Tuesday, July 10.

SECOND DIVISION.

MAIN'S TRUSTEES *v.* MAIN.

Marriage Contract — Revocation by Trust Settlement — Alimentary Provision in Favour of Husband — Provision as to Family Portraits in Favour of Cousins.

By an antenuptial marriage contract a wife conveyed her whole estate, present and future, to trustees, with the direction that, in the event of his survival, her husband should receive an alimentary liferent of one-half of the trust funds, which, failing issue, were destined to the wife, her heirs, and assignees. She also assigned and made over to the trustees the property of certain family portraits in trust to allow their use to her during her life and to a cousin during his life, and thereafter to hand them over to another cousin or his son. The wife died without issue, and left a will whereby she directed the trustees to pay over the whole of the trust funds to her husband. *Held* (1) (*dis.* Lord Guthrie) that the wife could not release her husband from the condition that his liferent was to be purely alimentary, and that accordingly the trust must continue in existence in order to ensure this, but (2) that the provision as to the family portraits was testamentary and revocable, and had been revoked.

A Special Case was presented by John Alexander Spens, writer, and others, the trustees under the antenuptial marriage contract of Robert Davidson Main and Janet Jemima Dunlop or Main, *first parties*, the said Robert Davidson Main, the husband, *second party*, George Dunlop, W.S., a cousin of Mrs Main, *third party*, and Mrs Mary Dunlop of Lockerbie House, the universal legatory of Colin Dunlop, her deceased husband, another cousin of Mrs Main, and of her son Colin John Dunlop, also deceased, *fourth party*, to ascertain the effect of certain clauses contained in the antenuptial marriage contract as affected by a clause in the trust-disposition and settlement left by Mrs Main.

The *marriage contract* set forth—"It is contracted, agreed, and matrimonially ended between Robert Davidson Main . . . of the first part (hereinafter called the first party) and Miss Janet Jemima Dunlop . . . of the second part (hereinafter called the second party) in manner following . . . But it is hereby declared that the said trustees shall hold and retain the whole estate hereinbefore specially and generally conveyed to them in trust for the ends, uses, and purposes following . . . (*Third*) They shall pay to the first party as a liferent provision in the event of his surviving the second party (but so long only as he remains unmarried) the free annual income and interest of one-half of the trust estate, which liferent provision shall be paid to him by equal portions at two terms in the year, Whitsunday and Martinmas, beginning the first payment at the first term of Whitsunday or Martinmas that shall happen six months after the death of the second party for the period between that term and the date of her death, and the next term's payment at the term of Whitsunday or Martinmas thereafter for the half-year preceding, and so forth half-yearly, termly, and proportionally thereafter during the lifetime of the third party: But it is hereby expressly provided and declared that in the event of the first party entering into a second marriage the liferent provision hereinbefore conceived in his favour shall cease and determine as at and from the date of such second marriage; and it is hereby declared that the first party shall not have power to deprive himself of the benefit of said liferent provision by sale, assignment, or otherwise in the way of anticipation, but the same shall be paid to him on his own receipts and discharges as a purely alimentary provision, and the same shall not be subject to his debts or deeds or the diligence of his creditors in any manner of way, and subject to the power hereinafter conferred upon the said trustees the surplus income and interest shall be accumulated in their hands and invested by them in virtue of the powers hereinafter contained and added to the capital of the trust estate. (*Fourth*) The said trustees shall hold the fee or capital of the trust-estate . . . for behoof of the child or children of the said intended marriage . . . And failing children of the said intended marriage, or in the event of their being children or their issue but of such children or their issue all dying before their shares shall have vested in them as aforesaid, the said trustees shall pay and make over the trust estate as and when the same is set free for division to the second party and her heirs and assignees . . . . .

. . . .

And further, with the view of preserving in the Dunlop family the property specified and contained in Schedule III hereto annexed, and subscribed by the second party as relative hereto, the second party with consent foresaid hereby assigns, transfers, conveys, and makes over to the said trustees acting under these presents all and whole the property specified and described in said Schedule III in trust that they shall allow the second party the free use and enjoyment thereof during her lifetime, and after her death to allow the same to her cousin, George Dunlop, Writer to the Signet, Edinburgh, during his lifetime, and on the death of the said George Dunlop to hand over said property to her cousin Colin Dunlop, residing at Lockerbie House, Lockerbie, whom failing to his son the said Colin John Dunlop. . . . ." [The property specified in Schedule III consisted of family portraits and an old oak cabinet.]

By her *trust-disposition and settlement*, dated 11th February 1905, Mrs Main, who died on 6th April 1916 survived by her husband, conveyed her whole estates to her husband as her sole trustee and executor, and, *inter alia*, directed him—"And subject to the foregoing burdens and provisions, I hereby provide that the said Robert

Davidson Main shall be entitled to retain and apply for his own exclusive use and enjoyment in absolute fee and property the whole of the said means and estate hereinbefore assigned, disponed, and conveyed to him, nominating and constituting him as I do hereby nominate and constitute him my sole successor and universal legatory: And whereas by antenuptial contract of marriage between the said Robert Davidson Main (therein described as residing at one hundred and fifty Hill Street, Glasgow) of the first part and me (who am therein designed as Miss Janet Jemima Dunlop, residing at number twenty-five Woodside Place, Glasgow), of the second part, dated the twentieth day of January, and registered in the Books of Council and Session at Edinburgh for preservation on the second day of February, both in the year Nineteen hundred and three, it is, *inter alia*, provided that the whole trust estate, heritable and moveable, thereby assigned, disponed, conveyed, and made over by me, with the special advice and consent of the first party thereto, to and in favour of John Alexander Spens, writer, Glasgow, Colin John Dunlop, residing at Lockerbie House, Lockerbie, Dugald Bannatyne, chartered accountant in Glasgow, John Marshall Cowan, doctor of medicine there, and Archibald Hamilton Donald, writer there, as trustees and trustee, for the ends, uses, and purposes of the said antenuptial contract of marriage, shall, failing children of the marriage between the said Robert Davidson Main and me, or in the event of there being children or their issue but of such children or their issue all dying before their shares under said antenuptial contract of marriage shall have vested in them as therein provided, be paid and made over by the said trustees as and when the same shall be set free for division to me and my heirs and assignees, I hereby provide, without prejudice to the generality of the foregoing provisions in favour of the said Robert Davidson Main, that the said trust estate in the hands of the said trustees acting under the said antenuptial contract of marriage, both capital and interest, together with the whole writs, titles, and instructions thereof, shall, in the event of my decease and upon the failure of children or their issue to take under said antenuptial contract of marriage as above mentioned, belong absolutely to the said Robert Davidson Main, and shall be deemed to form part of my said means and estate dealt with hereunder, and the said Robert Davidson Main shall be entitled to call upon said trustees forthwith to denude, and to convey and transfer the whole of said trust estate under their management, both capital and interest, to him, in absolute fee and property: And notwithstanding that the interest bestowed on the said Robert Davidson Main, under and in terms of said antenuptial contract of marriage in said trust estate, is limited to a liferent of one-half thereof, to be paid to him subject to the various conditions and restrictions expressed in said antenuptial contract of marriage, I hereby declare it to be my intention that the provisions referring to said liferent shall not in any way impair the right of absolute property in my said means and estate herein conferred on the said Robert Davidson Main, or in any way delay or suspend the vesting thereof in him, or his right to obtain immediate delivery and possession thereof: And whereas in the said antenuptial contract of marriage, I, with the consent of the said Robert Davidson Main, assigned, transferred, conveyed, and made over to the said trustees acting thereunder all and whole the pictures and other property specified in a schedule entitled 'Schedule III' annexed to the said antenuptial contract of marriage, and subscribed by me as relative thereto, in trust that they should allow me the free use and enjoyment thereof during my lifetime, and after my death to allow the same to my cousin George Dunlop, Writer to the Signet, Edinburgh, during his lifetime, and on the death of the said George Dunlop to hand over said pictures and other property to my cousin Colin Dunlop, residing at Lockerbie House, Lockerbie, whom failing to his son the said Colin John Dunlop, and that I now desire to bequeath the said pictures and property to the said Robert Davidson Main: Therefore I do hereby recall the assignation thereof to the said trustees, and cancel and revoke the power and directions with regard thereto bestowed upon the said trustees in said antenuptial contract of marriage, declaring that the same shall be altogether null and void: And I further direct that the said pictures and other property specified in said schedule shall upon my decease become the absolute property of the said Robert Davidson Main, who shall be entitled to immediate delivery thereof: In the event of the said Robert Davidson Main predeceasing me, I hereby bequeath the residue of my said means and estate, after payment of all debts, charges, and expenses, including the aforesaid legacies, to and in favour of the trustees of the Glasgow and West of Scotland Branch of the National Association for the Prevention of Consumption, to be applied for the maintenance and support of the Sanatorium at Bellfield, Lanark, carried on under the management of the said branch for the treatment of consumptive patients. . . ."

The Special Case set forth—"(10) The first parties stand possessed of the funds and estate conveyed to them *primo, secundo, tertio,* and *quarto* in the said contract of marriage, amounting in value to about £14,000. The family portraits and other property specified in said Schedule III were Mrs Main's property before the marriage, and were in her possession in her house at 25 Woodside Place, Glasgow, prior thereto. In conformity with the directions in the marriage contract they were allowed to remain in her custody till her death, and they are still in the house No. 25 Woodside Place, Glasgow, which she occupied. In the annual accounts of charge and discharge of the first parties' intromissions with the trust estate the portraits and cabinet mentioned in Schedule III were invariably entered as part of the trust funds at the value of £1100. These accounts were audited annually and a specimen of

the docquet which it was the auditor's practice to put on the accounts is printed in the appendix. After being audited the accounts were sent annually to Mrs Main for her perusal, and she annually wrote to the trustees intimating at their request that the said portraits and cabinet were in her possession in her house. . . . . (11) The second party has now intimated to the first parties that he proposes to include in the inventory to be given up by him for estate duty purposes as executor under his wife's trust settlement the whole funds and estate administered by the first parties, and has desired them to make immediate payment to him of the whole of the said funds. He has also claimed the absolute property in and possession of the portraits and other property in Schedule III above referred to. The first parties are arranging to pay over to the second party one-half of the said funds and estate, but are in doubt as to whether they have power to comply further with the said requests or either of them in view of the conflict between the terms of the said marriage contract and the said trust settlement of Mrs Main, and this case is accordingly presented to have these doubts removed. (12) The first parties *contend* that they are bound to hold one-half of the said funds and estate for behoof of the parties respectively entitled to the benefits thereof in terms of the said antenuptial contract of marriage. They maintain that neither Mrs Main nor the second party nor the spouses jointly were entitled to discharge his alimentary liferent in the one-half of the said funds and estate. Further, with reference to the said portraits and other property in Schedule III, the first parties adopt the contentions of the third and fourth parties. (13) The second party contends that Mrs Main by her said trust settlement effectually discharged the alimentary liferent in her estate in favour of the second party which had been provided by the said marriage contract, and conferred on the second party an absolute right to the said trust estate, in virtue of which the first parties are bound to transfer to him the said estate. The second party further contends that Mrs Main by her said trust settlement effectually recalled the destination expressed in the said marriage contract of the portraits and other property in Schedule III above referred to, and that in any event the destination of said portraits and other property in the said marriage contract has, *quoad* the fee, failed by the predecease of the said Colin Dunlop and Colin John Dunlop to whom the fee in said subjects was destined. The second party accordingly maintains that he, as his wife's universal legatory under her said trust settlement, is now entitled to the said portraits and other property as belonging to him absolutely. (14) The third party contends that (*a*) by the terms of the said antenuptial contract of marriage Mrs Main made a *de presenti* irrevocable gift of the portraits and other property specified in Schedule III thereof; (*b*) the said gift has been effectually completed by delivery of the said portraits and property to the first parties; and (*c*) the first parties are bound to hold the same for the third party in liferent in accordance with the provisions of the said antenuptial contract of marriage. (15) The fourth party adopts the contentions of the third party, and further contends that as universal legatory of the said Colin John Dunlop, or of the said Colin Dunlop, she is the fiar of the said portraits and other property to the liferent of which the third party is entitled."

The *questions of law* for the opinion and judgment of the Court were—"1. Are the first parties bound to denude of the whole of the said trust funds and estate (exclusive of the portraits and other property specified in said Schedule III) in favour of the second party; or must they continue to hold one-half thereof and administer the same in terms of the said marriage contract? 2. (*a*) Are the first parties bound to hand over to the second party the said portraits and other property in Schedule III; or (*b*) are they bound to hold the same for administration in terms of the said marriage contract for the third party in liferent and the fourth party in fee; or (*c*) are they bound to hold the same for the third party in liferent and the second party in fee?"

Argued for the first parties—The parties to the marriage contract could neither individually nor conjunctly annul the alimentary qualification of the husband's liferent. But further the expressions used in the trust disposition and settlement which were quite clear and unambiguous, manifested no real intention to abrogate the marriage contract, and such intention must be manifested—*Eliott's Trustees* v. *Eliott*, (1894) 21 R. 975, *per* Lord Rutherfurd Clark at p. 984, and Lord Kinnear at p. 987, 31 S.L.R. 850; *Hughes* v. *Edwards*, (1892) 19 R. (H.L.) 33, *per* Lord Watson at p. 34, 29 S.L.R. 911. The fact that the wife's will conferred the fee on her husband was immaterial—*White's Trustees* v. *White*, (1877) 4 R. 786, 14 S.L.R. 499; *Duthie's Trustees* v. *Kinloch*, (1878) 5 R. 858, 15 S.L.R. 586; *Dewar's Trustees* v. *Dewar*, 1910 S.C. 730, 47 S.L.R. 674. The present case was stronger than that of either *White* or *Duthie*, because here the alimentary liferent originated in a marriage contract, whereas in those cases it started from a testamentary deed. The case of *Martin* v. *Bannatyne*, (1861) 23 D. 705, being only concerned with the construction of a particular marriage contract, was distinguishable. The protection of the surviving spouse was a sufficient and legitimate interest.

Argued for the third and fourth parties—The antenuptial marriage contract was not testamentary *quoad* the pictures, and it was not revoked by the wife in her trust-disposition and settlement. The truster assigned the portraits expressly with a view to keeping them in the family, even to the exclusion of her own children. In this case there was a *de presenti* conveyance with a special purpose, conferring an indefeasable right on the beneficiaries. The subjects were conveyed to the trustees although there was no delivery. Counsel cited the following cases—*Mackie* v. *Gloag's Trustees*, (1884) 11 R. (H.L.) 10, *per* Lord

Watson at p. 15, 21 S.L.R. 465; *Macdonald* v. *Hall*, (1893) 20 R. (H.L.) 88, 31 S.L.R. 279; *Allan's Trustees* v. *Allan's Trustees*, (1907) 15 S.L.T. 73; *Murray* v. *Macfarlane's Trustees*, (1895) 22 R. 927, *per* Lord Kyllachy at p. 934 and Lord M'Laren at p. 937, 32 S.L.R. 715; *Walker* v. *Amey*, (1906) 8 F. 376, 43 S.L.R. 242; *Mitchell's Trustees* v. *Gladstone*, (1894) 21 R. 586, 31 S.L.R. 480.

Argued for the second party — It was essential that nothing should be done to defeat the intention of the truster. That being so, the second party was entitled to receive payment of the trust funds. A contrary decision was not arrived at in the case of *Eliott's Trustees* (*cit.*). The purposes of the marriage contract being at an end when the wife died without leaving issue, except in so far as the trustees thereunder had a duty to hold for the husband, the spouses were fully entitled to alter the agreement in the marriage contract, there being no issue or third party whose interests could be affected. There was nothing to prevent the husband from taking the larger provision which his wife had by her will given him the opportunity of doing. The trust only existed as a means of making the marriage contract effectual. It did not otherwise affect contractual rights. The doctrine of protection did not apply here as, the wife having died without issue, nothing remained to protect. Legally as well as contractually the wife had power to dispose of the fund, and she having exercised this by directing its transfer to her husband, the trustees were bound to deliver it to him. It did not matter that this procedure might lay the fund open to creditors. No delivery of the pictures having been made to the trustees, they remained the property of the wife, who had the right to revoke the provision in the marriage contract regarding them. This she had done by her trust-disposition—*Hewat's Trustees* v. *Smith*, (1892) 19 R. 403, 29 S.L.R. 339. The cases of *Hughes* v. *Edwards* (*cit.*) and *Martin* v. *Bannatyne* (*cit.*) did not apply, and the cases of *White's Trustees* v. *White* (*cit.*), *Duthie's Trustees* v. *Kinloch* (*cit.*), and *Mackie* v. *Gloag's Trustees* (*cit.*) were distinguishable. Counsel also cited *Anderson* v. *Buchanan*, (1837) 15 S. 1073; *Menzies* v. *Murray*, (1875) 2 R. 507, 12 S.L.R. 373; *Moncreiff*, (1900) 8 S.L.T. 281.

At advising—

LORD JUSTICE-CLERK—[*After narrating the facts and the contentions of parties*]—In my opinion the contentions of the first parties are sound, and we should answer the first alternative of the first question in the negative and the second alternative in the affirmative.

We had a full citation of authorities in the course of the argument before us, but ultimately I think the controversy came to depend on whether the views expressed in *Martin* v. *Bannatyne*, 23 D. 705, and by the minority in *Eliott's Trustees* v. *Eliott*, 21 R. 975, or those expressed by the majority in the latter case, should be held to apply and be given effect to.

I am of opinion that the case of *Martin* is not applicable to the present dispute. In that case, by antenuptial marriage contract Mrs Martin and her father made over to trustees £2500 for the joint-liferent of the spouses and the survivor of them also in liferent as an alimentary provision for the support of himself or herself and the children of the marriage and for behoof of the children in fee, and failing children, then for behoof of Mrs Martin and her heirs and assigns in fee. The husband died without issue, leaving his whole property to his wife. It was held that the widow was entitled to payment of the sum disponed to the trustees by her father and herself. The whole question turned there on the construction of the marriage contract. There were no other or competing provisions in any other deed. It was held that under the marriage contract whenever the marriage relations came to an end "that alimentary provision came to an end also, and the lady became, as before, absolute and unlimited fiar of her own fortune" (*per* Lord Justice-Clerk Inglis at p. 709). The words by means of which the fee was reserved to the lady were held to be of the most absolute character, and "as giving a right of fee to Mrs Martin on the marriage coming to an end by the death of her husband." There the wife claimed her own fortune from the trustees and obtained it, because under the marriage contract she was on the death of her husband "the sole and absolute fiar" of her own estate.

In my opinion a decision which only determined the construction of the particular marriage contract which was there concerned, and which related only, so far as it was said to bear on the present case, to the interests of the widow in her own estate, cannot be of assistance to us in determining the present controversy.

Here the wife by her antenuptial marriage contract made a certain provision for her intended husband by conveying certain estate to trustees, and directing them to hold one-half thereof for him as a liferent provision (so long only as he remained unmarried), and declared that "he should not have power"—[*His Lordship read the third direction to the trustees in the marriage contract.*] The property in question was completely conveyed and transferred to the trustees and held by them for the trust purposes. It ceased to be the property of the wife, who was completely divested thereof, and in my opinion it could not revert to or be disposed of by her until the trust purposes were satisfied. I think the wife had no power after the celebration of the marriage on the faith of said marriage contract to innovate upon or revoke any of the provisions therein which were in favour of the husband by a *mortis causa* trust-disposition and settlement. It is said that by the *mortis causa* deed she has simply freed the husband from restrictions and has converted him from a protected liferenter to an absolute fiar, and that he is entitled after her death to homologate and adopt what she has done. This may be to the advantage of the husband in the existing circumstances, but it might quite well have

been greatly to his prejudice in the event of his having become bankrupt between the date of the *mortis causa* deed and the death of the wife. I think it would be unfortunate if the law permitted a wife who has entered into such an antenuptial marriage contract as we have here, to be exposed to the solicitations of the husband in order to prevail on her to alter the disposal of her fortune as it is contended she has done here. I respectfully agree with and adopt the reasoning of Lord Rutherfurd Clark and Lord Kinnear in *Eliott's* case. In my opinion the wife had by the marriage contract effectually put it beyond her power to destroy the protection which that marriage contract was intended to give, and in my opinion effectually gave, to the husband's liferent. She could, no doubt, add to the husband's provisions, and so she could make him fiar as well as liferenter. But a fee and a protected liferent may coexist in the same person, the fee being restricted so far as is necessary to preserve the protection of the liferent. In my opinion that is the result here.

As to the property contained in the third schedule, I am of opinion that the provisions in the marriage contract were merely testamentary, and that accordingly effect must be given to the provisions of the *mortis causa* deed so far as these articles are concerned. I am therefore of opinion that head (*a*) of the second question must be answered in the affirmative and heads (*b*) and (*c*) in the negative.

I refer to the case of *Macdonald* v. *Hall*, 20 R. (H.L.) 88.

LORD DUNDAS—The first question is whether or not the first parties (the marriage-contract trustees) are bound to denude in favour of the second party (the husband) of the one-half of the trust estate which in terms of the marriage contract is to be liferented by him in the event of his surviving his wife, unless he should thereafter remarry. The marriage contract provided that the husband should "not have power to deprive himself of the benefit of said liferent provision by sale, assignment, or otherwise," but the same should be paid to him on his own receipts "as a purely alimentary provision," not subject to his debts or deeds or the diligence of his creditors. The second party contends for an affirmative answer to the question above indicated.

It would not, I apprehend, be enough for him that he has right to both the liferent and the fee of this fund, for it is quite possible for a liferent alimentary and a right of fee in the same property to coincide in the same person without any merger or confusion. They are separate legal estates and may be held on different titles.

But it was argued that in the circumstances set forth in the case, looking to the provisions of the wife's testamentary settlement and to the husband's assent to its terms, the liferent in the latter's person had lost its strictly alimentary character. The settlement and the assent were said to be equivalent to an agreement or contract between the spouses *inter vivos* that the husband should, if he survived his wife and no children had been born of the marriage, have the unburdened fee of her estate.

It was argued, and so far I agree, that in the general case parties to a contract may alter or terminate it by mutual consent provided that no interest of any third party be involved. But it would be another and in my judgment a more delicate matter to determine how far or under what conditions it may be possible for parties to terminate by mutual consent a trust which they have chosen to constitute for the protection of an alimentary liferent. It was contended that the parties to an antenuptial marriage contract are at liberty, where it contains no provision for children of the marriage, or where such provision is quite independent of the spouses' mutual rights by way of liferent, to alter the latter at pleasure by their joint consent notwithstanding the creation of the marriage-contract trust. I am not prepared to assent unreservedly to the proposition thus broadly stated. The case of *Martin* v. *Bannatyne*, 23 D. 705, founded on by the second party as an authority in its support, does not seem to carry one very far. It turned mainly upon the construction of the marriage contract there under consideration, upon the terms of which it was held that the widow was entitled to demand that the trustees should denude in her favour of the funds which she had put into the trust, in accordance with the ultimate destination to her which (it was decided) had come into active operation, notwithstanding that the marriage contract conferred an alimentary liferent of these funds on the surviving spouse for the support of herself and the children of the marriage, which had been dissolved without the birth of any child. "In *Martin's* case the whole trust purposes had been fulfilled—there were no longer any interests to protect, and in short the marriage contract was no longer operative and was at an end"—*per* Lord President Inglis in *Montgomery's Trustees*, 1888, 15 R. at p. 372.

But I do not find it necessary to decide whether the spouses in the present case might or might not have validly agreed *unico contextu* to cancel the stipulation that the husband's right of liferent should be alimentary. They did not do so during their joint lives. During the wife's lifetime the stipulation in the marriage contract admittedly remained in force. She had at her death power to dispose by her will of the fee of her estate, but subject *quoad* one-half to the burden of a liferent alimentary in favour of her husband. That, I take it, was all that she had to dispose of, or could dispose of, by will. But it was argued that she has by her testamentary settlement in effect revoked the stipulation in the marriage contract as to the alimentary character of her husband's liferent, and validly declared it to be no longer of force or effect. I do not think she had power to do this. She could not, in my judgment, deprive her husband, by her own volition, of the protection which the marriage contract afforded to him as liferenter against his creditors.

This indeed was I think conceded, but it was contended that she had in effect put it by her settlement in the power of her husband to elect whether or not the stipulation should remain effectual. But it seems to me that the creation of a power so to elect must *eo ipso* cancel the protective stipulation. If he be free to elect, his creditors could also elect, and the protection is gone. In my opinion therefore, viewing the question in accordance with principle, the intention expressed by the wife's settlement was inoperative and ineffectual from want of power on her part to give effect to it, and cannot be rendered effectual by any assent on the part of her husband given after her death.

So far as authority goes, I think the question must be considered to be an open one. But it was present in the case of *Eliott's Trustees*, 1894, 21 R. 975. What was there decided by a Court of Seven Judges was that the husband, who predeceased his wife, had not by his testamentary settlement evinced an intention (I quote the rubric) "to discharge his estate of the alimentary liferent in his widow's favour, and consequently that the trustee was not entitled to denude of the trust estate." But the opinions were expressed as to whether or not he had power to discharge the burden. Three of the judges thought that he had, but four thought he had not. By some strange inadvertence Lord Kinnear's name is omitted in the rubric as having been—along with the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Trayner—of the latter opinion. Yet he not only expressed it, but (alone of all the judges) made it his leading ground of judgment. The facts in *Eliott's* case appear to me to be as nearly as possible identical with those here present, except that the husband (not, as here, the wife) was the predeceaser, a distinction which, so far as I can see, makes no material difference. The second paragraph in Lord Kinnear's opinion seems to me to be, subject to the above distinction, precisely here in point. I cannot see any good answer to his Lordship's reasoning, and I respectfully pray it in aid as expressing, in better language than I can command, the views which I have endeavoured to formulate above. I think that Lord Rutherfurd Clark put forward the same opinion, though more briefly and less prominently, when he said at the conclusion of his judgment that he did not see how the husband could "by his will alter the quality of the estate which had vested in" the wife "at his death, or how he could empower her to renounce the alimentary liferent secured to her by the marriage contract." I do not find that the learned judges of the minority expressly meet, or in any way satisfactorily counter, the points put forward by Lord Kinnear.

I am therefore for answering the first alternative branch of the first question in the negative, and the second in the affirmative.

The second question relates to certain family portraits and an oak cabinet which by the marriage contract the lady conveyed to the trustees in trust to allow her the full use and enjoyment thereof during her lifetime, and after her death to allow the same to her cousin, the third party, during his lifetime, and on his death to hand over the same to another cousin, whom failing to his son, both of whom predeceased her and are represented by the fourth party. By her testamentary settlement Mrs Main expressly recalled the assignation of the said portraits, &c., to her marriage-contract trustees, cancelled and revoked the power and directions with regard thereto contained in the said contract, and declared them to be null and void, and directed that the portraits, &c., should on her decease become the absolute property of her husband, who should be entitled to immediate delivery thereof.

The portraits, &c., are claimed on the one hand by the husband, and on the other hand by the third and fourth parties in liferent and fee respectively. I think the husband is entitled to immediate delivery of these subjects. It seems to me to be impossible to hold that the directions in the marriage contract in regard to them were of a contractual nature, even as between the spouses themselves, or were otherwise than of a purely testamentary character, and as such revocable and validly revoked. If this view is correct it is unnecessary to consider other topics mooted in the discussion of this part of the case.

I am therefore for answering head (*a*) of the second question in the affirmative, and heads (*b*) and (*c*) in the negative.

LORD GUTHRIE—Two matters are at issue between the parties in this Special Case. Both involve the question whether the settlement of the late Mrs Main, the wife of the second party, dated in 1905, is to be held ineffectual in regard to these two matters by reason of the provisions of the antenuptial marriage contract entered into between her and the second party in 1903.

In regard to the second question, relating to certain pictures and an oak cabinet, I agree with your Lordships that the provisions in the marriage contract relating to that property were testamentary and not contractual, and therefore that the moveable property in question goes to the second party under the provisions of Mrs Main's will.

As to the first question, which deals with half of Mrs Main's estate, I think that the second party, the surviving husband, is entitled to succeed in his claim to the unfettered property of that half of his wife's estate. Under Mrs Main's settlement he was constituted her sole successor and universal legatory. In accordance with the views of the majority of Seven Judges in the case of *Eliott*, 21 R. 975, following, as they considered, previous cases, that provision by itself would only have entitled the second party to payment of half the deceased's estate, and would not have affected the first parties' right and duty to hold the other half in alimentary liferent for the second party, because such a

provision would not by itself have validly expressed an intention by the deceased to affect the second party's alimentary liferent. But it is agreed that in this case, differing from the case of *Eliott*, the deceased's settlement clearly expresses her intention, so far as in her power, to substitute in favour of the second party an immediate and unconditional right of property in the half of her estate, in which the marriage contract only gave him on her death, and subject to re-marriage, an alimentary liferent.

This involves two questions, one general, the other special. The first is—Can spouses, where no third parties' interests are involved, effectually agree, with or without consideration, to deal with antenuptial marriage contract estate in a manner inconsistent with the maintenance of an alimentary liferent constituted by the marriage contract in favour of one of them? The second question is—Suppose the first question is answered in the affirmative, have Mr and Mrs Main validly so agreed—he by the claim made in this Special Case, and she by her settlement? It is said—and there is support for the view in the way the case of *Eliott* was treated—that it is unnecessary to consider the first question, because if the second question is answered in the negative the first question will be superseded. But it may equally well be said that if the first question is answered in the negative the second question will be superseded. That the two questions run into each other, and that whatever answer ought to be made to the first question an opinion should be arrived at on both, is suggested by the fact that all the judges in *Eliott's* case who thought that the deceased's husband's will in question in that case did not sufficiently express an intention to terminate his wife's alimentary liferent, also appear to have thought, although they refrained from deciding the point, that such an alimentary right, if constituted by an antenuptial marriage contract trust, could not be validly terminated by the spouses by any method, *inter vivos* or *mortis causa*, even if the wishes, rights, and interests of third parties, dead, living, or potential, were not involved.

It seems desirable to consider the matter, in the first place, free from the elements of (*a*) contract, antenuptial or of other kinds, (*b*) alimentary interest, and (*c*) relationship. If A constitutes a trust in favour of B, and provides B with a liferent out of funds handed over to trustees without creating any interests in favour of third parties, I know no decided case, nor any legal principle, nor any ground of public policy to prevent A and B, for what might appear to other people sufficient or insufficient reasons, with or without any or what might appear to others sufficient consideration, from bringing that liferent trust to an end, and calling on the trustees to denude on a discharge by A and B. The trustees hold for the truster and the beneficiary; they have no separate estate or interest.

Does the use of the word alimentary have such potency that it prevents the universal right of persons to a contract, with or without reason, owing to an alteration of circumstances or without any such alteration, to change their minds and to act on their change of mind, so long as no other person's interests are prejudiced? I think not. In the case figured it is clear that A, although no interests of third parties are involved, cannot terminate the trust without B's consent, nor can B without A's consent, because the trustees hold for both. But I am unable to hold that the word alimentary has an effect denied to any other word or words in the English or any other language—declaring a stipulation irrevocable will not do it—namely, of clothing a right with such an indelible quality that its character cannot be changed without an Act of Parliament, although the persons who created it and all persons interested in it are willing, and although, it may be, all the reasons which led to the imposition of the limitation have disappeared, and it is certain that the limitation would never have been imposed had the ultimate state of facts been in view.

Next, would the element of express contract make any difference? Suppose A bargains with B in a bilateral deed, with or without consideration, for a similar trust, alimentary or not alimentary, in favour of B, I am unable to see why such a contract should absolutely stereotype the rights of parties, and prevent the contracting parties, reasonably or unreasonably, resolving to bring the contract, and the trust created to carry out the contract, to an end.

But then the contract in question in this case was an antenuptial marriage contract. Marriage implies a special kind of contract, because it may involve the interests of the children of the marriage, and therefore of the State. It creates a status which *stante matrimonio* cannot be ended unless with the consent of the State on cause shown, but which, apart from legal and contractual rights in property, and the interests of children, is ended to all effects by the death of one of the spouses. An antenuptial marriage contract, on the faith of which the marriage takes place, is for similar reasons a special kind of contract. But if no matrimonial interests, existing or potential, are involved, I fail to see any specialty about it, or why, subject to the contingency of the birth of children, an alimentary liferent in favour of one of the spouses, to take effect on the death of the other spouse, should not be modified or cancelled, with or without consideration, by mutual consent of the spouses, where, as here, they are the only parties to the contract.

The reasoning underlying the opposite view seems to be that a husband who has been provided by his wife in an alimentary liferent by an antenuptial marriage contract ought to be safeguarded by the law against his own wiles or threats directed to induce his wife to withdraw the alimentary provision in his favour, even for more than an ample although unprotected equivalent, and against her wiles or threats directed to induce him to consent to the withdrawal. Similarly it seems to be thought that a wife should be protected against her own wiles and threats, and against her husband's wiles and threats, leading her to abandon,

and him to consent to the abandonment of, an alimentary provision in her favour, even for more than an ample although unprotected equivalent. Apart in both cases from the mediæval character of such a reason it appears to me that the law ought not, in this case and no other, to afford a protection for a few weak people, with the result of interfering with the constantly recurring necessity to effect, in human affairs, pecuniary and other adjustments through changes which no human foresight could have originally anticipated.

The second question remains. Suppose Mr and Mrs Main could have contracted, *de presenti*, contingent on there being no children of the marriage, for the substitution in favour of Mr Main of a right of property in one-half of Mrs Main's estate instead of an alimentary liferent, can such a contract be effectually constituted by a provision clearly expressive of intention, such as exists in Mrs Main's will, and an acceptance by Mr Main, so declared as to be legally binding, of the option therein conferred on him? I assume that Mrs Main could not at her own hand, either *inter vivos* or *mortis causa*, with or without equivalent, have deprived her husband of the provision in his favour contained in the contract to which he was a party, and that Mr Main could not have brought the trust to an end after his wife's death, even although he is himself the fiar, or, if he had not been, even with the concurrence of the ultimate fiars.

It is said that the provision in Mrs Main's settlement cannot amount to a consent on her part, because it assumed that she could, at her own hand, bring the trust to an end, which it is admitted she could not do. I do not so read the settlement. What Mrs Main intimates is her intention is that the provisions in the marriage contract should not prevent her husband obtaining immediate delivery for his own sole behoof of the property out of which under that deed he was only to have an alimentary liferent. But suppose Mrs Main's settlement was framed under an erroneous idea that she was mistress of the situation, that does not derogate from the fact that she intended, so far as she was concerned, that her husband should take an immediate fee of her whole estate, and not an immediate fee of half the estate and a fee of the other half subject to the preservation of his alimentary liferent over it.

It is next suggested that the provision in Mr Main's favour being in a bilateral contract, that provision cannot be recalled by a provision in Mrs Main's will, coupled with an agreement on the part of Mr Main, expressed after Mrs Main's death. This view is affirmed by Lord Rutherfurd Clark in *Eliott's* case, where his Lordship said—"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." No reason is given for this view, and I am unable to see any. In the case of an ordinary contract, directions by a truster to his trustees, not to insist in certain provisions in the contract, would be unavailing if the other contracting party objected, or if the interests of third parties were thereby prejudiced. But if, as here, the other contracting party assents, and no interests of third parties are involved, I do not see why the directions of the truster in her settlement should not receive effect, even if, as is alleged, she erroneously believed that she could modify or cancel the contract or part of it at her own hand. The admitted consent of both parties seems to me equivalent to a contract between the spouses *inter vivos*. No doubt Mrs Main could not deprive her husband of his alimentary liferent without his consent, but she retained the power to contract with him afresh, and that power, it appears to me, she has validly exercised, so far as she is concerned, by her will, whether it be considered as an offer which he was free to accept or reject, or as conferring power on her husband to get rid of the limitation on his right. The course taken by Mrs Main was the most prudent one. In 1905 she had come to think the restriction imposed on her husband's right two years before improper. But circumstances might have subsequently arisen which would have made that restriction a suitable one to be retained. By the method adopted by her she left herself free, according to the circumstances at the date of her death, to leave him with the alimentary liferent provided by the marriage contract, contingent on remarriage, or to add to it a burdened fee, or to give him the option of an immediate and unrestricted fee.

An argument, stated by Lord Kinnear in *Eliott's* case, was relied on by the first parties. It is unquestionable that Mrs Main in 1903, in the antenuptial contract, clearly expressed her desire and intention, as at that date, to provide her husband, after her death, subject to his not remarrying, with an alimentary income over half her estate, which his creditors could not touch, and which he should not be entitled to subject to his creditors' diligence. To give effect to her settlement, it is truly said, would be to defeat the desire and intention entertained by her and assented to by him at the date of the marriage contract, because it would open the estate, destined to him in liferent alimentary, to the diligence of his creditors if he remained in the management of his own estate, and would hand over the estate to his creditors if at the date of her death he had granted a trust deed or had been sequestrated. As Lord Kinnear put it—"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. . . . It is not the absence of her consent, but her incapacity to consent, which excludes her creditors from attaching the liferent." This view is indisputable if the law is to ignore the right of people to change their minds, and their right, it may be their duty, to alter their *inter vivos* and *mortis causa* arrangements as circumstances alter, provided they do so without injury to anybody else.

Mrs Main held one view in 1903. Why

should she not hold another in 1905, when she had had time and opportunity to test whether her earlier view was sound or just? If the law, presuming I suppose that the parties will act reasonably, although the law well knows that for different reasons people more often act unreasonably before than during marriage, allows one spouse to provide for another by a restricted right, on what legal principle should it disable the only persons interested in the matter from altering the arrangement at a later period when circumstances have changed and when the restriction has been proved to be unnecessary or unreasonable or even unjust? There are many restrictions on freedom of contract, but these are imposed out of regard to the wishes, rights, and interests of third parties, dead, living, or potential, or on grounds of public policy. The State can have no interest to insist that persons shall be tied to contracts excluding creditors notwithstanding their desire for freedom. The strongest case that can be put is to suppose that on Mrs Main's death Mr Main had granted a trust deed conveying his whole estate to a trustee for creditors, or that he had been sequestrated before he had declared his refusal to accept the provisions in Mrs Main's settlement in lieu of the marriage contract alimentary liferent. In either case the power to consent to the provision in Mrs Main's settlement would be an asset of the property passing under the conveyance to the trustee under the trust deed or in bankruptcy; and the trustee, as Mr Main's voluntary or statutory assignee, could claim the immediate available fee and abandon the alimentary liferent. Why not? The option to Mr Main would still remain, although he might have so acted as to transfer the right to exercise the option to another, by executing voluntarily a trust deed in favour of creditors, or by voluntarily putting it in the power of his creditors to have his estates sequestrated and a trustee appointed, whom the law empowered to exercise all powers and faculties, forming part of the estate of the bankrupt, in his room. In all these cases I see no reason in legal principle or in public policy why the remote possibility of the resulting rights of creditors (arising in each case from the voluntary act of the survivor) preventing a personal and imposing a representative option in the place of the survivor, should interfere with the universal and salutary rule that it is impossible to create any right in favour of another, which cannot be modified or cancelled with the free consent of that other (both being *sui juris*) if no wishes, rights, or interests of third parties, dead, living, or potential, are concerned. The same argument would equally make it impossible for the parties to a contract providing an alimentary liferent to consent, during the life of both, to the modification or cancellation of the alimentary liferent right, because equally in that case, when the alimentary liferent came into operation, the liferenter's estate might be in the hands of a trustee.

It will, in my opinion, be regrettable if the law of Scotland is so helpless as not to allow spouses, who are *sui juris*, to alter their financial arrangements contained in antenuptial marriage contracts or otherwise, as their circumstances alter, and to compel them to adhere to arrangements, in which they are alone interested, when the reasons for these arrangements have ceased to exist. I think it will also be regrettable, although in a minor degree, if the law of Scotland, while allowing such alterations, refuses, in the case of an alimentary liferent under an antenuptial marriage contract trust, to give effect to the clearly-expressed intention of parties, evidenced in this case by Mrs Main's settlement and this Special Case.

I do not think that the cases quoted in the course of the debate, other than the case of *Eliott*, 23 D. 705, have any application. I agree with your Lordship and Lord Dundas in your view of the case of *Martin* v. *Bannatyne*, 23 D. 705. In all the other cases referred to, an attempt was made to terminate a liferent *stante matrimonio*, or without the consent of all the contracting parties, or where the wishes, rights, or interests of the third parties, dead, living, or potential, were involved.

LORD SALVESEN was not present.

The Court answered the first alternative of the first question of law in the negative, and the second alternative in the affirmative, and head (*a*) of the second question in the affirmative, and heads (*b*) and (*c*) in the negative.

Counsel for the First Parties—Anderson, K.C.—C. H. Brown. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Party—Chree, K.C.—R. C. Henderson. Agent—James Purves, S.S.C.

Counsel for the Third and Fourth Parties—Blackburn, K.C.—D. M. Wilson. Agents Russell & Dunlop, W.S.

HIGH COURT OF JUSTICIARY.

(Before the Lord Justice-General, Lord Hunter, and Lord Anderson.)

Monday, July 16.

GUY *v.* MACKENNA.
PHŒNIX *v.* CAMERON.
FREW *v.* CAMERON.

Justiciary Cases—War—Military Service—Exception—"Regular Minister of any Religious Denomination"—Military Service Act 1916 (5 *and* 6 *Geo. V, cap.* 104), *sec.* 1 (1) *and First Schedule IV—Military Service Act* 1916 (*Session II*) (6 *and* 7 *Geo. V, cap.* 15), *sec.* 1 (1).

The Military Service Act 1916, First Schedule, excepts from the military service imposed by the Act—"4. Men in holy orders or regular ministers of any religious denomination." *Held* that