

from liability for what all others were bound to pay for. But undoubtedly the interpretation clause of the statute exempts county road trustees, according to the ordinary meaning of the words, so that if the persons taking an extraordinary use, occasioning an extra cost, are county road trustees, they are not liable to be assessed as other people are. But Mr Gloag has pointed out that county road trustees were formerly exempt from all contributions for roads not only within their own county but from payment of tolls elsewhere; they had not to pay tolls without their own county when bringing materials to make their roads. Matters were changed in 1878, and after that no tolls were payable by anybody, the roads being maintained by assessments; but undoubtedly the policy of the Legislature had been to enable them to use for such a purpose the roads of another county without contributing to the cost of them by paying tolls like other people; and that does prepare one to expect an exemption in their favour in this Act. Therefore I am not prepared to dissent from the view taken by the Sheriff-Substitute, that these county road trustees are exempted from the provision on which the action was rested. I am of opinion that the appeal ought to be dismissed.

LORD RUTHERFURD CLARK and LORD M'LAREN concurred.

The LORD JUSTICE-CLERK and LORD CRAIGHILL were absent.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Pursuers (Appellants)—J. P. B. Robertson—Hay. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders (Respondents)—Gloag—Graham Murray. Agents—Watt & Anderson, S.S.C.

Friday, July 11.

FIRST DIVISION

[Lord M'Laren, Ordinary.]

CAMPBELL AND OTHERS (CAMPBELL'S TRUSTEES) v. WHYTE AND OTHERS.

Assignment—Marriage-Contract—Onerous Assignee—Intimation.

A wife by her antenuptial contract of marriage conveyed her whole funds *acquisita et acquirenda* to trustees who were directed *inter alia* to pay the liferent thereof to her as an alimentary fund. The trustees did not at the time accept office or act. Having succeeded to funds after her marriage, she conveyed them to trustees under a new trust, the purposes of which were *inter alia* to pay her a liferent thereof which was not to be declared alimentary. Subsequently she assigned her liferent interest therein in security of a debt of her husband's, and the creditor intimated the assignment to the trustees of the post-nuptial deed. A competition having arisen

between the creditor and the marriage-contract trustees, who never acted till after the intimation of the assignment, the Court *preferred* the creditor, on the ground that her assignment was duly intimated prior to any claim to the funds being put forward under the latent contract of marriage.

Alexander Campbell, merchant in Greenock, and Helen Turner or Campbell, in contemplation of their marriage, on 29th April 1861 executed an antenuptial contract of marriage whereby *inter alia* Helen Turner or Campbell, with her intended husband's consent, conveyed to six trustees her whole estates then belonging to her, or that should pertain and be owing to her during the subsistence of the marriage, for the purposes set forth in the deed, which were to pay the free yearly interest of the estate to her as an alimentary provision during her life and the fee to the child or children of the marriage, if any, and failing any in such manner as she should direct.

Mrs Campbell had an uncle, Alexander Turner, who by his trust-disposition and settlement, recorded 6th June 1868, left to her a legacy of £2000 along with a share of the residue of his estate, which were to be exclusive of her husband's *jus mariti* and right of administration. On 12th November 1868 Mrs Campbell, on the narrative of her uncle's settlement, of her desire to secure the sums therein left her to her own use and benefit, and of her love and affection for her children, executed a postnuptial trust conveyance by which she conveyed to three of the six trustees appointed under the antenuptial contract, as trustees, the legacy of £2000 and the share of the residue of Alexander Turner's estate. The purposes were for payment to her of £200 if the trustees deemed proper (which was done), exclusive of the *jus mariti* and of the income of the remainder for her liferent alienably exclusive of the *jus mariti*, and to the children in fee. The liferent to Mrs Campbell under this deed was not declared to be alimentary. The trustees accepted office and acted in the trust.

In May 1871 Alexander Campbell borrowed from Mrs Ann Morris or Whyte, widow of Robert Whyte, the sum of £400. In security of the loan, and without prejudice to Mr Campbell's personal obligation, a bond and assignment in security was granted by Mr and Mrs Campbell, which assigned to Mrs Whyte (1) the liferent right and interest which Mrs Campbell had in the sums of money conveyed to trustees by her by the trust-conveyance of 1868; and (2) a policy of insurance on Mrs Campbell's life. This bond and assignment was duly intimated to the trustees acting under the postnuptial trust conveyance of 1868 on 30th May 1871.

Mr Campbell's estates were sequestrated in January 1878.

Mrs Whyte applied to the trustees acting under the trust conveyance of 1868 for payment of the capital sum of £400 with interest due thereon, and for the amounts paid by her for premiums on the said policy since Mr Campbell's bankruptcy, amounting in all to £507, 11s. 3d. A claim, however, was also put forward by the trustees nominated under Mr and Mrs Campbell's antenuptial contract of marriage. Mrs Whyte then, in order to have the question determined, raised, in the name of the trustees under the trust-disposition of 1868, this action of multiplepoinding,

the fund *in medio* in which was the trust fund in the conveyance of 1868, and the income thereof since 1871. In the original condescence for the nominal raisers it was stated that the marriage-contract trustees of 1861 accepted and acted. In the Inner House, however, it appeared from a minute and answers which were given in, that until shortly before this action was raised, when certain of these accepted and acted, none of the trustees of the marriage-contract had ever accepted the trust, and nothing had been done therein. The assignation in it of Mrs Campbell *acquiritur* had never been intimated to her uncle's trustees or to the trustee under the trust-disposition of 1868.

The marriage-contract trustees claimed the whole fund *in medio*, amounting to about £2853. They averred that the money borrowed by Mr Campbell was in no sense a debt of Mrs Campbell's, and that they were never made aware of any legacy having been left to Mrs Campbell, or of the trust of 1868, or the assignation on which Mrs Whyte founded.

They pleaded (1)—“In respect of the conveyance by Mrs Campbell of her whole estates *acquisita et acquiritur* contained in the said marriage-contract, the claimants are entitled to the fund *in medio*. (3) The conveyance to the claimants having been prior to the conveyance by Mrs Campbell to the trustees under the private trust; and the claimant and real raiser [Mrs Whyte] taking only in virtue of said trust, the claimants ought to be preferred to the claimant and real raiser.”

Mrs Whyte claimed the whole fund *in medio*, or at least the revenue thereof, subject to a liability to account for any balance after payment of the sum due under the bond and assignation in security. She averred that the £400 was obtained for Mrs Campbell's personal expenditure, and for household expenses, and was so used. She pleaded that she had acquired right to the fund *in medio* by the bond and assignation in her favour duly intimated, to the amount due thereunder, and that she was entitled to be ranked accordingly, and also that the marriage-contract being a latent deed never intimated to the trustees under the trust-deed of 1868 could not compete with her assignation.

By interlocutor of 15th December 1883 the Lord Ordinary ranked and preferred the marriage-contract trustees to the fund *in medio* in terms of their claim.

“*Opinion*.—This case raises the question whether a married woman can under any circumstances grant an effectual security over the income of her estate, which is settled on her in alimentary liferent by her antenuptial contract. Mrs Helen Turner or Campbell, whose marriage-trustees are claimants, conveyed her whole estate *acquisita et acquiritur* to six trustees on certain trusts, the first of which is stated to be ‘to pay the free yearly interest of the estate of the said Mrs Helen Turner or Campbell as an alimentary provision to her during her life.’ Some years after her marriage Mrs Campbell became entitled to a legacy of £2000, with a share of residue out of the testamentary estate of her uncle Alexander Turner. This fund, the amount of which is set forth in the condescence of the fund *in medio*, ought to have been paid to the six marriage-trustees, to be invested by them on

the trusts of the marriage-contract. But, for some reason which is not explained, this was not done, and the legacy and share of residue were paid to the present holders of the fund, being three of the marriage-trustees upon trusts constituted by a deed dated 12th November 1868. The purposes of the postnuptial deed, so far as concerning the present question, are similar to those of the marriage-trust, except that the fund is not characterised as an alimentary fund, or limited to Mrs Campbell's alimentary use. In the result, Mrs Campbell's life interest is not *ex facie* of the postnuptial deed protected against her voluntary acts, and in the assumed absence of such protection the competing claimant, Mrs Whyte, accepted from Mrs Campbell an assignation of her life interest under the deed, in security of the obligation of Mrs Campbell's husband. The postnuptial trustees do not defend their trust, nor insist on retaining the trust-funds, and the question is, whether they are to pay over the funds to the marriage-trustees, to be held by them as an alimentary provision, or to pay to Mrs Whyte, the creditor in the bond and assignation in security. The marriage-trustees found on the circumstance that their right is prior in time; the creditor urges that her security is onerous. It does not appear to be open to dispute that a lady who is settling her property with a view to marriage may by proper clauses deprive herself of the power of anticipating her income. The most usual mode of doing so is by a trust, in which the lady's interest during the marriage is limited to an alimentary liferent, the fee being otherwise settled. Such a settlement constitutes an exception to the ordinary rule that an individual cannot withdraw his funds from the diligence of his creditors by constituting an alimentary trust for his own benefit. The reason of the exception, as explained by Lord Cottenham in *Rennie v. Ritchie*, 4 Bell, 244-5, and by other Judges, is the expediency of protecting married women's property against marital influence, and there is authority for holding that on the dissolution of the marriage and the survival of the wife the alimentary quality of the wife's interest will disappear,—I mean if it depends on the wife's own act, and is not a condition imposed by the will of some other person from whom the estate is derived.

“It follows from these considerations that on the opening of the succession of Mr Turner (Mrs Campbell's uncle), the alimentary character impressed upon Mrs Campbell's estate by the marriage-trust attached to the bequest in her favour. The decisions apparently do not recognise any distinction between alimentary conveyances of specific estate and alimentary settlements of the wife's whole fortune. I should regret if it were necessary to take such a distinction. It is, I think, the most usual case of marriage-contract that the lady has no present fortune to settle, but has expectations from her parents or relatives, and it would be unfortunate if, from any defect of power, a settlement intended to render the lady's future acquisitions non-assignable during the marriage should fail of effect.

“It is maintained for the claimant Mrs Whyte, that an assignation of *acquiritur* in a marriage-contract is in its inception nothing more than an obligation to assign; that, until the funds come into possession of the marriage-trustees, the

conveyance remains *in obligatione*; and that in the meantime it is in the power of the wife to assign these funds, and to give a good title to the assignee in security. But, as I conceive, an assignee under a general conveyance is in a better position than a creditor in an obligation. He is a procurator *in rem suam*, and is in a position to demand payment without going to the cedent for a conveyance in implement. The difference is this, that in my view the clause of assignment in the marriage-contract took effect upon Mr Turner's succession as soon as the succession opened and the right came into existence. But if, instead of an assignment, there had been merely an obligation to assign, some further act on the part of Mrs Campbell would be necessary to transfer the fund from her to her marriage-trustees, and the omission of that act would leave the fund exposed to her voluntary acts, and to the diligence of her creditors.

"The case does not, as I apprehend, raise any question of intimation, because intimation is not necessary in a question with the cedent. The fund was paid to Mrs Campbell herself or to her postnuptial trustees, who hold the income of the estate subject to her order and disposition, and the claim of the marriage-trustees is against them. For the reasons stated, I am of opinion that the marriage-contract took effect upon the fund when it came into existence; that Mrs Campbell was thus divested, and had no further interest in the fund than that of an alimentary liferenter under the marriage-trust. That being so, Mrs Campbell had not the power to assign her life interest in security of husband's debt, and the title of Mrs Whyte is therefore void.

"If it were necessary to consider the case further, I should be of the same opinion on this further ground, that the funds were in fact received by three of the marriage-trustees, and that the postnuptial conveyance was to them. Now, these gentlemen having accepted the marriage-trust, and obtained possession of the funds, were bound to hold them subject to the marriage-trusts. They could not set up a title contrary to their fiducial obligation, and they could not accept the postnuptial conveyance in any other sense than as a corroborative title to that of the marriage-trust. In this view of the case, the omission of the word 'alimentary' in the trust of the postnuptial conveyance would not derogate from the effect of the marriage-trust. The postnuptial conveyance would stand good as a conveyance of funds for Mrs Campbell's liferent interest alienably, subject to all conditions declared in the marriage-trust, to which in this view it is supplementary.

"While I sustain the claim of the marriage-trustees, I do not mean to say that Mrs Campbell can honestly take advantage of that claim to evade the fulfilment of her engagements. The alimentary income will be paid to her by her trustees, and it will be in her power, if disposed to act justly, to make such payments as she can afford out of that fund in satisfaction of the debt for which she became security."

Mrs Whyte reclaimed and argued—The question was one between an onerous assignee and antenuptial marriage-contract trustees who had never intimated their assignment or otherwise acted as trustees.

The marriage-contract trustees argued—To prefer Mrs Whyte's claim in the present

case would be to set aside the whole benefit of the conveyance of *acquirenda* in the marriage-contract. The assignation in a marriage-contract differed from an ordinary assignation of moveables in this, that it dealt with something which the party had not, and might never have. Neither the wife nor her husband could invalidate the deed, and the money left by Mrs Campbell's uncle fell under its provisions. The trustees under the deed of 1868 could only hold for the marriage-contract trustees. If Mrs Whyte was allowed an advantage over the marriage-contract trustees because she completed her diligence while they were ignorant that the money had been left to Mrs Campbell, then the whole advantage conferred by the marriage-contracts would be done away with.

Authorities—*Rollo v. Ramsay*, Nov. 28, 1832, 11 Sh. 132; *McDougal v. City of Glasgow Bank*, June 28, 1879, 6 R. 1089; *Miller v. Learmont*, May 17, 1870, 42 S. Jur. 418; Bell's Pr. 1466.

It appeared from a minute and answers which were allowed by the Court to be given in that the marriage-contract trustees never accepted and acted till after the date of Mrs Whyte's intimated assignation and shortly before the date of this action, and that then three of them, of whom two are not those in the postnuptial deed of 1868, accepted office and claimed in this action.

At advising—

LORD PRESIDENT—In this case I am not prepared to concur in the judgment of the Lord Ordinary, and cannot help thinking that if the circumstances of the case had been as distinctly before him as they now are before us, it is probable that he would not have come to the conclusion expressed in his interlocutor.

The marriage-contract of Mr and Mrs Campbell was executed in the year 1861. It was an antenuptial contract, and contained certain provisions by the husband in favour of the wife, which it is not necessary to advert to; on the other hand, the wife, not being apparently possessed of any property or estate of her own at the date of the contract, conveyed in general terms everything which she had or which might belong to her or come to her during the subsistence of the marriage, in trust, in the first place that the trustees should pay to Mrs Campbell "during all the days and years of her life, upon her own receipt, simply as an alimentary provision, and exclusive of the *jus mariti* and right of administration of said Alexander Campbell, the free yearly interest or income arising from her said means and estate hereby conveyed," and then the fee of the estate is destined to the children of the marriage, and failing them the fee is to be conveyed by the trustees in such manner as she by any writing under her hand may direct, and failing that to her own heirs whomsoever. Now, it is an ascertained fact in the case that this trust was not accepted by any of the persons named as trustees, and not only was there no formal acceptance, but there were no actings by any of them in the trust until a time when such actings came to be altogether unavailing in the question now before us.

It appears that Mrs Campbell succeeded to some money upon the death of her uncle, which occurred in June 1868. By his will this uncle left her a sum of £2000, and a share of residue. It is almost needless to say that the assignation

under the marriage-contract trust was not intimated to the uncle's executors, because there was nobody to intimate it. There were no trustees, and in point of fact it certainly was not intimated, and it stood therefore in the position of an unintimated assignation. In these circumstances Mrs Campbell executed a trust-deed in favour of three persons, who were three of the six trustees named in the marriage-contract, and these persons accepted of the trust which she made, and obtained payment from her uncle's trustees of the money left her. The object of this trust apparently was to alter in some degree the terms of the marriage-contract, because it sets out that this money had come to Mrs Campbell on her uncle's death, and with a provision that it should be exclusive of the *jus mariti* and right of administration of her husband, and she conveys the money to the persons named in the trust conveyance for the following purposes—first, that the trustees might pay out of the fee of the estate any sum not exceeding £200 to Mrs Campbell exclusive of the *jus mariti* and right of administration of her husband, or of any future husband, and second, she directs the trustees to hold the remainder for her liferent use alienably, and for behoof of her children in fee. There is no provision in that deed that the liferent of Mrs Campbell should be alimentary, and in that respect, and in respect also of the advance of £200, the purposes of this trust differ from those in the marriage-contract. Now, if this conveyance, which is dated 12th November 1868, had been for onerous causes, such as the bond and disposition which Mrs Campbell afterwards executed, there cannot be the smallest doubt, I apprehend, that the trust having been intimated to the uncle's executors, and the money due to Mrs Campbell by them having been actually received by these trustees, they were preferable to the trustees under the marriage-contract, even if these trustees had accepted, for the plain reason that the marriage-contract assignation had not been intimated. The Lord Ordinary seems to have an impression that the necessity for intimation in order to make an assignation effectual does not apply to assignations in antenuptial contracts in the same way as it does to other assignations, but I cannot assent to that doctrine. An assignation in an antenuptial contract of marriage, although it be made for a particular purpose, is nevertheless nothing but an assignation, and the criterion of preference in a competition of assignations is the date of intimation; and that comes to be the criterion, even although one of the assignations in the competition may be an assignation in a marriage-contract, assuming always that the other assignation in the competition is also for onerous causes. This, I apprehend, if there could be any doubt about it, was conclusively settled by the case of *Tod's Trustees v. Wilson*, 7 Macph. p. 1100. In that case a lady by antenuptial contract conveyed to trustees for behoof of herself and her husband in liferent alienably, exclusive of the husband's *jus mariti*, and for their children in fee, her interest in certain property held by her father's trustees. The marriage was dissolved by the death of the husband, and after the husband's death the lady's estate was sequestered, and a trustee appointed thereon. Now, this trustee in the sequestration, of course, unlike

every other assignee, held an assignation which required no intimation, but which took effect from the date of his appointment, and in a competition between the marriage-contract trustee and the trustee in the sequestration the latter was preferred. Lord Kinloch, who delivered the judgment of the Court there, in which I concurred, expressed himself thus—"I consider this question to involve a simple competition between two assignations of the same fund. The fund was transmissible by assignation. It was assigned to the trustees in the antenuptial contract for declared purposes. The after sequestration was in itself an assignation perfected by mere issue. If the previous assignation had not been completed by intimation, the fund was carried by the sequestration. The whole question in the case therefore is, Whether the assignation in the antenuptial contract was or was not completed by intimation anterior to the sequestration." Now, there was no direct intimation of the marriage-contract in that case, and the only equivalent which was put forward was registration in the Books of Council and Session, which the Court unanimously held was not equivalent to intimation. But in the present case the competition does not arise between the trustees of the deed of 1868 and the marriage-contract trustees, for after the fund had come into the possession of the trustees under the deed of 1868, Mrs Campbell became a party to a bond which was granted by her husband in favour of the competing claimant, Mrs Whyte, and she interposed her security by granting an assignation of the funds which were now in the hands of the trustees of 1868. This was an onerous assignation, for it was for money advanced by Mrs Whyte to Mr Campbell, and that bond and assignation was duly intimated to the trustees under the deed of 1868.

All this while the marriage-contract trust was dormant. Nobody had accepted, nobody had acted, and nothing had been done in fulfilment of the assignation which it contained, and, in short, this creditors' right was perfected by intimation of the assignation before any steps were taken on the part of the marriage-contract trustees. Now, in these circumstances it appears to me that there cannot be any doubt that Mrs Whyte's claim is preferable to that of the marriage-contract trustees, upon the simple ground that she has an assignation to this fund granted for an onerous cause, and duly completed by intimation, while the marriage-contract trustees have no intimation at all of the assignation in their favour. If at the time that Mrs Campbell created the new trust of 1868 anybody had interposed—if even after the trustees under the deed of 1868 had acquired possession of the fund, the marriage-contract trustees had come forward and challenged what Mrs Campbell had done, most probably they would have been quite entitled to vindicate the possession of the fund, because the trust-deed of 1868 was gratuitous while the trust contained in the marriage-contract was an onerous assignation, but nobody did come forward and the matter continued to stand over. What form would have been necessary to vest marriage-contract trustees with this money that had come from Mrs Campbell's uncle it is not necessary to decide, possibly it would have required a divestiture of the new trustees, or an intimation of the assigna-

tion in the marriage contract to the new trustees, in order to carry the purpose of that assignation, for there can be no doubt that Mrs Campbell was under an obligation which could be enforced against her to make good that assignation. But unfortunately the time for doing that passed and there came on the field a creditor with an assignation granted for an onerous cause and perfected by intimation, and that appears to me to be decisive of the question. I think therefore that the interlocutor of the Lord Ordinary must be recalled.

LORD SHAND—I am of the same opinion. The question on which the decision of the case turns is, what was the effect of the marriage-contract of Mr and Mrs Campbell? Having in view the terms of the Lord Ordinary's note, it appears that two alternatives only had been presented in the argument. The first of these is, that the provision of the marriage-contract was substantially an obligation upon the part of the wife to assign any *acquiritenda* during the marriage, and nothing more. The other alternative is, that the marriage-contract delivered is a completed title, not only to enable the trustees to claim the estate to which the wife might afterwards acquire right, but actually operating as a completed transfer of that estate the moment the right to it vested in her, to the same effect as if the estate conveyed had been reduced into possession immediately on the right vesting in Mrs Campbell. The former of these views is very plainly stated in the passage in his Lordship's note in which clause he says—"It is maintained for the claimant Mrs Whyte that an assignation of *acquiritenda* in a marriage-contract is in its inception nothing more than an obligation to assign; that until the funds come into possession of the marriage trustees the conveyance remains *in obligatione*;" and the latter view is stated in the passage somewhat further down in his Lordship's note, in which he puts it thus, that the assignation "took effect" whenever the fund came into existence; "that Mrs Campbell was thus divested and had no further interest in the fund than that of an alimentary liferenter under the marriage trust. That being so, Mrs Campbell had not the power to assign her life interest in security of her husband's debt, and the title of Mrs Whyte is therefore void." Now, neither of these alternatives is sound. A marriage-contract containing a conveyance of this kind is something more than an obligation to grant a conveyance. On the other hand, it is something a good deal less than a delivered completed title. A marriage-contract, whether it has reference to heritable or moveable property, is just like a conveyance or assignation in any other deed. In the case of moveable property it is a title to demand possession, and if possession cannot be obtained, it is a title which, if intimated, will transfer the right. But until possession is obtained, or until intimation is made, the right is not transferred, although there is a right in the person who holds it to have it transferred. And so in the case of heritable it is not an obligation to convey, but it is good in a question with third parties to give a completed title, and will be preferable to an earlier onerous deed if it be registered in the records so as to exclude such a deed. The law is I think clear, particularly having in view the

decision to which your Lordship has referred. It is quite plain that if the fund had remained in the possession of the trustees of Mrs Campbell's uncle, the title to it would have been completed either by the marriage-contract trustees, or the trustees under the later deed according to priority in giving intimation. Intimation would have completed the right. The marriage-contract trustees made no intimation of the marriage-contract (not having indeed, as it appears, accepted of the trust), and what occurred was that Mrs Campbell—whether in ignorance of the provisions of her marriage-contract or not, we cannot tell—executed a new deed, which in a question with the marriage-contract trustees she was not entitled to do, by which, however, she conveyed the fund for purposes other than those contained in the marriage-contract, and the trustees under that deed not only intimated that trust, but got possession of the fund. Holding this fund as they did still to a considerable extent for behoof of Mrs Campbell, the marriage-contract trustees might still have acquired right to it if the marriage-contract had been intimated to the new trustees. I think that that intimation would have carried the right even in the hands of the trustees under the later deed in virtue of the conveyance in the marriage-contract. But before that occurred Mrs Campbell had borrowed £400, for which she and her husband had granted an assignation in security, and that previous deed was intimated to the holders of the money. Under this new trust the effect of that intimation, in the absence of any intimation of the assignation in the marriage-contract, was, in my opinion, plainly to transfer the right to the fund, just the same way as if a person had granted two dispositions to the same property; the disposition first recorded is effectual, assuming always that both transactions are onerous, and therefore it appears to me that the view adopted by the Lord Ordinary is founded on a misapprehension.

But his Lordship has intimated that there was a second ground on which he was disposed to decide the case in the same way, which will be found stated in the following passage of the note—"If it were necessary to consider the case further I should be of the same opinion on this further ground, that the funds were in fact received by three of the marriage-contract trustees, and that the postnuptial conveyance was to them." Now, these gentlemen, his Lordship goes on to say, having accepted the marriage trust, and obtained possession of the funds, were bound to hold them subject to the marriage trust. This last passage in his Lordship's interlocutor and note was quite justified from the statement which appeared in the condensation of the nominal raisers—"It is believed the said trustees accepted office and still act in the trust"—that is, that the trustees under the marriage-contract trust accepted office under the contract, and still hold office under it. It has, however, been explained at the bar by counsel that the nominal raisers, who are the trustees under the trust-deed, and Mrs Whyte, the reclamer, not only do not admit, but dispute that averment, and we have a minute and answers which have been given in which show that it is not the trustees who accepted office under the second trust-deed who accepted office under the marriage-contract-trust.

In that state of matters, the fact upon which the Lord Ordinary would have rested this second ground of judgment fails. It is said in the minute for the marriage-contract trustees that although these gentlemen did not accept of the trust, two of them were aware of its existence. That is disputed, but however that may be, it cannot affect the decision of the case. In the first place, I understand that two of the trustees knew of the existence of the marriage-contract in which they were named as trustees, but that in no way shows that they may not have declined to have anything to do with the trust; and, secondly, it is a material circumstance that would require to be averred and proved, that not only were they aware of the trust under the contract of marriage, but that the deed assigned *acquiritur*. Upon this second part of the case I think therefore the respondents also fail.

LORD ADAM—This has all along appeared to me to be a case of two competing assignations to the same fund, and that it must be carried by the first intimated deed—that is, that of the claimant Mrs Whyte. That being so, the case falls within the decision in *Todd v. Wilson*, to which your Lordship has referred. In my opinion that case is quite in accordance with the principles of the law of Scotland, and I therefore agree with your Lordships in the conclusion arrived at, that the interlocutor of the Lord Ordinary should be recalled.

LORD DEAS was absent.

LORD MURE was absent on Circuit during the discussion, and delivered no opinion.

The Court pronounced the following interlocutor:—

“Recal the said interlocutor; sustain the claim for Mrs Isabella Philp Whyte or Fraser; rank and prefer her to the income of the fund *in medio* in terms of the bond and assignation in favour of Mrs Ann Morris or Whyte, but subject to a liability to account to the other claimants for any balance of the income to be received by her after payment of the sums contained in the said bond and assignation, with interest; and decern,” &c.

Counsel for Mrs Whyte—Mackintosh—Dickson. Agents—Henry & Scott, S.S.C.

Counsel for Campbell's Marriage-Contract Trustees—Trayner—Graham Murray. Agents—Smith & Mason, S.S.C.

Saturday, July 12.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

LECKIE AND OTHERS *v.* LECKIE AND OTHERS.

Process—Proving the Tenor—Absence of Ad-minicules.

In an action for proving the tenor of a will, said to have been designedly destroyed after the testator's death, no written adminicles

were alleged to exist, but it was averred that the draft and a memorandum from which it was drawn up had been destroyed as waste paper some time before the testator's death. The Court allowed a proof, at which the *casus omissions* libelled was proved, and it was also proved that the draft and memorandum which would have constituted written adminicles were destroyed as condescended on. The tenor of the deed was proved by parole, and the Court granted decree of proving the tenor as concluded for.

This was an action of proving the tenor of the general disposition and settlement of Alexander Leckie senior, slater, Bonnyrigg, at the instance of Mary M'Creddie or Leckie, relict of the said Alexander Leckie, John Stewart, Alexander Stewart, eldest son and heir-at-law of the deceased Daniel Stewart, and Alexander Leckie, the adopted son of Alexander Leckie senior, against James Leckie and others, the heir-at-law and next-of-kin of Alexander Leckie senior.

Alexander Leckie senior died on the 25th June 1883, and the pursuers averred that he left a general disposition and settlement in the following terms, or in other terms to the like effect:—“I, Alexander Leckie, slater, Bonnyrigg, being resolved to settle my affairs so as to prevent all disputes after my death, do hereby give, grant, assign, and dispoise to and in favour of my wife Mary M'Creddie or Leckie in liferent, and Daniel Stewart and John Stewart, residing in London, nephews of my said wife, equally, and their respective heirs and assignees whomsoever, in fee, heritably and irredeemably, All and Whole my whole heritable estate wheresoever situated, presently belonging to me, or which shall belong to me at the time of my death, with the whole writs, titles, and securities of the same, and my whole right, title, and interest present and future therein, and further, I do hereby give, grant, assign, and dispoise to and in favour of the said Mary M'Creddie or Leckie, my wife, in liferent, and Alexander Leckie, our adopted son, presently residing in family with us, and his heirs and assignees whomsoever, my whole stock-in-trade, book-debts, household furniture, cash, and, in general my whole moveable estate wheresoever situated, presently addebted and belonging to me, or which shall belong and be addebted to me at the time of my death, with the whole vouchers and instructions thereof, and all that has followed or is competent to follow thereupon: But these presents are granted in favour of the said Alexander Leckie under burden of payment of my debts and funeral expenses in the event of my surviving my said wife, and of the succession to my said moveable estate opening to him at my death, declaring that the said Mary M'Creddie or Leckie shall have power, in the event of her being in necessitous circumstances and unable to provide for herself, to sell and dispose of the whole or of such part of my said estate as she may think proper for her maintenance and support: And I hereby nominate and appoint the said Mary M'Creddie or Leckie, whom failing the said Alexander Leckie, to be my sole executor; and I reserve power to alter or revoke these presents; and I dispense with the delivery hereof; and I reserve my liferent right; and I consent to registration hereof for preservation.— In witness whereof, I have subscribed these presents,