conclusion that the two women should be instantly dismissed.

The pursuer averred that if the defender received the report condescended on (which was not admitted) he made no inquiries to ascertain whether it was well or ill-founded, but at once made the statements complained of, and that in so doing, he acted maliciously.

The defender pleaded, *inter alia*—"(1) The pursuer's statements being irrelevant and insufficient to support the conclusions, the action should be dismissed. (3) The defender having acted and spoken without malice in the execution of his duty, is privileged, and should be assoilzied."

On 2nd February 1904 the Lord Ordinary (KINCAIRNEY) approved of the issue proposed by the pursuer and appointed the same to be the issue for the trial of the cause.

Opinion.—"I think that in this case I must give the pursuer an opportunity of proving malice. I am not going to review the cases on this point. But I think my judgment must be in conformity with the case of *Macdonald* (3 F. 1082, 38 S.L.R. 781), which must be held to have overruled such of the previous cases as cannot be reconciled with it. The question is whether there is any averment, beyond the mere general averment of malice, which will support that general averment? Now, one peculiarity in this case is that the charge of theft was admittedly untrue. It was made in error. That follows at once from the want of an issue of *veritas*. I think I may go further and assume that if the defender had given the pursuer an opportunity of explaining the circumstances, she would have done so to his satisfaction. But he would not listen to her, but hastily and rashly and roughly charged her with the crime of theft. Now, it has been held that the term malice, as used in actions of defamation, does not necessarily imply ill-will, or hatred, or desire to injure, but that a calumnious charge may be made with so much recklessness as to be equivalent to or to indicate malice. And I think it may be that the jury may think that the defender's hastiness and recklessness were of such a character. I think, therefore, that it is not inconsistent with the case of *Macdonald* to hold that the averment of malice is relevant."

The defender reclaimed, and argued—The case being privileged, in respect of the relation of the parties as master and servant, and of the fact that the words complained of were used by the defenders in answer to a request by the pursuer for an explanation, it was necessary that the pursuer should aver specific facts and circumstances sufficient to displace the presumption that the defender acted in good faith. No facts were averred which would raise an inference of malice, and the mere recklessness in the use of words would not set up malice—*Farquhar* v. *Neish*, March 19, 1890, 17 R. 716, 27 S.L.R. 549; *Urquhart* v. *Grigor*, December 21, 1864, 3 Macph. 283; *M'Donald* v. *M'Coll*, July 18, 1901, 3 F. 1082, 38 S.L.R. 781.

Counsel for the respondent were not called on.

LORD PRESIDENT—I think the Lord Ordinary's interlocutor is perfectly right, and that there are adequate grounds for granting an issue in this case. It is true that the situation was one which may have warranted the defender in forming an opinion on which he might have dismissed the pursuer, without giving any reason for doing so, for although in the general case it is only fair to give a servant a reason for dismissal, a master may simply say "I do not wish you to remain any longer in my service." But the defender did not follow this course, did give a reason when he was asked for one, and we find that there was apparently language and conduct on the part of the defender in giving his reason which was of an improper or at least of an intemperate character. What he is alleged to have said was "Clear out at once, or I will fling you out of the door, as the theft is quite clear against you." He is alleged to have stated, not as something which he has been told but as something which he knows, that the theft is clear. That is an unequivocal charge of theft. If a master makes such a charge against a servant without due inquiry, he puts himself in an awkward position. Without saying more, especially as in the case of *Macdonald* we had an opportunity of expressing our views upon a similar question, I think that the Lord Ordinary was right in allowing an issue, and that his interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent

The Court adhered.

Counsel for the Defender and Reclaimer—Horne. Agent—Arthur Adam, W.S.

Counsel for the Pursuer and Respondent—J. C. Watt, K.C.—A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Tuesday, May 17.

SECOND DIVISION.

WILKEN'S TRUSTEES *v.* WILKEN.

Trust — Marriage-Contract — Antenuptial Assignation in Trust by Wife with Consent of Husband—Alimentary Liferent to Wife—Revocation.

By antenuptial assignation Miss E. F., on the narrative that a marriage between her and J. W. was in contemplation, and that they had agreed that before the solemnisation of the marriage her estates should be settled as thereinafter specified, with consent of J. W. conveyed the whole estate, heritable and moveable, which belonged to her or should belong to her during the

subsistence of the marriage, to trustees for the following purposes — (1) Payment of the annual proceeds to E. F. for her alimentary use during the subsistence of the marriage; (2) on the dissolution of the marriage by the death of E. F. leaving issue, payment of the fee to them, this provision being in satisfaction of legitim; (3) on the dissolution of the marriage by the death of E. F. without issue, payment of the estate to her heirs or assignees whomsoever; and (4) on the dissolution of the marriage by the death of J. W. the estate was to revert to E. F. and the trust was to terminate. In the deed J. W. renounced his *jus mariti*, right of administration, *jus relicti*, and other legal rights in his wife's estates.

J. W. and E. F. were married the day after the execution of the deed.

Some years thereafter, no children having been born of the marriage and the spouses being both over sixty-seven, they desired to revoke the deed.

Held that the deed was in effect an antenuptial contract, one of the conditions of which protected the wife's property as an alimentary fund for herself during the subsistence of the marriage, and that it was therefore not revocable.

Watt v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267, *distinguished*.

By antenuptial assignation dated 20th December 1887 Elizabeth Ann Fowler "considering that a marriage between John Wilken . . . and me is in contemplation, and that it has been agreed between him and me that before the solemnisation of the said marriage my estates hereafter specified should be settled as after mentioned: Therefore I, with consent of the said John Wilken, do hereby assign, dispone, convey, and make over to and in favour of my brothers, . . . as trustees . . . for the purposes after mentioned, . . . the whole estate, heritable and moveable, real and personal, of what kind or nature soever, now belonging or due and addebted, or that may belong or become due and addebted to me during the subsistence of the foresaid marriage; . . . and the said John Wilken hereby resigns and renounces his *jus mariti* and right of administration, and also his *jus relicti* and right of courtesy, and all action, right and pretension competent to him by law, in consequence of his said marriage, which he can claim to exercise over the means and estate above conveyed to the said trustees, and over the interest and yearly produce thereof, or upon the said estate and effects upon my death, and the same are hereby declared to be unaffectable by his debts or deeds, legal or voluntary, or by the diligence of his creditors."

The purposes of the trust were—"*First*, That the said trustees shall, during the subsistence of the said intended marriage, pay to me for my alimentary use the free interest or annual proceeds of the whole property hereby conveyed, declaring that my own receipts and discharges, without the consent of the said John Wilken, shall be sufficient exoneration for the said interest and annual profits." *Second*, In the event of the dissolution of the marriage by the death of the wife leaving issue, for payment of the estate to the children or their issue at the period therein specified, this provision being declared to be in full satisfaction of legitim. "*Third*, In the event of the dissolution of the said intended marriage by my death without issue, my said trustees shall hold, pay, and convey the aforesaid means and estate to my heirs and assignees whomsoever. *Fourth*, In the event of the dissolution of the said intended marriage by the death of the said John Wilken, the aforesaid means and estate hereby conveyed shall thereupon revert to me, and my said trustees shall denude themselves thereof accordingly, and the trust shall thereupon be terminated."

Elizabeth Ann Fowler and John Wilken were married the day after the execution of the antenuptial assignation, and thereafter the trustees entered into possession of the trust funds and paid over the income to Mrs Wilken in accordance with the provisions of the deed. The trust funds amounted to about £3955 and the income to £133.

In 1904, Mrs Wilken being 67 years of age and her husband over that age, and no children having been born of the marriage, Mr and Mrs Wilken desired to revoke the antenuptial assignation, and called on the trustees to hand over to them the capital of the trust estate on the grounds that they intended to reside permanently in America and wished to invest the trust funds to better advantage. The trustees were doubtful as to whether the spouses were entitled to revoke the deed, and declined to hand over the estate without judicial sanction.

In these circumstances a special case was presented to the Court by (1) the trustees, and (2) Mr and Mrs Wilken.

The special case stated, *inter alia* — "Parties are agreed that there is now no likelihood of there being any children of the marriage. . . . The parties of the first part contend that the trust assignation is irrevocable, and that during the subsistence of the marriage they are not entitled, nor in safety, to denude themselves of the trust in favour of the second parties, notwithstanding that no issue have as yet been, or are likely to be, born of the marriage, and that their duty is to conserve the trust funds and administer the same in conformity with the provisions of the said antenuptial assignation, which was specially constituted for the protection of Mrs Wilken. The parties of the second part contend that the trust assignation is not of a contractual character, and further, as there cannot now be any children of the marriage, that they are the sole parties who have any interest in the trust funds, and that they are therefore entitled to revoke the trust and to have the trust estate paid over to them. They offer, if necessary, to safeguard the first parties by taking out a policy of insurance

to the satisfaction of the first parties, to cover the risk of possible issue of the marriage."

The questions of law were—"(1) Is the said trust assignation revocable by the parties of the second part? (2) Are the parties of the first part entitled, on the application of the second parties, now to denude themselves of the trust and pay over the capital of the trust funds to the parties of the second part in exchange for a discharge by the latter in their favour?"

Argued for the second parties—The trust deed was revocable. If there had been a proper contract of marriage, they would have had no case. But this was not a contract of marriage. The present case was ruled by the decision in *Watt* v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267. No doubt in that case the husband was not a party to the deed. But the mere fact that the husband was a party did not prevent revocation—*Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120, 9 S.L.R. 106. The only other distinction between the present case and *Watt* was that in the present the liferent to the wife was declared to be alimentary. But in *Watt*, although the word "alimentary" was not used, the liferent was alimentary, the income being declared not to be affectable by the deeds or debts of the wife or by the diligence of her creditors—Bell's Commentaries, 7th edition, i, 124; *Irvine* v. *M'Laren*, January 24, 1829, 7 S. 317

Counsel for the first parties was not called on.

LORD JUSTICE-CLERK—The deed in question is no doubt not in the form of a marriage-contract. But by it the prospective husband and wife in contemplation of their marriage agreed that before marriage was entered into, the wife's estate should be conveyed to trustees for, *inter alia*, her liferent alimentary use. The deed was therefore entered into for the protection of the wife during the marriage and is equivalent to a marriage-contract. The case seems to me to be quite distinguishable from that which was quoted to us in argument. I therefore am of opinion that the first question should be answered in the negative.

LORD YOUNG—I think there is nothing in the argument for the second parties.

LORD TRAYNER—I agree. I think the case of *Watt* is quite distinguishable. In that case the deed was unilateral, and was executed no doubt in contemplation of marriage, but without reference to any marriage-contract or any agreement as to the terms or conditions on which the marriage was to be celebrated. Here the deed is bilateral—it is an agreement not merely executed in contemplation of marriage, but one which the parties agreed should be made and executed before the marriage was solemnised. The conditions which protected the wife's property as an alimentary fund for herself was a condition of the marriage—the marriage took place on the faith of it. I regard that agreement in effect as a contemplated contract; and therefore I apply the doctrine laid down in *Menzies* v. *Murray* (2 R. 507, 12 S.L.R. 373) and other cases. Accordingly I think the first question should be answered in the negative.

LORD MONCREIFF was absent.

The Court answered the first question in the negative, and found it unnecessary to answer the second question.

Counsel for the First Parties—Macmillan. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second Parties—Dove Wilson. Agents—Henry & Scott, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, May 25.

(Before the Lord Justice-Clerk, Lords Stormonth Darling and Pearson.)

CREIGHTON *v.* H. M. ADVOCATE.

Justiciary Cases—Indictment—Time-Latitude—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. c.* 35), *sec.* 10.

Section 10 of the Criminal Procedure (Scotland) Act 1887 provides:—"The latitude now in use to be taken in stating time in indictments at the instance of His Majesty's Advocate shall be implied in all statements of time when an exact time is not of the essence of the charge . . . and when the circumstances of the offence charged make it necessary to take an exceptional latitude in regard to time . . . it shall not be necessary to set forth such circumstances in the indictment or to set forth that the particular time . . . is to the prosecutor unknown; provided always that when exceptional latitude is taken, the court shall, if satisfied that such exceptional latitude was not reasonable in the circumstances of the case, give such remedy to the person accused by adjournment of the trial or otherwise as shall seem just."

An indictment charged an accused person with committing an offence "between 14th January and 6th February 1904 (the particular date being to the prosecutor unknown)." The accused, who was tried before a Sheriff and jury, was convicted, it being proved that the offence was committed in December 1903.

Held, in a bill of suspension and liberation, that under such an indictment the prosecutor could not avail himself of the provisions of sec. 10 as to latitude of time, and the conviction therefore quashed.

Opinion that the latitude implied by sec. 10 ought never to be resorted to except in cases where no ambiguity can arise as to its commencing and conclud-