acts, go in the face of that decision? When a matter so important in the law of conveyancing has once been settled as that a trust which shall not be revocable, notwithstanding of the absence of present vested interests in third parties under that trust, may be created in a marriage-contract, I do not think that it would be safe or right to disturb the judgment. Parties know that by the adoption of certain acts and declarations such a result may be obtained, and act upon the faith of it. How can we say that in framing this very deed the case of *Anderson* was not before the parties? The difference of the detail of narrative in a deed is not material. The decision is that of the whole Court, and it has stood as a ruling case for thirty years. It has not been, so far as I know, dealt with as an unsound decision by any judge in any subsequent case, or by any institutional writer. I do not myself consider the decision wrong, but if I did, I should adhere to it as a decree settling an important general question, and as having regulated numerous important transactions.

The two clauses in the deed on which the pursuers rely are, first; "that during the lifetime of the said Mary Anderson or Pringle, she should be permitted to have the full and unlimited use, enjoyment, and management of the lands of Wilton Lodge, including Dean Mill, and to draw and receive the rents and other profits thereof; and to grant leases and charters, and exercise all other rights of property in the same manner as if the said trust-assignation had not been granted."

I read this expression, conformably to the usual canon of construction, as covering acts in the exercise of property of the nature of the antecedent acts specified.

The other clause is, that the trustees acting for the time shall pay and make over the whole free interest of the said sum of £10,000, and certain other money, in a certain manner "aye and until the said Mary Anderson shall, by a writing under her own hand, addressed to the said trustees, direct the same to be otherwise applied, and which direction, if so given, the said trustees shall follow and comply with." As to which I have only to remark, that the exception applies to the particular matter here in question, which is specially dealt with and cannot go further.

The result to which I come is, that the interlocutor of the Lord Ordinary should be so far altered as to deal only with the first of the points disposed of, and that we should dismiss the action.

The other Judges concurred.

Agents for Pursuers—Scott, Moncrieff, and Dalgetty, W.S.

Agents for Defenders—J. & F. Anderson, W.S.

Friday, July 10.

OUTER HOUSE.

(Before Lord Barcaple.)

THOMSON *v.* THOMSON'S TRUSTEES.

Husband and Wife—Marriage-Contract Provision—Trust Provision—Debitor non præsumitur donare. By antenuptial contract of marriage, a husband settled on his wife, in the event of her surviving him, an annuity of £200. He died, leaving his property in trust for the purposes *inter alia* (1) of paying his widow an annuity of £400; (2) of paying annuities to his brothers and sisters (which were to suffer a proportionate abatement in case of insufficiency of trust-funds to pay them in full); and (3) on the death of his widow of dividing the trust-estate among his brothers and sisters. *Held* (1) that the widow was not entitled to both annuities, but that the testamentary annuity was in satisfaction of the annuity provided by the marriage-contract, on the ground that *debitor non præsumitur donare;* (2) that, should the income of the trust-estate be insufficient to pay the widow's annuity in full, the deficit should be made up out of capital.

The late Mr William Thomson, by antenuptial contract of marriage, settled on his wife in the event of her surviving him an annuity of £200, and in security thereof conveyed certain heritable subjects to trustees. He also, by the same deed, assigned to his wife the whole household furniture of which he should die possessed. Thereafter, he executed a trust-disposition and deed of settlement by which he conveyed to trustees his whole means and estate (including the subjects previously conveyed in security to his marriage-contract trustees) for the purposes *inter alia* (1) of paying his widow an annuity of £400; (2) of paying annuities to his brothers and sisters; and (3) on the death of his widow of dividing the trust-estate among his brothers and sisters. The trust-deed also directed that "in the event of there being a shortcoming of funds to pay in full the annuities hereby provided to my said brothers and sisters after deducting all necessary expenses attending the execution of this trust, then the whole annuities provided to them shall suffer a proportional and equal diminution."

The widow now brought this action to have it found and declared that, besides the annuity of £400 provided by the trust-deed, she was entitled to the annuity of £200 under the marriage-contract; and further, that should the income of the trust-estate be insufficient for payment of these annuities, the deficit should be paid out of capital.

The defenders, the testamentary trustees, maintained that the provisions of the antenuptial contract were satisfied by those of the trust-settlement, and that the widow accordingly was not entitled to more than £400 a-year, and that only if the annual income of the estate was sufficient for the payment of that sum. The Lord Ordinary has found that, on a sound construction of the settlement, the annuity of £400 provided to the pursuer by the trust-deed, dated 29th March 1851, and codicils, must be held to be in satisfaction of the annuity of £200 which Thomson had previously bound himself to pay to the pursuer in the event of her surviving him; that the pursuer is not entitled to both annuities; and that the pursuer is entitled to payment of the £400 out of the capital of the trust-estate, so far as there may be a shortcoming of annual income for full payment thereof.

In a note his Lordship says:—

"The first question is, whether the pursuer is entitled to claim both the annuity of £200 provided to her in her contract of marriage and the annuity of £400 settled upon her by her husband in his subsequent trust-settlement. The Lord Ordinary cannot doubt that the principle *debitor non præsumitur donare* is applicable. It has been directly applied and held effectual for determining whether a subsequent voluntary provision by a husband or father was made in satisfaction of, or as additional to a prior obligatory provision in a marriage-contract. In other cases, effect has been re-

fused to it only in respect of what were held to be stronger grounds for an opposite presumption arising out of the circumstances of the case, or the special terms of the testamentary settlement. The maxim only expresses a legal presumption, which, like all mere presumptions of law, must give way to any stronger presumptions or influences in the case. The question is equally one of construction and intention—whether the Court, upon a view of the whole elements in the case for arriving at a decision upon that matter, gives effect to this recognised presumption, or holds that there are grounds for setting it aside.

"It cannot be disputed that this legal presumption has long been recognised and given effect to by the law of Scotland in this class of cases—*Houston* v. *Hamilton*, in 1708, M. 11,465; and *Skene* v. *Udney*, in 1735; Elchies 'Presumption,'—No. 4. In *Hay* v. *Hay's Trustees*, 16th May 1823, F.C.; and *Balfour* v. *Balfour's Trustees*, 4 D. 1044; effect was refused to the maxim only because it was excluded by the circumstances. In *Kippen* v. *Darley*, 18 D. 1137, 3 Macq. 203, where it was held that a provision by a father upon his daughter in her marriage-contract was not to be construed as being in satisfaction of a *voluntary* provision made by the father in her favour by a prior trust-settlement, the application of the maxim *debitor non præsumitur donare*, when the prior provision is obligatory, was fully recognised.

"The question therefore is, whether there are grounds in the present case for refusing effect to the legal presumption that the truster meant the annuity which he conferred upon his widow by his trust-settlement to be in satisfaction of the smaller annuity which he had become bound to pay her by the prior marriage-contract. There is nothing to lead to that result in the general conception and terms of the trust-deed or of the clause conferring the annuity. It does not bear to be granted for love, favour, and affection; but in consideration that it is every man's duty to settle his affairs in such a manner as to prevent disputes after his death, and for other good causes and considerations. Satisfaction of prior obligatory provisions is not beyond the scope of a deed proceeding on such considerations. The truster conveys his whole property for certain purposes. The first is for payment of debts. This ordinary clause cannot control or even throw light upon the truster's intention. The second purpose is to pay to his wife an annuity of £300 sterling, to allow her the liferent of Ballingall Lodge, and make over to her his furniture and plate. Having afterwards sold Ballingall Lodge, he, by codicil, increased the annuity to £400. The Lord Ordinary can discover nothing to set aside the ordinary presumption that the annuity was to be in satisfaction of the obligation in the marriage-contract. It confirms the legal presumption that in the same head of the trust purposes which embraces all the provisions made upon the widow by the trust-deed the trustees are directed to make over to her the whole furniture and plate. The truster had in the marriage-contract disponed the furniture and plate to his wife, in the event of her surviving him, and the circumstance that he directs his testamentary trustees to convey them to his widow, which would necessarily be full implement of that part of the marriage-contract provision, is strongly corroborative of the view that he intended the new and larger provisions which he was then making to be in satisfaction of the marriage-contract obligations.

"It is contended that this construction is excluded by the truster having in the marriage-contract disponed certain heritable subjects to trustees in security of the contract annuity of £200. But this was only a security, and could only constitute a burden upon the truster's property, whether vested in himself during his life or in his testamentary trustees after his death. He could effectually dispone the property to the testamentary trustees, subject of course to the burden; and it will be freed from the burden by the debt being satisfied. The marriage contract trustees now hold the security for payment of annuity under the contract, and it can only be brought to an end by payment or satisfaction of that provision. The question is, whether the annuity of £400 under the trust-settlement, if accepted by the pursuer, will constitute satisfaction? This is a question as to the construction and import of the trust-deed, and is not affected by the existence of a security for payment of the prior provision.

"The other question is, whether, in the event of the income of the trust-estate proving insufficient, the pursuer is entitled to be paid in full out of the capital, to the disappointment of the other annuities and of the bequest of the residue? The Lord Ordinary thinks that, from the terms of the trust-deed that must be held to have been the intention of the truster. The leading purpose of the trust, after providing for payment of the truster's debts, is to make payment of the annuity to his widow, to allow her the liferent use of Ballingall Lodge, and to make over to her the furniture and silver plate. Then follows, as a separate trust-purpose, the appointment to pay certain annuities to brothers and sisters of the truster. Lastly, there is a direction to the trustees, on the death of the widow, to sell the estate, and pay the proceeds to the trustee's brothers and sisters.

"It appears to the Lord Ordinary that the provision for proportional abatement of the other annuities implies, 1st, that the annuity to the widow was not only prior in place in the trust-deed to the annuities to the brothers and sisters, but was to be paid before they could become due; and 2d, that it was not, like them, to suffer abatement in consequence of a shortcoming of income. The fact that the truster thought it necessary to declare that the annuities to his brothers and sisters should suffer abatement in that case, while he made no such declaration as to the annuities to his widow, is, on ordinary principles of construction, evidence that he had no such intention in regard to her."

Counsel for Pursuer—Mr Asher. Agent—Thomas Pearson, S.S.C.

Counsel for Defenders—Mr Black. Agent—D. Curror, S.S.C.

END OF FIFTH VOLUME.