hand appears to me to be a fair case for holding that the objections to the report are not too late. This was evidently a moot point in practice, and the circumstances mentioned at the bar would lead me to admit an extension of the usual period of forty-eight hours, which after all is only the interpretation put by practice upon a clause in an Act of Sederunt.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court allowed the note of objections to be received, and remitted to the Lord Ordinary to dispose thereof, and his Lordship allowed fees of 125 guineas and 100 guineas to Dr Watson and Dr Renton respectively instead of £15, 15s. and £10, 10s. as allowed by the Auditor.

"*Note.*—At the previous hearing on 14th July I heard a full argument not only on the competency, but also on the merits of the objections. The competency of the objections having now been sustained, I am of opinion on the merits that the Auditor has not allowed sufficiently large sums in respect of the fees paid to Dr Heron Watson and Dr Renton. The sums allowed by the Auditor, viz., £15, 15s. and £10, 10s., were fixed on the footing of what would have been paid to medical men resident in London. The examination of the pursuer in London was rendered necessary by her declining to come to Scotland for this purpose, and I think that in the circumstances the defender was entitled to employ medical men resident in Scotland, who would be available as witnesses when the trial took place. If the defender had employed London doctors of equal eminence, he would have required to pay them on the same scale if he had asked them to attend the trial. I therefore think that the fees allowed by the Auditor are inadequate, but I am not prepared to allow, as against the pursuer, the whole of the fees paid to Dr Heron Watson and Dr Renton. I shall allow in all a fee of 125 guineas for Dr Heron Watson, and a fee of 100 guineas for Dr Renton."

Counsel for the Pursuer — Jameson — Clyde. Agent—Lockhart Thomson, S.S.C.

Counsel for the Defender — Dickson — M'Clure. Agents — Webster, Will, & Ritchie, S.S.C.

Friday, July 13.

SECOND DIVISION.

(Before Seven Judges).

ELIOTT'S TRUSTEES *v.* ELIOTT.

Trust — Marriage-Contract — Will — Construction—Husband and Wife—Liferent and Fee—Denuding—Alimentary Liferent to Wife Burdening her Right to Fee.

By antenuptial contract of marriage between a husband on one part, and his wife and her father on the other, the husband disponed and conveyed to trustees his whole means and estate for payment to himself during his life, and after his death to his wife, if she should survive him, of the free annual income or revenue thereof for the liferent and alimentary use allenarly of them and the survivor of them, declaring that the same should not be affectable by the debts or deeds of either of them or the diligence of their creditors. The marriage-contract further provided that in the event of the wife surviving the husband, and there being no children of the marriage, the trustees should, on the wife's death, pay and convey the whole trust-estate to the husband's heirs and assignees whomsoever.

By will and codicil the husband bequeathed all his real and personal estate, including any property over which he had power of appointment whatsoever or wherever to his wife absolutely.

There were no children of the marriage. The wife survived the husband.

Held (*diss.* Lord Young, Lord Adam, and Lord M'Laren) that the widow's right to the fee of the estate was burdened with her right to an alimentary liferent, and that the marriage-contract trustees were not entitled to hand over the capital to her, but were bound to hold the estate during her life, and pay her the income as an alimentary provision.

By antenuptial contract of marriage dated 23rd and 27th April 1886, entered into between George Augustus Cuming Eliott on the one part, and Edith Hamilton, daughter of Richard Fisher Hamilton, with the advice and consent of her said father, and the said Richard Fisher Hamilton for himself on the other part, George Augustus Cuming Eliott disponed and conveyed to trustees his whole means and estate "for payment to the said George Augustus Cuming Eliott during his life, and after his death to the said Edith Hamilton, if she shall survive him, of the free annual income or revenue thereof for the liferent and alimentary use allenarly of them and the survivor of them, declaring that the same shall not be affectable by the debts or deeds of either of them or the diligence of their creditors." The antenuptial con-

tract contained the following further provision:—*Quarto*, "In the event of the said Edith Hamilton surviving the said George Augustus Cuming Eliott, and of there being no children or issue of children of the said intended marriage then alive, or in the event of such children or issue of children all predeceasing the said Edith Hamilton, the said trustees shall, on the death of the said Edith Hamilton, pay and convey the said whole trust-estate to the heirs and assignees whomsoever of the said George Augustus Cuming Eliott."

George Augustus Cuming Eliott died on 22nd October 1892. There were no children of the marriage.

Mr Eliott left a will dated the 16th January 1888, in the following terms:—"I devise and bequeath all my real and personal estate, including any property over which I have power of appointment whatsoever and wheresoever, unto my dear wife Edith Maud Eliott absolutely." Mr Eliott also left a codicil dated 30th May 1890, by which he appointed his said wife to be "the sole executor of my said will."

After her husband's death Mrs Eliott required Thomas White, S.S.C., sole surviving trustee under the marriage-contract, to denude himself of the trust-estate, and pay it over to her absolutely. The trustee, though perfectly willing to comply with this request, was not satisfied that he was entitled so to do, in respect that the widow's liferent under the antenuptial contract of marriage was declared to be alimentary. The trust-estate consisted of moveable property of the value of about £8000, and of heritable property under deduction of the securities affecting the same of about £3000. For the decision of the question a special case was presented by (1) the marriage-contract trustee, and (2) Mrs Eliott.

The question at law was—"Is the first party bound to denude himself of the trust-estate, and to convey and pay over the capital thereof to the second party?"

Argued for the first party — He was bound to retain the estate, paying the liferent to the second party during her life. There was no intention on the husband's part to revoke the marriage-contract. The terms of the will showed that the husband intended to leave to his wife the fee of the estate burdened in the same manner as when he himself possessed it, viz., under the conditions set forth in the marriage-contract. But even if the husband intended by his will to revoke the marriage-contract, he had not the power to do so. By the marriage-contract the wife only got the alimentary liferent of her husband's estate, and was thus protected against her creditors. Neither husband nor wife could *stante matrimonio* alter the conditions of the marriage-contract. The marriage-contract trustee had in the present case come into the position of the husband. It was not inconsistent for the same person to have the fee and the alimentary liferent of an estate. A trust constituted for payment of an alimentary liferent could not be brought to an end by the action of the liferenter and fiar, even although the liferent and fee were in the same person—*Whyte's Trustees* v. *Whyte*, June 1877, 4 R. 786; *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858; *Hughes* v. *Edwardes*, June 25, 1892, 19 R. (H.L.) 33.

Argued for the second party—It was quite plain that the husband intended to revoke the marriage-contract and to give his wife an unburdened fee. With the exception of the marriage-contract funds the husband had no estate. The terms of the will and the appointment of his wife as his executrix in the codicil clearly showed that such was his intention. The husband had also power to give his wife an unburdened fee. The purposes in an antenuptial contract of marriage were matrimonial purposes. The interests which the spouses had in view in entering into such a contract were the protection of the estate for the children. But here the marriage was dissolved, and there were no children whose interest required to be protected. There being, then, no other interest, the husband and wife could revoke the marriage-contract. The marriage being dissolved and no children surviving, the liferent to a surviving wife merged in the fee if the fee was left to her either in the marriage-contract or in the will of her husband. It was said that the liferent was alimentary, but it was only made alimentary to protect her in her relations arising out of the marriage, and in no other sense. The alimentary character did not attach to the fund under existing circumstances—*Martin* v. *Bannatyne*, March 8, 1861, 23 D. 705, opinion of Lord Inglis, p. 709, followed in *M'Lean's Trustees* v. *M'Lean*, February 23, 1878, 5 R. 679; Fraser's Husband and Wife, ii. 1496. There was no case and no principle which laid down that where no other person is interested in the marriage-contract estate except the husband and wife they could not do as they pleased with it. The case of *Hughes* v. *Edwardes* was distinguished from the present, as in that case there was a contingency of grandchildren whose interest required to be protected. The case of *Duthie's Trustees* v. *Kinloch* did not affect the contention that the trustee in the present case was bound to denude, that being a case depending entirely on the express intention of the testator, and the Court being of opinion that his intention was plainly to the effect that the alimentary annuity should be kept up. This contention also applied to the case of *Whyte's Trustees* v. *Whyte*. All that these cases decided was that it was not in the power of the alimentary liferenter and the person having the beneficial right to the fee to defeat the conditions of the grant without the consent of the giver of the bounty.

At advising—

LORD JUSTICE-CLERK—By the contract of marriage entered into between the second party to this special case Mrs Edith Maude Eliott, then Miss Hamilton, and Mr George Eliott, now deceased, Mr Eliott assigned, disponed, and conveyed to certain trustees, the survivor of whom is the

first party to this case, all "means and estate, heritable and moveable, real and personal, wherever situated," then belonging to him, or to which he might acquire right during the subsistence of the marriage. The trust purpose now in question is the fourth—"In the event of the said Edith Hamilton surviving the said George Augustus Cuming Eliott, and there being no children or issue of children of the said intended marriage then alive, or in the event of such children predeceasing the said Edith Hamilton, the said trustees shall on the decease of the said Edith Hamilton pay and convey the said whole trust-estate to the heirs and assignees whomsoever of the said George Augustus Cumming Eliott. The purpose of the trust thus directed to subsist until the death of Mrs Eliott is, so far as she is concerned, the first purpose, by which the trustees are directed after Mr Eliott's death to pay Mrs Eliott "the free annual income or revenue thereof" for her "liferent and alimentary use allenarly," with a declaration added by which the liferent is declared not to be affectable by her debts or deeds, or the diligence of her creditors.

Mr Eliott died without issue, and his will contains the following clause—"I devise and bequeath all my real and personal estate, including any property over which I have power of appointment whatsoever and wheresoever, unto my dear wife Edith Maude Eliott absolutely."

Under this clause, the second party maintains that she is now entitled to call upon the surviving marriage-contract trustee to denude himself of the trust-estate in her favour, and he feeling uncertain as to his position, declines to do so without judicial authority, and accordingly the question now put to the Court is whether the first party is bound to denude of the trust-estate and to pay over the capital to the second party.

The position of Mr Eliott after entering into the marriage-contract was that he had conveyed his property to trustees by deed, under the terms of which he had retained to himself two powers only, the one a power of apportionment among the children of the marriage, to take effect on the death of the last surviving spouse, the other a power of disposal of the estate on the lapse of the liferent purposes, by the death of the last survivor of the two spouses, there being then no issue alive. According to the expression of the contract itself, if he predeceases his wife, the direction to the trustees to denude is one to take effect only "on the death" of his widow. He could dispose of the fee, but not so that the fiar could call upon the trustees to denude in his favour until the contract restriction, under which the trustees were to hold, realise the annual product, and pay it to his widow as an alimentary provision, came to an end by her death. That is the plain course the trustees had to follow, unless by authority of law they were ordained to depart from it. For it is quite certain that if Mr Elliot had left his estates to a third party, the trustees could not have been called upon to denude in his favour, whatever security the fiar might have offered to make the widow's interest safe, and whatever consents she might have given to renounce her rights under the contract, and accept the equally good or even it might be the better money terms offered to her for its renunciation. For the trustees' duty to protect her enjoyment of the protected alimentary provision would remain. She could not discharge it, and the trustees could not without breach of duty part with the estate on her discharge. In short, the position is such under the deed that nothing can be done which may lead to the defeat of the intention of the truster in creating the trust. And the security provided by the trust is the only security that can be suffered to be the guard of the interest. For only by the trust can the protection specified by it be effectually maintained. Any new arrangement, however, binding in its form of expression, will be only a contract between the new contracting parties. The removal of the estate out of the protection of the trust would cause the alimentary, unattachable quality of the benefit to perish. That quality would cease to be a protection given by another to secure the enjoyment of a gift and become a protection stipulated for in his own transaction by the person benefited, in which case, to use the words of the late Lord President Inglis, such a qualification "would be of no avail whatever." For it is a trust and a trust only which can protect an estate, and limit its disposal and its liabilities for the debts and obligations of those who have the beneficial enjoyment of it. If a protective trust be competently created, its terms are the law of the administration of the trust property, and all must submit to their operation. Whereas if, without the protection of a trust, estate be made over to another, conditions forbidding or restraining alienation cannot be effectual to protect it from alienation by direct act, or by legal diligence. An alimentary declaration cannot hedge it from attack by those having claims against its owner, or prevent the owner from doing with it what he pleases.

The peculiarity of this case is that Mr Eliott, who retained to himself the power of disposing of the fee of his estates, in certain events, has by his will bequeathed his whole estates to his widow. This the widow maintains makes her now entitled to demand from the trustee a conveyance of the estate, notwithstanding the direction of the contract that the trustees are only to convey on the death of the widow. Her case is that being now the fiar, the trustee is not entitled to continue to hold the estate, and to pay its produce to her from time to time, and that she can give the trustee a sufficient discharge on its being disponed and conveyed to her absolutely in terms of the will.

Mrs Eliott could not, as it appears to me, have discharged had she not been made fiar. But the question is, can the fact that

she is made the fiar enable her to discharge, as she could not otherwise have done. Or is it not the true view that although her husband has constituted her the fiar, the contract restriction must still remain operative—a restriction which limits her powers to the end of protecting her present enjoyment. I think that that question must be answered in accordance with the latter alternative. The husband here had in the marriage-contract exercised his power to dispose of the liferent of his estate for onerous causes, and protected his gift of it against alienation, voluntary or enforced. He had not, as I think, by retaining the power to dispose of the fee after his wife's death, retained to himself the power to revoke and alter what he had already done with the liferent. He could not himself discharge the trustees of their duty, and it is, as I think, very doubtful indeed whether he could by any act of his enable his widow to do so, and thus place her in a position which is inconsistent with the restriction and protection given by the trust conveyance. This trust was a subsisting trust at the time of her husband's death. I cannot hold that leaving a will in her favour could confer upon her a power to bring the trust created by the marriage-contract to an end, and to take without restriction that which she could not so take under that contract. He could of course confer upon her the fee, which she might dispose of as she pleased, even by using her right to it to improve her position financially during her life by conveying it away for a money consideration. But that is not the same thing as taking away the protection of the trust from the alimentary provision. But there is another question. Can it be held that granted the power existed, the deceased has expressed intention to do what the second party here maintains that he has done? At the time when the deceased made his will he desired to give to Mrs Eliott all that he had. But what he had was a burdened estate, under which protection was given to a liferent for the wife, both against her own act and those of others, and he gave it as such, so far as appears. I should be unable to hold that the expressions used by him necessarily implied that he did not wish the protection provided to his widow of an alimentary non-attachable income to be still upheld for her.

I think, therefore, that the question put in this special case should be answered in the negative.

Lord Young—I think the most accurate and comprehensive statement of the question in the case is this, What is the construction and legal effect of the will (and codicil) of the deceased George A. Cuming Eliott, having regard to the fact that the testator was married and under contract with his wife, who survived him, by the antenuptial marriage-contract stated in the case? On the one hand it is maintained that the language of the will (and codicil) is so plain that it does not admit of construction, and that in the circumstances the existence of the marriage-contract was no impediment to the testator making the will and codicil according to the plain meaning of the language which he used, and affords no reason for putting a special construction on that language at variance with its usual and ordinary meaning. These circumstances are that there being no children of the marriage the contract at its dissolution subsisted only as a contract between the spouses, and that the predeceasing husband left everything (taking his language in its ordinary sense) to his surviving wife, who is of course willing to accept it. On the other hand it is maintained that the language employed admits of the construction that the testator's wife should have the property or fee of his estate, but only subject to her own liferent secured to her by the contract, for which purpose the estate itself—*i.e.*, the subjects of the property—must go to the marriage trustee to be held for her during her life, but subject on her decease to her debts and deeds as owner, and that if the testator intended more or other than this his intention was illegal, and therefore inoperative.

Now, in the first place, it seems to me clear that if the testator had power, with the assent of his wife (for I assume her assent), to make a will in her favour according to the plain meaning of the language employed by him in the will in question, it must have effect accordingly. The only reason suggested for denying it effect according to its language, and for putting a special and qualified meaning upon it, is defect of power. The question then comes to be this, Was there such defect of power by reason of the marriage-contract? There is plainly no other reason, and so if this be bad, no reason at all.

I had myself thought it to be a settled rule of law that a marriage-contract had effect and operation as a contract only between the parties to it and the issue of the marriage, who are regarded as parties, and that the parties may, with reference to the event of dissolution of the marriage without issue, modify the contract between themselves as they please, and even cancel it. The rights of children of the marriage, including, as we must now hold to be settled, grandchildren and possibly great grandchildren, cannot be affected by any subsequent arrangement between the spouses or acts of either, but in a case where the marriage is dissolved without issue the contemplated and provided for possibility of their existence may be disregarded, and so account taken only of the spouses themselves, at least where there are no other contracting parties, such as parents or others who have given funds to be dealt with under the contract.

But we were told that it had been otherwise settled by authority, and we were specially referred to the case of *Duthie's Trustee* v. *Kinloch*, June 5, 1878, 5 R. 858, as an authority exactly in point. But the point being whether and how far the power

of testing is limited by a marriage-contract to which the testator is a party, I quite fail to see how that case can be an authority upon it, seeing that there was in that case no marriage-contract, and indeed no question whatever of a testator's power to test as he pleased, but only a question regarding the construction and meaning of a particular codicil by a testator whose power to test as he pleased was clearly and admittedly unlimited—certainly not limited by marriage-contract, there being none. I do not think that *Duthie's Trustee* v. *Kinloch* has the remotest bearing on the present case.

Is there any other authority for the trustee's contention that by the existence of the marriage-contract the testator was disabled from making the will he did? They referred to one other, viz., *Hughes* v. *Edwardes*, 19 R. (H. of L.) 33, not indeed for the decision, which was admitted not to be in point, but for some judicial *obiter dicta*. What I have to say regarding that case may, I think, be usefully prefaced by a few preliminary observations. And, in the first place, I would remark that a trust for the protection of an alimentary liferent (or annuity), and to secure the fee to others on its termination, cannot be terminated without the consent of the truster by an arrangement between the liferenter and fiar. The rule is based on the consideration that the intention of the truster must be regarded and executed, and cannot be defeated by an arrangement to which he is no party, and so can have no application when he is a party to the arrangement or will signifies his assent in any way. Where such an arrangement has been attempted (as it has repeatedly) before the fee is vested, and it is yet uncertain who will be the fiar, it is of course bad on that ground—it is not an arrangement between the beneficiaries interested. But even where it is vested and all the beneficiaries interested are certain, the arrangement is bad on the rule as a frustration of the truster's intention. The cases usually referred to as examples and illustrations of the rule are cases of testamentary trusts where after the testator's death an arrangement in violation of his intention has been attempted, and these cases can have no bearing on any question regarding the testator's power by will or codicil subsequent to the trust to test as he pleases. He may be deprived of such power by onerous contract or a completely executed gift, which may have been made by a deed of trust, but the cases I am now noticing, relating to the invalidity of an arrangement among beneficiaries or donees to defeat the donor's purpose, can have no bearing on a question regarding a limitation of the donor's own power. In the second place, I have to point out that the only question I am now considering is, whether and to what extent the present testator's power of testing was limited by the marriage-contract to which he was a party? I have thus expressed the question, because it is, I think, clear that his testing power was thereby limited. Without the contract he might have tested as he pleased, leaving his wife to her legal rights of terce and *jus relictæ*, while with the contract he certainly cannot. He could deprive his wife of nothing to which she had right under the contract, but that on a rule of contract law which is as foreign to the rule which forbids arrangements by beneficiaries under a will in violation of the testator's intentions as one thing can be to another. Then, as regards the validity and effect of the wife's assent to what he has done by his testament in violation of her contract right, it may be valid or not, but must be the one or other, on grounds which cannot possibly have been considered or decided in cases about the validity of agreements amongst beneficiaries under a will made after the testator's death, and to which he consequently gave no assent. In saying so I only mean that on the question before us we can have no light from these cases.

When a marriage without issue is dissolved by the predecease of either spouse, leaving a will in favour of the survivor, who assents to it, I venture to submit as sound in law these two propositions—First, that the validity of the will is not affected by the existence of a marriage-contract, to which the spouses were the only parties, and in which at the dissolution of the marriage the survivor alone has an interest; and second, that the construction of the will is not thereby affected, unless indeed the language of the will is such that on the ordinary rules of construction the existence and terms of the contract may afford legitimate assistance in reaching the true meaning and intention of the testator.

Now, is the case of *Hughes* v. *Edwardes* adverse to either of these propositions? In that case there was a marriage-contract, whereby the wife conveyed to the marriage trustees a sum of £4000, "paid to her in view of the marriage" by her step-father, to be held by them for her husband in liferent and the children of the marriage in fee. She predeceased, survived by her husband and a son of the marriage, leaving a will of all she possessed to her husband, and the question in the case, speaking generally, regarded the validity of a demand by the husband, with consent of the son (he being of full age), for immediate payment, and this question was, by the Lord Ordinary and the First Division, and I think also by the House of Lords, dealt with as turning upon whether or not the *conditio si sine liberis* applied. The First Division, by a majority, and reversing the judgment of the Lord Ordinary, held that the *conditio* did not apply, and so authorised immediate payment. The House of Lords held that the *conditio* did apply, and so reversed the judgment of the First Division. The *conditio*, if applicable, was of course conclusive, for on that footing the fee was not vested in the son, and might never vest in him, for he might predecease the liferenter leaving issue, who would then be the fiars. But it is said that there are *obiter dicta* in Lord Watson's judgment which show satisfactorily that he would have disallowed the husband's

demand for immediate payment even though the *conditio* had not applied, on the ground that the terms of a marriage-contract cannot be altered or affected though all the parties to it or interested in it, being *sui juris* and at large, and never so able to manage their affairs regarding matters of the greatest magnitude, concur. I can find no such *obiter dicta*. He does indeed refer with emphatic approbation to the decision in *Duthie's Trustee* v. *Kinloch*, which I have already noticed, and also to one or two other cases, as distinctly recognising the rule that the beneficiaries in liferent and fee under a beneficient trust cannot by arrangement between themselves after their benefactor's death defeat his distinctly expressed intention. I have shown, I hope satisfactorily, that this rule has no bearing on either of the two propositions which I have advanced. Lord Watson's reference to it, and statement of his approval of the case of *Duthie's Trustee* v. *Kinloch* and other cases which recognised it, is perhaps explained by the first sentence in his judgment, which runs thus—"The appellants, as trustees under an antenuptial contract between Dr and Mrs Edwardes dated 20th February 1855, hold in trust a sum of £4000, which was settled by the lady's step-father upon the spouses and their children." Had this been so, the rule referred to would have been conclusive of the case, for then the beneficent giver of the £4000 in question, and the party to the marriage-contract with respect to it being dead, his expressed intentions were protected by the rule, and could not be defeated by an arrangement among the objects of his bounty even on the assumption of vesting and consequent certainty. But it was not so, the fact being, as I have stated, that the money was the wife's, and settled by her. This misapprehension, really unimportant in itself, explains what is said by his Lordship on a rule which otherwise has no very obvious application.

We cannot reject and refuse effect to this will as *ultra vires* of the testator, or put a construction on it at variance with the plain meaning of its clear and familiar language without affirming some general proposition in law of the greatest, even startling magnitude and importance. What is that proposition? Rejecting the propositions which I have propounded as in my opinion sound, we must affirm others, and they must be of the most general and extensively applicable character, for we are not dealing with a case of special or peculiar features and circumstances. Are we to give it forth that so far as our judgment goes it is a rule of the law of Scotland that a marriage-contract is so lastingly and conclusively binding that the only parties to it, and the only parties interested in it, or who can possibly ever be so, cannot alter it in any particular; and that those who have been by themselves named as trustees under it may always step forward and veto any change. Or is a change impossible only where trustees have been named? Or is this Court to exercise a discretion as to what change may be made and what not?

We must in this case act on a rule which by so doing we sanction and proclaim as a general rule, the case being general and in no way special or exceptional. I never saw a more general case or one which must of necessity be decided on a more general and more largely applicable rule of law. Can we limit it to cases where an annuity or liferent is given? On what principle can we do so, assuming that the parties may alter a marriage-contract in which they alone are interested, just as the parties to any other contract may? Are there religious considerations, but these applicable only where a liferent or annuity is given, for which, on religious grounds, no fee whatever can be accepted in substitution, or even, I suppose, a liferent of another property, however much larger and more valuable it may be.

I only wish to say a few words as to the difficulty of imputing to the testator the intention of giving his wife the fee of the estate burdened with the alimentary liferent. The will is an English will, and by the rules of law we must give effect to it as if it were a Scots deed in absence of any proof that the English law attributes a particular meaning to the words used. The language used is—"I devise and bequeath all my real and personal estate, including any property over which I have power of appointment, whatsoever and wherever, unto my dear wife absolutely." There can be no dubiety as to the man's meaning if he has the power. He gives all he possesses to his wife absolutely. Then he calls in a Scots solicitor to give effect to his will. The Scots solicitor proposes a codicil, recalling the appointment of the executor by the English will, and appointing the wife as "the sole executor of my said will." The meaning imputed by the first party to the codicil is that the testator appointed his wife to be his executor to ingather his estate, and hand it over to the marriage-contract trustee to hold for her alimentary use during her life. I must say that to impute such an intention to the maker of the will and codicil in my opinion approaches the ridiculous.

I am therefore of opinion that it was the intention of the testator that his wife should have the unburdened fee of his estate, that the will and codicil were not in excess of the power of the testator, and that they should receive effect.

LORD RUTHERFURD CLARK—By antenuptial marriage-contract Mr Eliott disponed his whole estate to trustees for payment to himself during his lifetime, and after his death to his wife if she should survive him, "of the free annual income thereof, for the liferent and alimentary use allenarly of them and the survivor of them, declaring that the same shall not be affectable by the debts or deeds of either of them, or the diligence of their creditors." The fee was settled on the children of the

marriage, and in the event of there being none, the trustees were directed on the death of Mrs Eliott to convey the estate to the heirs and assignees of Mr Eliott.

The conveyance contained in the contract came into operation on the celebration of the marriage. The question which we are asked to determine is whether the trustees are bound to denude. Mrs Eliott survived her husband and thus became entitled to the alimentary liferent. There were no children of the marriage, consequently the fee was not disposed of by the marriage-contract. It remained in Mr Eliott.

By his will Mr Eliott devised and bequeathed all his real and personal estate to his wife absolutely. He makes no reference to the marriage-contract.

The question before us is, whether Mrs Eliott can require the trustees to denude in her favour, with the necessary effect of extinguishing her alimentary liferent? She maintains that they are bound to do so by reason of her husband's will, by which he has made her absolute fiar, and by which, as she contends, he has signified his consent that the liferent should be terminated.

We have not to consider the question whether the spouses had the power of altering the marriage-contract during the subsistence of the marriage. They made no attempt to do so, and I think that there can be no doubt that on the dissolution of the marriage Mrs Eliott took under the contract an alimentary liferent in her husband's estate. It is not, I think, difficult to determine the legal qualities of that right. The liferent is created and secured by the constitution of a trust. By the trust-deed it is declared that it shall not be affected by her debts or deeds, or by the diligence of her creditors. In my opinion it is an estate which she cannot assign, renounce, or discharge. This is, I think, well-settled law, and I need cite no other authority than the cases of *Rennie*, as decided in the House of Lords, 4 Bell, 221, and of *White*, 4 R. 786, as well as the case of *Hughes*, to which I shall have occasion afterwards to refer.

Mrs Eliott does not contend that as a mere alimentary liferenter she can put an end to the liferent, nor, in my opinion, could she maintain with success that she is entitled to require the trustees to denude from the mere fact that she has come to have right to the fee. That fact could not justify any such demand unless she could show that of legal necessity the liferent perishes by being merged in the fee. I see no reason for thinking that there is any such necessity. The trust-deed was constituted in order to the creation and protection of the liferent, and was probably essential for that purpose. So long as it exists the benefits of the liferent are secured to the liferenter. The legal title is in the trustees, and Mrs Eliott, whether as liferenter or as fiar, has nothing more than a claim against them. These claims are distinct, and with the legal title in the trustees there is no difficulty in keeping them distinct and in maintaining both.

I do not mean to suggest that the beneficial fee is not vested in Mrs Eliott. The fact that she has an alimentary liferent over it is no impediment to the condition that the liferent must be preserved. Mrs Eliott has the full fee. She may dispose of it as she sees fit, and it may, I think, be attached by her creditors. But her deeds and the diligence of creditors will be postponed to the liferent, and will be suspended until the liferent terminates. In other words, the fee cannot be disposed of or attached to the detriment of the alimentary liferent. But there is no other limitation on the rights of the fiar or of the creditors of the fiar.

The argument on which Mrs Eliott relied was that both the spouses consented to the discharge of the liferent. I do not require to consider the question whether the liferent could be terminated with the joint assent of the spouses. For in my opinion the argument fails on the fact. I am unable to read the will as signifying Mr Eliott's consent to the determination of the alimentary liferent. I think that it expresses no more than that his wife should have all the estate which he had the power to convey, or, in other words, the estate burdened with the alimentary liferent. Such a liferent secures her due support and maintenance after his death. He made this provision for her in his marriage-contract, and I do not think that he meant to alter it by a will which makes no reference to that contract, and which can receive full effect consistently with the preservation of the liferent. He merely made an addition to those rights which were already vested in her by giving her a power of disposing of the fee. He has signified nothing more than that she should have both the alimentary liferent and the fee. I do not attach importance to the use of the word absolutely. A fee and an absolute fee are precisely the same. I do not think that Mr Eliott in giving the fee absolutely intended to distinguish the right he was then giving from the right given under the marriage-contract, or to indicate that he was substituting the one for the other. It seems to me that he meant no more than to declare that he did not by his will impose any limitations on the fee which he thereby gave.

We are not without authority, and to my mind conclusive authority. In the case of *Hughes*, Lord Watson, with the concurrence of the other noble Lords, said—"The learned Judges of the Inner House who decided in favour of the pursuers do not suggest that a trust duly constituted for payment of an alimentary annuity can be brought to an end by the joint action of the annuitant and the parties having beneficial right to the fee. A rule to the contrary has long been settled, and was recently enforced in *Whyte's Trustees* v. *Whyte*, 4 R. 786, and *Duthie's Trustees* v. *Kinloch*, 5 R. 858. In both instances the parties entitled to the fee had a vested interest, which is not the case here; and in *Duthie's Trustees* v. *Kinloch* the alimentary liferenter and the beneficial fiar were

one and the same person. Yet it was held that the combined action of all parties interested could not defeat the settlor's intention to make the annuitant's right alimentary, a result which could not be attained except by continuing the trust."

The language seems to me to be conclusive of the present case. For of course it did not escape the notice of Lord Watson in *Duthie's* case that the limited right and the fee were created by the same person, and I take him to mean that a person who has created alimentary liferent by means of a trust does not put an end to that liferent by giving the fee to the liferenter. It is said that it was merely *obiter*, and that is true in the sense that the case was decided on another ground. But to my mind it is not the less authoritative. It is the statement of what the House regarded as a well-settled rule, and in my opinion I should be bound to follow that rule, even if I were not convinced that it was sound.

It was urged that Lord Watson mistook the import of the case of *Duthie* when he said that the Court held that a trust could not be determined when the alimentary liferenter and the beneficial fiar were one and the same person. It is true that in that case there was no liferent. The truster had directed that an alimentary annuity should be purchased for his sister, and that the title to the annuity should be taken in the names of the trustees. By a subsequent codicil he revoked the residuary clause of his trust-deed and left the whole residue to his sister. There could be no doubt that the whole estate belonged to her partly as an annuity and partly as residue, and that if the annuity was not to be bought, she was fiar of the money which would be necessary to purchase it. If she could sell or discharge the annuity she would have been entitled to prevent the trustees from purchasing, and to require them to denude. For the Court will not allow trustees to do against the wish of a beneficiary what the beneficiary can undo. But the Court refused to pronounce such an order, because they were of opinion that she could not discharge the annuity. I do not think that there was any doubt on this question. The only point which was discussed was, whether the direction to purchase an annuity was revoked by the subsequent codicil?

In a question of this nature I see no difference between an alimentary annuity to be bought from the estate of which the annuitant is owner, and an alimentary liferent on an estate of which the liferenter is the fiar, so that the language of Lord Watson if erroneous in form is to my mind accurate in substance. But were it otherwise, we have the expression of a distinct opinion, in which the other noble Lords concurred, that where a trust is constituted in order to the creation of an alimentary liferent, the trust cannot be brought to an end because the liferent and fee happen to coalesce in the same person. I should be very unwilling to decide to the contrary.

Holding, therefore, that the liferent does not perish by the fact that Mrs Eliott is beneficial fiar, and that Mr Eliott has not signified his consent to the termination of the liferent, I am of opinion that Mrs Eliott cannot require the trustees to surrender. I have not entered on the question whether such consent would avail her. I think it better to reserve my opinion. My impression is that it would not. I do not see how he could by his will alter the quality of the estate which had vested in her at his death, or how he could empower her to renounce the alimentary liferent secured to her by the marriage-contract.

LORD ADAM—My opinion is in accordance with that of Lord Young.

LORD M'LAREN—My opinion coincides with that of Lord Young and Lord Adam.

The first question is the question of intention. The testator in his will does not use the word fee, or residue, or reversion, or any equivalent term, but professes to give to his wife his "real and personal estate absolutely." He adds, parenthetically, that he includes any property over which he has the power of appointment. If these words are not sufficient to express an unqualified gift of the testator's estate, then the English language must be incapable of expressing the distinction between a universal legacy and a gift of the same estate burdened by a liferent.

On the second point I have always understood that alimentary conditions were effectual in law as being conditions of the gift or contract to which they relate, and I cannot assent to the description of an alimentary right as a particular kind of estate in any other sense than that it is a conditional gift. If a father in his lifetime puts a sum of money into the hands of trustees to provide an alimentary life interest to his son, it is, I think, self-evident that the father and son by their joint act can put an end to the trust. They alone are interested in its fulfilment, and the father's consent is of course sufficient to release the son from his obligation not to assign the life interest or to allow it to be carried away by creditors.

The reason why alimentary trusts are indissoluble when constituted by will is that the testator being dead, his consent to the revocation of the alimentary trust cannot be obtained. This is the only legal proposition which I can extract from *Duthie's Trustees* and similar cases; the question in such cases always is, whether the testator meant by his codicil to revoke the alimentary liferent and to give the fund in property, or whether he meant the legatee to take an alimentary liferent and a fee concurrently.

But in the present case the alimentary liferent was constituted by a marriage-contract, and its efficacy depends on contract. Supposing there were no trust, but only an obligation to provide an alimentary liferent, there is no reason that I can

discover why the husband and wife during the subsistence of the trust should not by their joint act discharge the obligation. Such a discharge would of course be revocable by the wife on the ground of *donatio inter virum et uxorem*, but if the husband gave her a better provision she would not be likely to exercise the right of revocation.

Now, in the present case there is in the contract of marriage the form of a conveyance to trustees. But then it is a conveyance of the husband's whole estate, and it is a settled point in the law of marriage-contracts that such a trust only comes into operation on the husband's death.

Accordingly, it appears to me that in the present case it was quite open to the wife, upon the terms of her husband's will being made known to her, to elect to take under the will instead of taking under the marriage-contract. If my view upon the first point be correct, she could not take under both instruments, but her husband's will on that view is a discharge of the alimentary condition so far as he is concerned, and the wife's election to take under the will is a discharge of the condition on her part. No human being is interested in the fund except the spouses, and there are no trustees put into possession in Mr Eliott's lifetime who could interfere with their action.

The trustee very properly states that he is willing that Mrs Eliott should have the capital, but he does not feel at liberty to part with it unless with the authority of the Court. He only comes into possession on Mr Eliott's death, and his possession for purposes of administration of the real and personal estate left by Mr Eliott can be no bar to the exercise of Mrs Eliott's election to accept the testamentary gift of her husband's estate. In such circumstances I cannot help thinking that the right claimed by Mrs Eliott is demonstrably clear.

LORD KINNEAR—I agree with Lord Rutherfurd Clark. I admit the force of the argument that the parties to a contract may in general by mutual consent alter or cancel stipulations which they themselves have made and in which no other person is interested. I do not, however, think it necessary to determine the conditions under which that doctrine will avail to put an end to a trust which has once been effectually constituted for the protection of an alimentary liferent. To make any agreement effectual for that purpose it must be made quite clear, not only that the parties interested have consented, but also that they all have power to consent, and it appears to me very doubtful in the present case whether the wife had such power. But the husband and wife have made no agreement to cancel the stipulation of their marriage-contract, that the income of the trust estate should be an alimentary provision for the wife in case of her survivance, and should not be affectable by her debts or deeds or the diligence of her creditors. The question is, whether the husband has cancelled it by the terms of a bequest in his will?

Now, if he had declared in terms that the stipulation should have no force and had revoked the conveyance in trust for that purpose, I think that that declaration of his will would have been inoperative and that his wife's right would have remained exactly as it stood under the marriage-contract. A husband may of course give his wife more by will than he has undertaken to give her by contract, and therefore he may liberate her from a mere restriction upon her enjoyment of his estate which has been laid upon her for the protection of other interests which have been determined or have never emerged, and not for her own benefit. But the stipulation in question is not a mere restriction. It is a stipulation for the benefit of the wife that her liferent shall be protected from the diligence of her creditors. I do not understand it to be maintained that the husband could, without her own consent, deprive her of the benefit of this protection for which she and her father—who was a party to the contract—have formally stipulated. But I hardly see how the argument can stop short of that contention. For the argument is that by his will he has given her power to consent to the abolition of the restriction, and the validity of the restriction depends entirely on the stipulation that she shall have no such power. It is not the absence of her consent, but her incapacity to consent, which excludes her creditors from attaching the liferent. It is perfectly well settled, and indeed it is elementary, that money or estate of any kind cannot be placed *extra commercium* and exempted from the diligence of creditors so long as the person to whom it belongs has power to dispose of it at pleasure. This is the principle in which it was held in *Whyte* v. *Whyte's Trustees*, that the only way in which an alimentary right can be effectually created is that which was adopted in the marriage-contract in question—that is, by the constitution of a trust under which the trustees are prohibited from giving any effect to the claim of assignees or arresting creditors, and which the liferenter or annuitant is effectually debarred from discharging. It appears to me to follow that the husband cannot liberate his wife from the restraints involved in the alimentary character of the right without necessarily and at the same time depriving her of the protection for which she had stipulated, and opening the estate by his will to the diligence of her creditors. A trust which she has power to determine at pleasure is totally ineffectual for the purpose for which it was created, and therefore if the husband by his will has given that power to the wife, the stipulation for the protection of her liferent from creditors is no longer of any validity whatever, whether she desires to avail herself of the power or not. It appears to me that if the meaning of the will is to give the wife an absolute and uncontrolled power of disposal, not only of the fee, but also of the liferent, it

must either be held that the testator has cancelled the protection from creditors by his own act, or else that the bequest is altogether inoperative to alter or affect the alimentary right.

But, however that may be, I agree with Lord Rutherfurd Clark that the husband's will does not purport to relieve the wife of the conditions or deprive her of the protection attached by contract to her liferent right. The estate which he could dispose of by will consisted of the fee under burden of the liferent. That appears to me to be all that is carried by the will. There could be no question either as to the construction of the words of bequest or as to their legal effect if the will had been in favour of a stranger, and I think it makes no difference that it is in favour of the wife. It would have made a very material difference if the bequest of the fee in favour of the liferenter carried with it by necessary implication the determination of all conditions and limitations affecting her liferent enjoyment. But I think it must be taken as settled law that when a person who is vested in an alimentary liferent acquires the fee by a separate title, the two rights are not merged as in the case of a simple liferent, but co-exist in the same person as separate and distinct rights. I agree with what Lord Rutherfurd Clark has said as to the case of *Duthie*, and as to Lord Watson's observations upon that case in *Hughes* v. *Edwardes*. The distinction that has been taken between these cases and the present is no doubt just so far as it goes. They do not decide that. The persons who have imposed a restriction by contract may not remove it by mutual consent. But they decide that an alimentary right which is effectually protected by a trust may still subsist under the conditions by which it was originally limited, notwithstanding that the liferenter has acquired an absolute right in the fee. Now, there is nothing in the will we are construing to affect the alimentary character of the liferent except the absolute terms of the bequest. If that does not by itself merge the liferent in the fee, and give the wife the whole estate by a new title, there is nothing from which it can be inferred that the testator intended to deprive his wife of the protection provided by the marriage-contract, or that he had adverted at all to the conditions attaching to her rights under the marriage-contract in bequeathing to her, in addition to what was secured to her by contract, all the estate he had power to dispose of by will. I think the word "absolutely," upon which so much stress was laid in argument, has no reference to the liferent, with which the will has no concern, but only to the estate which the testator had power to dispone. The legatee's right in that estate is to be absolute and unlimited. But that does not affect the separate right, which he had no power to give or take away. I do not see that the case raises any question of election. I think the wife shall take the liferent by virtue of her marriage-contract, as she would have done if the fee had been bequeathed to a stranger, and that she takes nothing under the will except the fee already burdened by her liferent right.

LORD TRAYNER—I concur in the opinion of Lord Rutherfurd Clark.

The Court answered the question in the negative.

Counsel for the First Party—J. A. Reid—Howden. Agent—Thomas White, S.S.C.

Counsel for the Second Party—Guthrie—Walton. Agents—Drummond & Reid, S.S.C.

Friday, July 20.

FIRST DIVISION.

ROMANES (LIQUIDATOR OF THE SCOTTISH HERITABLE SECURITY COMPANY, LIMITED), PETITIONER.

Process—Process Lost in Hands of the Clerk of Court—New Process Made up by the Use of Copies.

A note was presented by the liquidator in a liquidation under supervision of the Court in which the process had gone amissing in the hands of the Clerk. The Court *allowed* the note to be dealt with as a separate process, copies of the original petition and of the interlocutor sheets being lodged.

Counsel for Petitioner—Maconochie. Agents—Mackenzie, Innes, & Logan, W.S

Friday, July 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

AUCHINCLOSS *v.* DUNCAN.

Agent and Client—Employment of Law-Agent by Curator for Benefit of Minors—Action of Damages for Alleged Professional Negligence—Relevancy.

A father who borrowed money from his minor children, with consent of his wife, directed a law-agent to prepare a bond and disposition in security in their favour over certain heritable subjects belonging to her, but to which she had only a personal title. The bond was prepared and executed, but was not at once recorded. The title was not completed, the property was afterwards sold, and the bond was subsequently found to be invalid as a real security. The children thereupon brought an action of damages against the law-agent for professional negligence inasmuch as he had failed to make the security in their favour valid and effectual.

Held that the action was irrelevant,