being dissatisfied with the determination of the Commissioners, called upon them to state a case for the opinion of the Court.

The appellants maintained that the bond having been discharged to the extent of £2000 in 1887, and discharge duty at the rate of 6d. per £100 having then been paid on that sum, duty was now chargeable only on the balance of £3000, which was the whole extent to which the bond was discharged and required to be discharged by this instrument. They submitted accordingly that it was liable to be charged with 15s. only of *ad valorem* duty, and not £1, 5s.

The question submitted for the opinion of the Court was—"Whether the said instrument, in the circumstances above set forth, is liable to be assessed and charged with *ad valorem* duty of £1, 5s., or whether it is chargeable with *ad valorem* duty of 15s. only?"

Argued for appellants—By the terms of the discharge it was only a partial one, to the extent of £3000, and not general, and it was accordingly liable to duty only on that amount. In creating a bond, an addition might be made to the money already secured, and by the fourth sub-section of the schedule, duty must be paid only on that addition, and, conversely, the fifth sub-section should apply only to the amount actually discharged. The principle of the Stamp Act was not to make a sliding scale, but a uniform duty applicable to the amount actually dealt with. It would be a very dangerous doctrine for the Crown to maintain that partial discharges were not liable to this duty.

Argued for respondents—There was no reference in the schedule to a partial discharge, and the fifth sub-section applied only to a total discharge, as the words used, "total amount," showed. The partial discharge had only been liable to a deed stamp of 10s., as falling under the denomination of "any deed whatsoever not described in this schedule." Thus, where there was a transaction involving several deeds, the *ad valorem* duty stamp would be exacted on the principal one, and the 10s. stamp on each of the others.

At advising—

Lord President—In my opinion, the instrument in question is liable to be assessed and charged with *ad valorem* duty of one pound five shillings.

I think the Commissioners rightly read the fifth sub-section, *voce* mortgage, in the schedule as applying, and applying only, to such discharges as have the effect of wholly freeing the subjects of the security from that security, and that the duty is to be calculated by the maximum of the burden which was ever incumbent by virtue of the security. It results, first, that the duty is payable equally on a discharge of the balance of the money with a discharge of the whole money; and, second, that this section does not apply to a discharge which lifts off from the security subjects only part of the security, but leaves it in part still incumbent.

As this view has the effect of ousting from this section discharges which do not have have the effect by themselves, or in combination with previous discharges, of finally removing the burden, it follows that such discharges are liable to an ordinary deed stamp, for they certainly are deeds, and they are not, in the words of the Act, "described in this schedule."

What course the Department deem it proper to take in exacting the several duties which the statutes authorise, is a matter of administration with which courts of law have not to do.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

The Court pronounced the following interlocutor:—

"Find and determine that the instrument in question set forth in the case is, in the circumstances set forth, liable to be assessed and charged with *ad valorem* duty of one pound five shillings sterling, and decern: Find the Commissioners of Inland Revenue entitled to expenses, and remit," &c.

Counsel for the Appellants—M'Lennan—Younger. Agents — Cumming & Duff, S.S.C.

Counsel for the Respondent—Lord Advocate (Sir C. Pearson) — A. J. Young. Agent—Solicitor of Inland Revenue.

Friday, November 29.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

SHEDDEN *v.* WILSON AND OTHERS.

Trust—Antenuptial Trust—Jus quæsitum tertio — Revocability — Option of Trustees to Repay to Truster.

A truster, in contemplation of her approaching marriage, assigned to trustees her whole estate, heritable and moveable, to be held by them, "*First*, for my liferent use and enjoyment allenarly during all the days and years of my life. . . . *Second*, for behoof of my sisters . . . equally between them and their respective heirs in fee; and *Third*, notwithstanding the provision of liferent and fee hereinbefore contained, it shall be within the power of my said trustees at any time, in their discretion solely, and to the exclusion of every other manner of judging, to advance and pay to me in life either the whole or such part of the capital as they may think fit, and that without any consent or concurrence of any kind whatever." It was further provided that the trust-estate was not to be affected by the debts or deeds of the truster.

The deed was delivered to the trustees.

Held that the deed operated a complete divestiture of the truster's estate, and was irrevocable.

On 3rd February 1894 Miss Jane Dunlop Cochran executed a trust-disposition and assignation, by which, in contemplation of her approaching marriage, she assigned to trustees her whole estate, heritable and moveable. She directed that "these presents are granted and are to be accepted by my trustees in trust always for the following ends, uses, and purposes, viz.—*First*, for my own liferent use and enjoyment allenarly during all the days and years of my life, exclusive of the *jus mariti* and right of administration of any husband I may have; *Second*, for behoof of my sisters Margaret Robertson Cochran or Muir, wife of the said Robert Muir, now farmer, Craignaught, Dunlop, and Jessie Cochran or Anderson, wife of the said Matthew *Anderson*, equally between them and their respective heirs in fee; and *Third*, notwithstanding the provision of liferent and fee hereinbefore contained, it shall be within the power of my said trustees, or the survivors of them, at any time in their or his discretion solely, and to the exclusion of every other manner of judging, to advance and pay to me while in life either the whole or such part of the capital as they may *deem it expedient and* think fit, and that without any consent or concurrence of any kind *whatever*, declaring that all such payments as may be made to me shall be exclusive of the *jus mariti* and right of administration of any husband I may have." She further declared "that these presents shall be held as an alimentary provision for behoof of myself, and shall not be affectable or attachable by the debts or deeds of me, nor by the diligence of my creditors."

The trust deed was delivered to the trustees.

On 6th February Miss Dunlop married Mr John Shedden. On 11th December 1894 an action was raised by Mrs Shedden, with the consent and concurrence of her husband, against the trustees under the above-mentioned trust-disposition and assignation and her two sisters, the beneficiaries under it, craving the Court (1) for reduction of the deed, and (2) alternatively for declarator that it was revocable, and had been effectually revoked by her. The pursuer averred that she had signed the deed in the belief that it was merely a testamentary writing; and pleaded—"(1) The said trust-disposition and assignation being revocable in its nature, and having been validly revoked by the pursuer, decree of declarator should be pronounced, in terms of the alternative conclusion of the summons. (2) Decree of reduction as libelled ought to be pronounced, in respect that the pursuer was, at the date when she signed the said trust-disposition and assignation, under essential error as to its true import and effect."

The defenders averred that the pursuer had been aware of the nature of the deed when she signed it, and that, accordingly, there had been no essential error on her part. They maintained that the trust-deed having been executed by the pursuer in contemplation of marriage, and for her protection during marriage, it was not revocable by her.

The Lord Ordinary (KYLLACHY) on 8th June repelled the first plea-in-law for the pursuers, on the revocability of the trust-deed, and allowed the parties a proof of their averments as to essential error.

Note.—"In this case I have come to the conclusion that the disposition and assignation challenged is upon its legal construction a deed which operated as an irrevocable divestiture of the pursuer. I need not explain the grounds of that opinion. They come simply to this, that the deed is a conveyance to trustees for certain purposes, which appear to me to leave the truster merely such rights as are provided to her under the trust-deed, and I do not think it material—at all events I do not think it conclusive—that under the deed the trustees in their discretion have certain powers which may enable them in effect to restore the estate, or part of the estate, to the granter. I do not proceed on the ground that the deed, while essentially revocable as a mere trust for administration, is irrevocable during the subsistence of the marriage. I do not, in short, proceed on the argument which was pressed on me, founded on the application of the cases of *Pringle* v. *Anderson*, 6 Macph. 982; *Torry Anderson* v. *Buchanan and Others*, 15 S. 1075; and *Menzies* v. *Murray*, 2 R. 507. I reserve my opinion upon the application of those cases to trusts of that description. I do not require to consider that position, being of opinion that this was, as I have said, a divesting and irrevocable deed. That being so, I do not know that there is any further question to be decided. Both parties are agreed that there must be inquiry with regard to the averments of the pursuer to the effect that she executed the deed under error, and I am glad that the questions as to whether it would be safe to liberate the granter of such a deed from its provisions, and with respect to what is represented as delivery, have been considered more suitable for proof than jury trial."

Proof was led by the parties, and on 20th July the Lord Ordinary assoilzied the defenders from the conclusions of the action.

The pursuer reclaimed, and argued—The deed was not irrevocable. The trustees might without any breach of trust reconvey the whole estate to the truster, and accordingly all the right that the beneficiaries could be said to have under the trust-deed was a mere *spes successionis*, which could be defeated at any moment by an act within the sole discretion of the trustees. Accordingly there was no *jus quæsitum* in them as to prevent the truster from revoking—*Fernie* v. *Colquhoun's Trustees*, December 20, 1854, 17 D. 232. That being so, the beneficiaries might be said to be out of the way, and the present case was assimilated to *Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027; and *Murison* v. *Dick*, February 10, 1854, 16 D. 529, where revocation of a deed made voluntarily before marriage was allowed on the ground that no *jus quæsitum tertio* had been created. The present case was distinguishable from

Downie's Curator Bonis v. *Macfarlane's Trustees*, July 20, 1895, 32 S.L.R. 715, where an assignation in trust was held to be irrevocable, for there only a specific sum was assigned, while here it was the *universitas*, and, moreover, in that case there was no option given to the trustees to reconvey the whole subjects to the truster at their discretion. The cases of *Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237; and *Forrest* v. *Robertson's Trustees*, October 27, 1876, 4 R. 22, showed that such a deed as this was not effectual against creditors, and accordingly did not operate a complete divestiture of the truster's estate, and was revocable. There were *dicta* to the same effect in *Williamson* v. *Boothby*, June 11, 1890, 17 R. 927. (2) The evidence showed that the deed had been executed by the truster in essential error as to its meaning and effect, and it therefore should be reduced.

Argued for the respondents (1)—As soon as the deed was delivered it was irrevocable, and the evidence showed it had been delivered. The case was ruled by *Robertson* v. *Robertson's Trustees*, June 7, 1892, 19 R. 849; *Downie's Curator Bonis* v. *Macfarlane's Trustees*, *supra*, and *Turnbull* v. *Tawse*, April 15, 1825, 2 W. & S. 80. The deed had been executed in contemplation of marriage, and accordingly there were rights to be protected, and the Court would not deprive the truster—at anyrate *stante matrimonio*—of the protection she had created for herself. The question whether the deed was good against creditors was quite different from the question whether the truster was at will able to revoke this protection which she had given to herself against the influence of her husband. In the cases of *Williamson* v. *Boothby* and *Mackenzie* v. *Mackenzie's Trustees* quoted by the reclaimer, the deeds had not been executed in contemplation of marriage. The fact that the truster had assigned her *universitas*, and not merely a specific sum, did not affect the argument—*Smitton* v. *Tod*, Dec. 12, 1839, 2 D. 225. (2) The evidence showed the truster was aware of the contents and effect of the deed when she executed it.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary both on the construction of the deed and on the result of the proof. The deed, on the face of it, bears to be a present conveyance of the fee to trustees for persons named, and the trust-estate is not to be affectable by the deeds of the truster. The authorities support the conclusion of the Lord Ordinary, and the power of the trustees to give to the truster part of the capital does not displace that conclusion. The power is absolutely at the discretion of the trustees, who hold for the fiars as well as the liferenter, and the estate is in no sense at the call of the truster.

The facts are such that, of the more delicate questions put to us in argument, none really arise. This is not the case of the granter of a gratuitous deed who has not understood the true effect of her deed. I agree with the Lord Ordinary that the result of the evidence is that the pursuer was properly informed of the effect of the deed, and fully understood it.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer — Salvesen — M'Lennan. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders—Vary Campbell—Craigie. Agents—Millar & Murray, S.S.C.

Wednesday, December 4.

SECOND DIVISION.

[Sheriff-Substitute at Dundee.

IRELAND *v.* SMITH.

Nuisance—Hen-Run—Interdict.

A person who had constructed a hen-run and hen-house close to a mutual wall about 30 feet from his own house and 5 feet from that of his neighbour, *held* to have occasioned a nuisance dangerous to health, and causing material discomfort to the latter and the inmates of his house, by reason of (1) foul dust blown from the hen-run and hen-house getting into his house and settling in his larder and preventing its use; (2) offensive smells arising therefrom, which rendered it necessary to keep the windows of the house closed; and (3) the noise made by the hens at night and in the morning; and interdict granted against the nuisance.

In August 1895 David Ireland, coal exporter, 12 Douglas Terrace, Broughty Ferry, raised an action in the Sheriff Court at Dundee against James Nicoll Smith, merchant, Home House, Broughty Ferry, in which he prayed the Court "to interdict the defender from keeping cocks, hens, or other fowls or animals in or about his premises at Home House, Broughty Ferry, so as to cause material discomfort and annoyance and be a nuisance to the pursuer and those living in family with him in 12 Douglas Terrace, Broughty Ferry."

Proof was led before the Sheriff-Substitute (SMITH).

The pursuer and defender were proprietors and occupants of conterminous houses in Broughty Ferry facing the river Tay. Each house had garden ground around it. The mutual wall between the properties was about 5 feet from the pursuer's house, and about 30 feet from that of the defender. The pursuer entered into possession of his house at Whitsunday 1892, and the defender began to reside in his house in October of the same year. The windows of the pursuer's larder and some of his bedrooms were on the side of the house next to the mutual wall.