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

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

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Now, in the present case, according to James Angus's own showing, the money with which those six payments were made was withdrawn with his knowledge and connivance from the firm's funds when both he and his brother knew that the firm was hopelessly insolvent, and that his brother Robert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

LORD YOUNG was absent.

The Court adhered.

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

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

Friday, November 22.

SECOND DIVISION.

[Lord Pearson, Ordinary.

HEDDERWICK *v.* MORISON.

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

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

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

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

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

in the second place, "to hold the said sum of £1000, and to pay and apply the free annual proceeds and profits thereof to and for behoof of" the truster's wife (the present pursuer) "during all the days and years of her life." Upon her death the fee was to go to her children.

Defences were lodged for the trustees and for Morison.

The pursuer averred that prior to the granting of said deed she "had made large advances to the defender (Alexander Morison) amounting in all to more than £1000," and that he, "instead of repaying said indebtedness to the pursuer, granted said deed."

The defender Morison in answer averred that the defender being unable to meet the household expenditure the pursuer contributed thereto to the extent of £200, for which sum the defender, though under no obligation to do so, granted her an I O U on 5th June 1894, payment of which she had received in January 1900; that the "large sums of money received at various times" referred to as the cause of granting the trust-deed were the pursuer's said contributions, amounting to £200, as already set forth; and that the provision in the deed was gratuitous, and had been revoked by the defender as a donation *inter virum et uxorem.*

The pursuer pleaded, *inter alia*—"(3) The trust-assignation referred to in the condescendence being granted in respect of onerous considerations, and the pursuer's rights thereunder having vested and not being affectable by a decree of divorce, she is entitled to decree of declarator as concluded for."

The defender Morison pleaded, *inter alia*, "(2) The pursuer having been divorced from this defender has no further claim or right under said assignation. (3) *Separatim*—The provisions in favour of the pursuer, constituted by said deed, being donations *inter virum et uxorem*, and having been revoked, the pursuer has no right thereto."

Proof was allowed and led. The facts sufficiently appear from the opinion of the Lord Ordinary (PEARSON).

By interlocutor dated 23rd April 1901 the Lord Ordinary assoilzied the defenders from the conclusions of the summons.

Opinion.— . . . "The facts are not quite as stated by either party. They appear to be as follows—At the time of the marriage and afterwards the husband was a clerk in the employment of the firm of which his father was a partner. His nominal salary was £100 a-year, but he was much given to drink, and as his salary was suspended during his absences, the result was that he earned in some years only about half of it, and sometimes a good deal less. The pursuer's mother lived with them for a year or two after the marriage, and helped them a little. But the scale of living was throughout extravagant, and much beyond the available income.

"On the death of her mother in January 1894 the pursuer succeeded to her whole estate. This proved to be of the value of over £850, but of this a sum of £578 was derived from heritable property, which was not realised until some years afterwards. In addition the pursuer received legacies of £50 and £80 from friends in 1895 and 1896.

"All this appears to have gone in the personal and household expenses of the family, including some rather expensive holiday trips, notwithstanding that Mr Morison senior paid throughout for rent, wages, and coal, besides aiding them otherwise from time to time. There is no trace of any undue pressure, or any pressure at all, by the husband upon the wife to induce her so to spend her money, and it is plain from her evidence that the money was not even committed to him as her steward, but was in the main disbursed by herself directly, though doubtless to some extent on his personal expenses as well as her own. The figures given by the defender in his evidence do indeed throw some doubt upon whether so much of the wife's estate was made away with. He gives what appears to be a fairly complete account of the expenditure from the vouchers extant, and of the money that came in, and the expenditure is all accounted for without drawing upon the wife's estate, except to the extent of about £570. I suspect the difference is to be explained by there having been a large leakage of unvouched expenditure. And as there appears to be none of the pursuer's estate left, except the £200 which she has recovered from the defender since the divorce, I take the case on the footing that it all went as mentioned above.

"Two other circumstances must be taken account of in ascertaining the pecuniary relations of the spouses at the time when the husband granted this trust-deed in 1898.

"In the first place, in June 1894, after they had been married for three years, the defender granted to his wife an I O U for £200. The pursuer says on record that this was for an advance of 'a special sum of £200' to the defender. But the fact seems to be, that after the death of her mother in January 1894 the pursuer, having made certain payments out of the estate for household purposes, suggested to the defender that he should settle the furniture upon her, and instead of doing so he granted her the I O U. It did not represent money handed over to him at the time, but was just part of what the pursuer had already paid and was then paying for household expenses. To that extent it may be taken that the husband had acknowledged his wife's money so advanced as a debt, and, as I have said, she sued him for it after divorce, and obtained payment, thereby excluding herself from saying that that £200 was any part of the consideration for which the trust-deed was granted. She says that he did not ask her to hand it back when the deed was signed, that perhaps she ought to have done so, but that she 'thought he had forgotten it.' I prefer the defender's explanation, that almost immediately after signing the trust-deed he asked her to give up the I O U, and that she said she did not know where it was, but that she would look for it and destroy it, and that he understood she had done so.

"The other circumstance is, that, as was known to both spouses, the defender had expectations from his father which, on Mr Morison senior's death in 1898, produced him between £4000 and £5000. It was in some sense upon the faith of matters being set right when these expectations were realised that the pursuer went on squandering her fortune. She herself does not put it very definitely. Being asked, 'Did he say anything about repaying it?' she replies, 'He said it would be all right at his father's death.' Again, she is asked, 'Did you make it a condition of paying the accounts that your husband would repay the money?'—(A) 'He said that he would.' (Q) 'Did you advance the money upon the faith of his assurance that he would repay it to you?'—(A) 'Yes, certainly. He was to repay it at his father's death.' The defender again, while saying that he remonstrated with her about the rate of her expenditure, put it thus—'I never indicated to her that I would repay her on the death of my father.' (Q) 'Did you ever consider that you would be under any obligation to repay her?'—(A) 'I may have.' (Q) 'Did you ever express to her your opinion that you were under obligation to repay her?'—(A) 'No, not in those words, but I have no doubt I said that I would refund the money.' This appears to me the most delicate part of the case; for while the defender's counsel objected to this whole line of examination, so far as directed to prove loan by parole, I think it admissible as bearing on the pecuniary relations of the parties, and particularly on the onerosity of the deed of trust; and when so regarded it does appear to me to disclose an onerous cause of granting. The deed may have been voluntary in the sense that he could not have been compelled to grant it, but it was not gratuitous. So far as his children were concerned, it was in fulfilment of a natural obligation; and as regards the wife, even if it be regarded as a donation, it disclosed an onerous cause of granting which showed it to be a remuneratory donation, and therefore not revocable.

"The deed itself bears to be a family provision by a husband in favour of his wife and children for onerous causes. *Prima facie* the words used in the deed do not import that it was granted in respect of any antecedent relation of debtor and creditor as between himself and his wife. The onerous cause set out in the deed is, not that the moneys had been received from her in loan, which was thereby repaid, but that moneys had been received in such circumstances as to make it right and proper that he should 'make some provision for her and my family.' Now, the proof shows the money to have been 'received' by him only in this sense, that she had made disbursements towards the common expenses of the establishment in the knowledge that his income was altogether inadequate to meet these expenses. To some extent these disbursements had been made for his own personal expenses, but his salary (such as it was) and her own funds had not been kept separate in the matter. All had gone towards the personal and family expenses of spouses living together. Now, I think such payments by her were not recoverable by her from her husband, either as being loans which he was bound to repay, or as being donations which she was entitled to revoke. If they had been payments of her income this would have been quite clear. They were, in fact, payments of capital, but they were all spent in defraying current family expenses. She treated the capital as income, by using it for other than capital expenditure. Nor do I think that the circumstances under which the payments were made created the relation of debtor and creditor between the spouses. There was, I do not doubt, an understanding between them that the money should be 'refunded' when he succeeded to his patrimony. But that falls considerably short of an acknowledgment by him that the moneys had been advanced by way of loan. It appears to me that the truth and substance of the matter is to be found in the trust-deed itself. That deed had its inception in the advice given by Mr Smith to the defender to take that means of discharging the moral obligation under which he lay. It was not demanded by the pursuer, but she accepted it as fulfilling her expectations of what he would do when his father's succession opened.

"Now, the trust-deed is a deed of provision. It is in form a trust by a husband out of his own estate in favour of his wife in liferent and the children of the marriage in fee, and there is no clause carrying the fee to her or her heirs failing children. I take it that this must be regarded as implementing whatever obligation was incumbent on him. In consideration of her having spent her separate estate on the family and household he makes a postnuptial provision, setting apart £1000 of his own estate for her in liferent and the children in fee.

"But this being, both in form and substance, a postnuptial settlement by a husband of part of his own estate in favour of his wife and children, the provisions of it, however onerous, are forfeited in so far as they are provisions for the wife, in consequence of the decree of divorce against her. The only way by which this result can be avoided is by representing the trust-deed as something other than it is. The case for the pursuer truly depends on making it appear (1) that the relation of the spouses at the date of the trust-deed was that of debtor and creditor in a loan transaction, and that the trust-deed was by way of repayment, and (2) that consequently the trust-deed is to be regarded, not as a settlement by the husband of his own property for onerous consideration, but as truly a settlement by the wife of £1000 of her own estate which has been repaid to her by her husband. In this view, the provision being truly one granted at her request out of her own estate in the hands of her husband would not be forfeited through her divorce. I see no reason, however, in the circumstances of this case, why I should draw that inference contrary to the fact.

The sum of £1000 was in fact his money. And however onerous the trust-deed may have been, it appears to me that the provision of income in favour of the offending wife is forfeited just as if it had been contained in an antenuptial contract."

The pursuer reclaimed, and argued—She was entitled to decree as craved. The deed was one for onerous causes. On this point the Lord Ordinary was with her. It was something more than a family provision. It was repayment by the husband of money received by him from his wife, and expended in fulfilling obligations which he was bound by law to fulfil, namely, payment of household expenses. He was bound to recoup his wife for this expenditure, and he did so by placing the money in the hands of trustees. It was thus taken as effectually out of his possession as if he had put it in the hands of the pursuer. The deed contained a recital of the onerous cause of granting, and bore in its terms to be a return for money advanced. The deed was therefore of full force and effect notwithstanding the dissolution of the marriage by the divorce of the wife — Ersk. Inst. i. 6. 30; Bell's Prin., sec. 1616; Fraser's Husband and Wife (2nd ed.) ii. 925; *Countess of Argyle* v. *Tenants of Dollar*, December 19, 1573, M. 327; *Ferguson* v. *Jack's Executors*, January 30, 1877, 4 R. 393. 14 S.L.R. 277.

Argued for the defenders—Whether the deed was held to be gratuitous or onerous the decision of the Lord Ordinary was right. If the deed was gratuitous, then it was a donation and therefore revocable— — Ersk i. 6, 29; Fraser's Husband and Wife, ii. 916. Even if it were not gratuitous, it was a matrimonial provision which was forfeited on the divorce of the wife. The wife's money had been applied to the payment of household expenditure. If a wife spent her own money on household expenditure she was not entitled to demand it back from her husband — *Edward* v. *Cheyne*, March 12, 1888, 15 R. (H.L.) 37, 25 S.L.R. 422. There was no question here about payment of a debt. The wife was not in the position of a creditor. The deed merely conferred a matrimonial provision. This was revoked by the divorce, the law in a question with the innocent spouse regarding the guilty spouse as having died at the date of the divorce — *Johnstone Beattie* v. *Johnstone*, February 5, 1867, 5 Macph. 340, 3 S.L.R. 203; *Harvey* v. *Farquhar*, July 12, 1870, 8 Macph. 971, *aff.* February 22, 1872, 10 Macph. (H.L.) 26, 8 S.L.R. 441, and 9 S.L.R. 421.

At advising—

LORD JUSTICE-CLERK — The question in this case is, whether a deed granted by the former husband of the pursuer by which he placed £1000 in the hands of trustees for the purpose, *inter alia*, of paying the annual proceeds to the pursuer during her lifetime, is to receive effect by the payment to her of these annual proceeds, she having been divorced by her former husband on the ground of her adultery with her present husband. In ordinary circumstances there can be no doubt that a provision made by a husband for his wife would fall on her being divorced, as she must as regards her rights arising out of the marriage relation and provisions made in respect of it, be held to be dead, and the obligations undertaken to have lapsed as if she were dead. But in this case certain circumstances are founded upon as taking the case out of the ordinary rule. It appears that in the early years of the married life of the parties the earnings of the husband were meagre, and that this was the consequence in greater or less degree of his inattention to business as the result of dissipated habits, and that the wife from funds of her own contributed to the maintenance of the family. For part of the advances she made, viz., £200, the husband granted an I O U, and this sum has been repaid to her. But I think it is established that what she contributed was not limited to this sum, but was considerably larger. On the other hand, there is no satisfactory evidence of the amount, neither is there any means of ascertaining how much of it was spent upon what was proper provision for family maintenance. I agree with the Lord Ordinary in thinking that very considerable sums were expended which cannot be held to have been applied as alleged to proper household expenditure.

But however that may be, it is, I think, clear that any advances she made were of her own free will, and that no proper relation of debtor and creditor can be held to have been established between the husband and wife except in regard to the £200, which has been repaid. And the deed in question accordingly does not proceed on the footing of any debtor and creditor relation, although it relates in general terms, as a reason for granting it, that he had at various times received sums of money from his wife, and this is stated as an inducing cause for his granting the deed—he states that only as a reason why it is proper he should make some provision for her and for the family. Thus it bears on the face of it to be a voluntary provision. There is nothing of the nature of admission of a right to recover money from him as under legal obligation. It is a moral and not a legal claim he recognises by making a provision for his wife when he had succeeded to money and was in a position to do so. And accordingly the deed is one essentially of protected provision by which she is secured in an income and in nothing else.

The legal question is, what is the effect of her being divorced for guilt in being unfaithful to her marriage vows? I can see no ground for answering that question in any other way than the Lord Ordinary has done. The money at the time of granting the deed was his to do what he pleased with it. He devoted £1000 to provide, *inter alia*, an annuity to his wife. That he had onerous cause for doing so does not alter the fact that it was a simple postnuptial provision, and that that provision is by law forfeited by the wife by her unfaithfulness resulting in her being found guilty of adultery, and decree of divorce being pronounced against her by a competent Court.

I am therefore in favour of adhering to the Lord Ordinary's judgment.

LORD YOUNG—This is certainly a peculiar case, and presents a question which is attended with difficulty. The Lord Ordinary has taken the view that the decision of the question depends upon whether the relation of debtor and creditor existed between the parties at the time the deed was granted. I do not think that the case depends on this. This action is founded on the deed itself, and is brought against the trustees appointed by the deed to carry out the instructions of the deed by paying to the pursuer the interest of £1000 during her life. Unless the deed has been revoked or destroyed by reason of the divorce, I do not think the trustees would have any answer to this demand, and the action would not be arguable.

Your Lordship said that there was a contention on the part of the pursuer that this case forms an exception to the ordinary rule which, after decree of divorce, deprives an offending spouse of all rights as a spouse. But I think it is part of the rule that it has no application to the estate of the divorced spouse. I therefore am of opinion that the pursuer bases her case not on any exception to the rule but on the rule itself, and maintains that what she claims is part of her own estate, and that the rule does not apply to her estate. I see no ground for the suggestion that this was not the pursuer's estate. She is in this position, that looking to the date of her marriage, her estate did not pass on that event to her husband. For many years she paid the household expenses out of that estate. I do not suggest that by reason of her paying these household expenses the relation of debtor and creditor existed between herself and her husband. I do not think that it did. But I think that when she paid these household expenses, debts which were truly her husband's, although her husband was not by reason of her doing so put in the position of her debtor, yet he came under a moral obligation to make restoration to her, if his circumstances improved, as he believed they would, not as her debtor but as an honourable man. The Lord Ordinary in his note states the circumstances which led him to take this view. I note them as showing that although the husband did not put himself into the position of a debtor who could be sued by his wife as creditor, yet it is found that he was under an honourable obligation to make restoration to his wife when it was in his power to do so. An honourable obligation though it may not be a legal debt, is an onerous cause in connection with such a deed.

Now I venture to put this case. Suppose the husband, instead of paying the money to trustees had put it into his wife's bank account, out of which she had formerly drawn her own money to be expended on household expenses, I think that would have been restoration, and that the divorced wife could not now be deprived of that money. I can see no difference between such restoration of money and the placing of money in the hands of trustees in order to provide the wife with an annuity. I think they are in the same position with regard to the operation of the rule. That rule does not apply to the divorced wife's own estate, and I think that the good sense and good feeling of the matter should lead me to hold that the husband's conveyance to trustees was equivalent to a restoration to the wife of her own estate, and that being so, that the income which she claims should be held by us to be her own property.

LORD TRAYNER—I think the Lord Ordinary's judgment is well founded. The deed on which the pursuer founds cannot in my opinion be regarded as anything else than a matrimonial provision made by a husband in favour of his wife and children. The language of the deed appears to me to be conclusive of this. The only thing that can be said to the contrary is that the narrative of the deed sets forth that the motive or consideration in respect of which it was granted was that the granter had "at various times received large sums of money from" his wife, and it is argued from that that the trust created by the deed was really payment of a debt and not a matrimonial provision. I confess I can scarcely follow such an argument. The character of a deed is not determined by the motive which led to its execution. That is determined by what the deed, in respect of the stated motive, actually and substantially does. Now here, for the reason given, the granter of the deed is moved to do something—not to pay a debt, or to give money on trust to pay a debt (for debt by the husband to the wife there was not, and in the circumstances could not be), but to "make some provision for her and my family," and accordingly it provides a fund, of which his wife (not his creditor) should have the liferent, and his children the fee. It is impossible to read the evidence of Mr Andrew Smith, the gentleman on whose suggestion the deed was granted, and by whom it was prepared, without seeing that in the intention of the parties it was a matrimonial provision which was being made. But I place no weight on that. The deed itself, to my mind, bears conclusive testimony that it was a matrimonial provision and nothing else. That matrimonial provision the pursuer has forfeited by her divorce.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—A. S. D. Thomson—Mercer. Agents—Hossack & Hamilton, W.S.

Counsel for the Defenders and Respondents—Dundas, K.C.—Graham Stewart. Agent—Charles George, S.S.C.