender should be assoilzied.

The other judges concurred.

The Court pronounced this interlocutor:—

"The Lords having resumed consideration of the cause, with the minute for Alexander Allan jun., No. 9 of process, and heard counsel: Find the claim made by the said Alexander Allan, as stated in the said minute, is not founded on any relevant allegation of damage for breach of contract; therefore assoilzie the defender from the whole conclusions of the summons, so far as not already disposed of, and decern: Find the pursuer Alexander Allan liable to the defender in expenses, and remit the account thereof to the Auditor to tax and report."

Counsel for the Pursuers—Dean of Faculty (Clark) and Brown. Agent—Alex. Morison, S.S.C.

Counsel for Defenders—Balfour and Moncreiff. Agent—George Andrew, S.S.C.

Thursday, March 11.

SECOND DIVISION.

APPEAL—PATON *v.* TURNBULL.

Lease, constitution of—Liability for Rent.

Circumstances in which the owner of certain heritable subjects, having disponed them in security of debt, and continuing in possession after his sequestration, was *held* to have relinquished his right of ownership, and incurred liability as tenant of the premises.

This was an appeal from the Sheriff Court of Roxburghshire for Alexander Paton, merchant, Glasgow, in an action at his instance against John Turnbull, draper, Jedburgh. The summons concluded for payment of £82, 10s., being rent for a shop and other premises alleged to have been occupied by the defender as tenant of the pursuer. It appeared that the defender was originally owner of the subjects, but had conveyed them by an *ex facie* absolute disposition, dated 28th November 1868, to Barclay, Paton & Co., merchants, Glasgow, in whose right the pursuer now stood. The disposition was made in security of debts due by the defenders to Barclay, Paton & Co., and was qualified by a minute of agreement, by which, *inter alia*, power was conferred on the disponees in certain events to sell the subjects disponed, and to enter into possession thereof. The defender was sequestrated in April 1871, and the pursuer's firm ranked on his estate, and accepted a composition, but did not renounce the security held by them, and the trustee in the sequestration refused to interfere with the subjects disponed. The defenders continued in the occupation of the premises, but at Whitsunday 1871 the pursuer's firm made notarial intimation to the tenants on various parts of the subjects disponed, including the defender, that the rents would thereafter be payable to them. The rent thus due by the defender for the half year ending Martinmas 1871 was recovered by Barclay, Paton & Co., on a decree in absence pronounced against the defender for payment thereof, and several payments were made subsequently by the defender in name of rent, as the pursuer alleged. The pursuer accordingly maintained that the defender was tenant of the premises, and as such liable in payment of the rents thereof. The defender, on the other hand, denied that he had paid the sums referred to as rent, and contended that he had continued to possess the premises as owner, his *ex facie* absolute conveyance of the subjects being qualified by the minute of agreement.

The Sheriff-Substitute (RUSSELL) found that the facts set forth did not infer any contract of lease between the parties, or constitute the defender tenant of the subjects occupied by him, and the Sheriff (PATTISON) adhered to this judgment.

Appellant's authorities—Hunter on Landlord and Tenant, ii., 262, 263, 534.

Respondent's authorities—*Rankin*, 19th Nov 1868, 7 Macph. 126; *Abbott*, 25th May 1870, 8 Macph. 791; Bell's Conveyancing, vol. ii. pp. 1075 1076.

At advising—

LORD JUSTICE-CLERK—I cannot agree with the judgment of the Sheriff. Looking to the decree in absence pronounced in the Sheriff-court for a sum which was sued for as rent due at Martinmas 1871, and to the payment following thereon, and the subsequent termly payments made by the defender, I cannot resist the conclusion that the relation of landlord and tenant was constituted between the pursuer, or the firm whom he now represents, and the defender. These payments are alleged by the latter to have been made in satisfaction of debt, and not for rent at all. But no debt is specified, and, as the defender was a discharged bankrupt, no debt can have been due. I am therefore of opinion that the pursuer's claim for rent is well founded, and that this appeal should be sustained.