

The words "district asylum" as they occur in the 75th section must be read in connection with the dispensing power, and construed to include any place which shall be substituted by the exercise of that power, otherwise the exercise of the power would affect the liability of parishes, and there is no ground for thinking that the Legislature had any such purpose. The reasons for the rule introduced by the 75th section apply with equal force whether the lunatic be detained in a district asylum or in any substituted place.

LORD TRAYNER—I agree. Lord Rutherford Clark has expressed the views I hold so exactly that I have nothing to add to what his Lordship has said.

LORD YOUNG was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Find in fact that the parish of Murroes was the parish of settlement of the husband of Marjory Stewart or Thow, the mother of the illegitimate imbecile child at the time when the said child was with the sanction of the Board of Lunacy first sent to the Baldovan Institution, an establishment duly licensed for the reception of imbecile children: Find in law that in virtue of the 75th section of the Act 20 and 21 Vict. cap. 71, that the parish of Murroes is liable for the expenses of maintaining the said child during the whole period of his confinement as a lunatic: Decern against the defender as inspector of the said parish of Murroes for the sum of £28, 17s. 11d. with the interest as concluded for."

Counsel for Pursuer—Dickson—A. M. Anderson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defenders—Graham Murray Q.C.—Kennedy. Agents—Macpherson & Mackay, W.S.

Tuesday, February 27.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

WOOD AND OTHERS (BRUCES' MARRIAGE-CONTRACT TRUSTEES) v. WYLLIE GUILD (BRUCE'S TRUSTEE) AND OTHERS.

Husband and Wife—Antenuptial Marriage-Contract—Trust—Exclusion of Jus Mariti.

By antenuptial marriage-contract a wife conveyed certain funds to which she was entitled under her father's settlement to trustees, for the following purposes, *inter alia*—That during the joint lives of the said intended

spouses the clear revenue of £5000 of the trust funds was to be paid to herself, exclusive of the *jus mariti* and power of administration of her husband, and that "the clear revenue of the remainder" of the trust funds was to be held for the joint behoof of the spouses, and paid to them on their joint receipt. The husband renounced his *jus mariti* and right of administration as to the capital of the funds conveyed by the wife and the revenue of the £5000 above mentioned, but there was no express exclusion or renunciation of the *jus mariti* as regarded the revenue of the remainder.

The husband having been sequestrated a competition arose between the marriage-contract trustees, the trustee in the husband's sequestration, and the wife. Held that "the revenue of the remainder" did not fall under the husband's *jus mariti*, and that the marriage-contract trustees were bound to pay one-half thereof to the wife, and the other half to the husband's trustee so long as the sequestration should continue, and to the husband himself thereafter.

By antenuptial marriage-contract dated in July 1855, entered into between George Cadell Bruce and Roberta Cadell, the latter conveyed to Robert Philip Wood and others, as trustees for the purposes after mentioned, all and whole her share (about £10,000) in the residue of the estate of her deceased father, settled upon her by his trust-disposition and settlement (with the exception of £1000 which she assigned direct to George Cadell Bruce), and in particular, without prejudice to the said generality, the sum of £5000, being along with said sum of £1000 the amount of said share of residue which was presently divisible, and which share of the residue, with the exception of the foregoing sum of £1000, was to be held by the trustees in trust for the following purposes—"First, that during the joint lives of the said intended spouses the clear revenue of £5000 of the trust funds is to be paid to the said Roberta Cadell, exclusive of the *jus mariti* and power of administration of the said George Cadell Bruce, for whose debts and deeds and to whose control the same shall not in any way be liable or answerable, and the clear revenue of the remainder of the trust funds is to be held for the joint behoof of the spouses and paid to them on their joint receipt."

By a preceding clause in the marriage-contract George Cadell Bruce expressly renounced his *jus mariti* and power of administration, "and every other right and claim which he as husband of the said Roberta Cadell might have to the funds and effects and means and estate hereinafter conveyed in trust, and that in so far as the capital of the funds and estate is concerned and the revenue of £5000 thereof specially after mentioned: Declaring that the same shall not be affectable by his debts or deeds legal or voluntary, nor by the diligence of his creditors."

After the year 1876 the two parties to the

marriage-contract lived separate. In 1877 the marriage-contract trustees with the acquiescence of the spouses divided that portion of the revenue of the trust funds which they held for the joint behoof of the spouses into two equal shares, and paid one-half to Mr Bruce and the other half to Mrs Bruce, on their separate receipts, and continued so to deal with the income of that part of the trust funds until the year 1880, when the estates of George Cadell Bruce were sequestrated, and James Wyllie Guild was appointed trustee. From 1880 onwards the marriage-contract trustees continued to pay Mrs Bruce her share of the said revenue, but retained in their own hands the whole of the share which would have fallen to Mr Bruce, with the exception of certain sums applied by them in paying certain interest on heritable debt due by Mr Bruce, and insurance premiums which he was bound to pay under his marriage-contract.

This system was followed until 1891 without challenge on the part of the trustee in Mr Bruce's sequestration, but in that year the latter objected to its further continuance, and accordingly the trustees thereafter retained the whole of the revenue of the said remainder of the trust-estate in their own hands.

On 26th February 1892 an action of multiplepoinding was raised by the trustee in the sequestration in the name of the marriage-contract trustees, as pursuers and nominal raisers, against himself and others for the purpose of settling the competing claims of parties to the revenue of the said "remainder" of the trust-funds accumulated in the trustees' hands.

Claims were lodged for the trustee in the sequestration and for the marriage-contract trustees.

The marriage-contract trustees submitted that the *jus mariti* of Mr Bruce did not affect that part of the fund *in medio* which consisted of the revenue accrued on the said remainder of the trust-funds during the half-year ending Martinmas 1891, and further, that they were not liable to pay the revenue of the said remainder of the trust-funds except on a joint-receipt signed by Mrs Bruce and her husband, or by Mrs Bruce and the trustee in the husband's sequestration.

They claimed to be ranked and preferred to that part of the fund *in medio* which consisted of the revenue which had accrued during the half-year ending Martinmas 1891, or alternatively to one-half thereof.

The trustee in Mr Bruce's sequestration submitted that Mr Bruce's *jus mariti* was not excluded as regarded the fund *in medio*.

He claimed to be ranked and preferred to the whole fund *in medio*, or alternatively to the whole of the fund so far as representing accumulations of income up to Whitsunday 1891, and to one-half of the fund *in medio* so far as representing income accrued since that term.

On 1st March 1893 the Lord Ordinary pronounced the following interlocutor:—
"Ranks and prefers the claimant James Wyllie Guild, as trustee on the sequestrated

estates of George Cadell Bruce, to the fund *in medio*, in terms of his claim, in so far as representing accumulations of income up to Whitsunday 1891; *quoad ultra* repels the said claim of the claimant James Wyllie Guild: Ranks and prefers the claimants, Robert Philip Wood and George Miller Cunningham, as the surviving and accepting trustees on the antenuptial contract of Mr and Mrs Bruce, in terms of the first alternative of their claim, and deerns: Finds the said claimant George Cadell Bruce liable to the said claimants Robert Philip Wood and George Miller Cunningham in expenses in the competition," &c.

"*Opinion.*—This is a question which turns on the construction of the antenuptial marriage-contract between Mr and Mrs George Cadell Bruce, dated 26th July 1855.

"The lady had a fortune, derived from her father, which turned out to be of the value of about £10,000. Of this she reserved £1000, which went absolutely to her husband. All the rest she conveyed to trustees, subject to a declaration that the whole capital and the revenue of £5000 thereof should be exclusive of the *jus mariti* and right of administration, and not affectable by the debts or deeds of her intended husband, nor by the diligence of his creditors. Only £6000 was payable at the date of the contract, which explains the special reference to the sum of £5000. As regards the income of that sum the trustees were to pay it to the wife, exclusive of the husband's rights, and the clear revenue of the remainder was to be held by the trustees for the joint behoof of the spouses, and to be paid to them on their joint-receipt. It is with regard to this portion of the income that the present question arises.

"Since 1876 the spouses have lived separate. In 1877 the marriage-contract trustees, acting on the advice of counsel, and with the acquiescence of Mr and Mrs Bruce, divided this portion of the income into two equal shares, and paid one-half to Mr Bruce and the other half to Mrs Bruce on their separate receipts. Mr Bruce was sequestrated on 2nd November 1880, and the sequestration still subsists. The system of division adopted in 1877 continued without challenge on the part of the trustee in the sequestration down to the summer of 1891. I formerly decided in a question as to the amount of the fund *in medio* that the trustees were not bound to bring into the fund the amount of revenue which they had paid to Mrs Bruce under the arrangement of 1877 down to the raising of the present action. But I have now to decide the much more difficult question—what are the rights of the parties under the contract apart from any arrangement.

"The trustee in the sequestration claims the whole of the revenue which has accrued on this portion of the trust-estate at and since Martinmas 1891, on the ground that it falls under the *jus mariti*. He says with force that the right attaches to all property of the wife from which it is not distinctly excluded, and that the precision with which it is excluded from the income of the £5000 and from the capital of the whole shows

clearly that it was not intended to be excluded from this portion of the income. He also says that property settled by marriage-contract belongs either to the husband or the wife; that there is no such thing as a joint-right of property between spouses; and that as the money is not claimed as separate estate of the wife it must be the property of the husband.

"The marriage-contract trustees on the other hand claim to hold this portion of the revenue until a joint-receipt is presented to them in terms of the contract. I have come to be of opinion that their claim ought to be sustained.

"I have endeavoured (I hope with success) not to allow myself to be influenced by some observations which I made in deciding the former question, and which probably went further than was necessary for the decision of the point then before me. The present question is solely one of interpretation of the contract; there is not much light to be derived from decided cases, and I own that I have found the question difficult.

"The *jus mariti* is a right of comprehensive and stringent application, but the law has developed very considerably with respect to it, and all in the direction of relaxing its stringency. Thus, in Lord Stair's time it was thought that it could not be renounced or excluded at all. Then it was thought that, at all events, express words of exclusion were necessary. But now it is settled, not only that the right may be excluded, but that the exclusion may be implied if the implication be clear. Indeed, the right itself rests to some extent on implication, that is to say, on the legal fiction of an assignation constituted by marriage. Where, therefore, the legal exclusion is contained in an antenuptial contract, all that sound principle requires is that the wife shall be shown to have thereby dealt with her property in a way inconsistent with the assignation which the law would otherwise imply. To quote Lord Mackenzie's words in the case of *Rollo v. Ramsay*, 11 S. 134—"The legal assignation of the wife's moveable fortune by marriage to the husband never can be suffered to have existed at all, in contradiction to a conveyance contained in the antenuptial contract on which the marriage proceeds."

"What, then, is the effect of the contract here? It excludes the *jus mariti* from the capital of the wife's whole fortune, and if it had stopped there, probably that would have been held to imply an exclusion from the income also—*Robertson*, 13 S. 442; *Hutchison*, 4 D. 1399. The deed goes on, however, to deal specially with the income of the sum of £5000, which is excluded from the husband's rights just as carefully as the capital. With regard to the income in question here, a different provision is made. Nothing is said about the *jus mariti*, but it is to be held by the trustees for the joint behoof of the spouses, and to be paid to them on their joint-receipt. Probably the intention was that the money should be used for household expenses; and possibly that

the husband's right of administration should not be excluded. But if it were to be held that a provision of this kind let in the operation of the *jus mariti* it would follow that the husband could demand payment on his own receipt, because, the money being his, he would be entitled to get it, and he could not compel his wife to sign the receipt. Therefore I apply to this provision Lord Mackenzie's language in *Black v. Pearson*, 3 D. 504, p. 511—"If the husband's *jus mariti* is to apply to these funds, every word of that conveyance is contradicted." That is to say, the words of a solemn contract to which the husband was a party, and made when the parties were perfectly free to contract, must be held *pro non scriptis*. It seems to me that any result is to be preferred to that.

"Counsel for the trustee in sequestration argued that, even if the income had been directed to be paid to the wife on her own receipt, the *jus mariti* would have attached. I cannot assent to that view, because I think the whole question, whether under a marriage-contract or under the will of a stranger, is one of intention. Such a construction would be opposed to the cases of *Hunter v. Smith* in 1793, and *Stables v. Murray* in 1889, reported in Fraser on H. and W. i. pp. 786-7. The trustee in the sequestration cannot, in my opinion, succeed unless he shows that holding for joint behoof and payment on joint-receipt are consistent with and equivalent to an absolute right of property in the husband.

"It is urged against the claim of the marriage-contract trustees that it brings about a deadlock. But I understand that it is the husband's trustee and not the wife, who is causing the deadlock, by declining to continue the arrangement for a division of the income into two equal parts. With that, of course, I have nothing directly to do. The short, and as I have come to think the sufficient solution of the question is to hold, that whatever may be the result, the marriage-contract trustees are entitled to demand a joint-receipt, and are not bound to pay until such a receipt is presented to them."

The trustee in Mr Bruce's sequestration reclaimed—In course of the debate, on the recommendation of the Court, Mrs Roberta Cadell or Bruce was sisted as a claimant in the action. She claimed (1) The whole fund *in medio*; and alternatively, either (2) the revenue accrued since Whitsunday 1891; or (3) one-half of the whole fund *in medio*.

Argued for the defender and reclamer—(1) The husband's *jus mariti* was not excluded by the marriage-contract so far as the revenue of this fund was concerned. Its express exclusion from all the capital and part of the income implied its retention *qua* the other part of the income. The meaning of the provision was not to provide a separate income for the wife, who was otherwise provided for. *Jus mariti* attached to all property from which it was not expressly and unequivocally excluded—*Cuthbertson v. Pollock*, November 22, 1799, Hume's Dec. 206; *Smith v. Frier*, February

7, 1857, 19 D. 384; *Black v. Pearson*, February 9, 1891, 3 D. 504; *Fraser on Husband and Wife* (2nd ed.) i. 793. The marriage-contract trustees had no right to retain the fund, and thus defeat the purpose of the trust. There was no averment of fault on behalf of the husband to exclude his *jus mariti*. The reclaimer was therefore entitled to the whole of the fund *in medio*; to give effect to the respondents' view would cause payment to be postponed till the death of the survivor of the spouses, and would thus produce a deadlock. The necessity for a joint receipt would be discharged if the trustees could get their exoneration from the Court. 2. Alternatively, in any case, the reclaimer was entitled to one-half of the revenue, since it was held for the joint behoof of the spouses. The Lord Ordinary had merely postponed this point to be settled hereafter.

Argued for the marriage-contract trustees—1. The existence of an antenuptial marriage-contract was strong presumption against *jus mariti*, being intended to protect the wife against it. The question in all cases was—"Did the truster intend to put the funds in the hands of the husband?" Here certainly it was not so intended. The money was never in the position of being under the *jus mariti*, for it was held by trustees for the joint behoof of the spouses, and so could not be dealt with by the husband exclusively. There was therefore no occasion for the express exclusion of the *jus mariti* in the marriage-contract, and the fact that it was excluded as regarded one portion of the funds, did not imply inclusion as regarded another—*Anderson v. Buchanan*, June 2, 1837, 15 S. 1073, at p. 1084; *Commercial Bank of Scotland v. Black*, June 23, 1842, 14 Scot. Jur. 528; *Rollo v. Ramsay*, November 28, 1832, 11 S. 132; *M'Dougall v. City of Glasgow Bank*, June 20, 1879, 6 R. 1089. 2. The respondents were justified in retaining the funds in question till some agreement was come to for dividing it as had been done originally on the separation of the spouses. They were only doing their duty in doing so, and resisting the claim of the reclaimer for the whole. If a deadlock was caused thereby, it could be terminated by the parties agreeing to halve the income as before. As to the possibility of a joint property in husband and wife existing as regarded third parties, see *Forrester v. Milligan*, July 1, 1830, 8 S. 992.

The above argument, so far as it related to the exclusion of the *jus mariti*, was adopted by the claimant Mrs Roberta Cadell or Bruce. This claimant further argued that if necessary the Court might order the marriage-contract trustees to pay one-half of the revenue in question to herself, and one-half to the trustee in her husband's sequestration so long as the sequestration lasted.

At advising—

LORD M'LAREN—The question under this reclaiming-note relates to the right to the income of a part of Mrs Bruce's estate, which was conveyed to trustees by mar-

riage-contract dated 26th July 1855. The material facts are very distinctly stated by the Lord Ordinary in the first and second paragraphs of his judgment, which I take the liberty of incorporating with my opinion.

"The lady had a fortune derived from her father, which turned out to be of the value of about £10,000. Of this she reserved £1000, which went absolutely to her husband. All the rest she conveyed to trustees, subject to a declaration that the whole capital and revenue of £5000 thereof should be exclusive of the *jus mariti* and right of administration, and not affectable by the debts or deeds of her intended husband, nor by the diligence of his creditors. Only £6000 was payable at the date of the contract, which explains the special reference to the sum of £5000. As regards the income of that sum, the trustees were to pay it to the wife, exclusive of the husband's rights, and the clear revenue of the remainder was to be held by the trustees for the joint behoof of the spouses, and to be paid to them on their joint-receipt. It is with regard to this second portion of the income that the present question arises.

"Since 1876 the spouses have lived separate. In 1877 the marriage-contract trustees, acting on the advice of counsel, and with the acquiescence of Mr and Mrs Bruce, divided this portion of the income into two equal shares, and paid one-half to Mr Bruce and the other half to Mrs Bruce on their separate receipts. Mr Bruce was sequestrated on 2nd November 1880, and the sequestration still subsists. The system of division adopted in 1877 continued without challenge on the part of the trustee in the sequestration down to the summer of 1891."

The trustee in the sequestration now claims the whole income which has accrued on the second mentioned portion of the money settled in trust by Mrs Bruce at and since the term of Martinmas 1891, alleging that he has right to it *jure mariti*.

If the trustee's view of the effect of the contract be well founded, this will be a unique case in the history of the *jus mariti* of a trust being constituted by a wife for the conservation of that ancient and now abolished right. There are few principles, if any, in the law of property better settled than this, that an antenuptial conveyance of the wife's estate to trustees excludes the *jus mariti*, and that any interest which a husband may claim under such a trust is derived, not from the assignation of marriage, but from the agreement of the parties that the wife's estate shall be applied as the trust purposes direct. The law is so stated in the judgment of *Rollo v. Ramsay*, from which the Lord Ordinary quotes, and I agree with his Lordship that it suffices to exclude the *jus mariti* that the wife in her antenuptial contract has "dealt with her property in a way inconsistent with the assignation which the law would otherwise imply."

Passing to the construction of the words of the contract, we have to consider what is meant by this direction, "and the clear revenue of the remainder of the trust-funds

is to be held for the joint behoof of the spouses, and paid to them on their joint-receipt."

Under this provision the income is certainly given to the spouses jointly, and not in equal shares, as was indeed natural and proper in a contract of marriage in which *consortium vite* was contemplated. But it is also certain that under this provision the interests of the spouses in the joint-estate are equal. As the spouses are separated under a voluntary agreement, and the fund can no longer be used and enjoyed as a joint-estate, either the fund—I mean the income—must be divided, or we must accept the self-contradictory proposition, that neither spouse can claim any benefit from a fund which belongs to them jointly. I am not aware of any exception to the rule of law which permits the division of a joint-estate which cannot be specifically enjoyed by the joint-owners. There is a distinction between joint-interests and interests in severalty or shares; in the case of a proper joint-interest each owner is supposed to be seized of the whole estate, so that on the death of one of them the fee expands. But this distinction, the latest exposition of which is to be found in the case of *Paxton's Trustees*, 13 R. 1191, is, in its practical effect, confined to questions of succession, and would not, in my apprehension, impede the right of one of the joint-owner's to sue for a division of the subject. In the present case it is found in fact that while the spouses were living separate the income of the fund was divided between them at their desire, and this arrangement was continued until it was challenged by the reclamer in the interest of creditors.

I may here observe that even if there were a good theoretical objection to the alteration of the mode of enjoyment of this joint-fund at the desire of one of the parties against the wishes of the other, that objection would not affect the judgment which I propose, but would strike at the claim of the trustee. When Mr Bruce's creditors came into possession of his interests under the marriage-trust, the state of possession of this fund was that of division of the income between the spouses. This is accordingly the "*melior conditio*" which the law will support against the claim of one of the parties to alter the mode or form of possession. But I believe your Lordships agree with me that it is not necessary to found on this consideration; because Mrs Bruce is entitled to have her just and equal interest in the fund assigned to her in the only form in which she can receive that benefit, by having one-half of the income paid over to her.

According to my opinion, the Lord Ordinary has rightly preferred the marriage trustees to the income in question, but it will be necessary to add a declaration that the trustees are to hold the income in trust for payment of one-half thereof to Mrs Bruce, including arrears, so long as the spouses shall continue to live separate, and for payment to the trustee in Mr Bruce's sequestrated estate of the other

half of the income, including arrears, so long as the estates of the said George Cadell Bruce shall be under sequestration, and thereafter to Mr Bruce himself.

LORD ADAM, LORD KINNEAR, and LORD PRESIDENT concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel on the reclaiming-note for the late James Wylie Guild as trustee on the sequestrated estates of George Cadell Bruce against Lord Stormonth Darling's interlocutor of 1st March 1893, insisted in by William Auld Guild as trustee in succession on said sequestrated estate, Find and declare that under and by virtue of the antenuptial contract of marriage entered into between the said George Cadell Bruce and Mrs Roberta Cadell or Bruce, dated 26th July 1856, the claimants Robert Philip Wood and George Miller Cunningham, as surviving and accepting trustees thereunder, are bound to make payment of the income of the funds and estate conveyed to them by the said Mrs Roberta Cadell or Bruce so far as said fund exceeds the sum of £5000 (that accrued or may accrue for the period subsequent to Whitsunday 1891) as follows, viz., so long as the said George Cadell Bruce and Mrs Roberta Cadell or Bruce continue to live separate, of one half thereof to the said Mrs Roberta Cadell or Bruce, and of the other half thereof to the trustee on the sequestrated estates of the said George Cadell Bruce, so long as said estates shall be under sequestration, and thereafter to the said George Cadell Bruce himself, but subject to deduction from the last-mentioned half of the premiums of insurance paid or to be paid by said trustees on the policies of insurance on the life of the said George Cadell Bruce conveyed to them by said contract of marriage, and under reference to and subject to the foregoing finding and declaration—Adhere to the Lord Ordinary's interlocutor of 1st March 1893, except as regards said finding recal said interlocutor, and decern: Find the claimant William Auld Guild, as trustee on the sequestrated estate of the said George Cadell Bruce, liable to the said claimants Robert Philip Wood and George Miller Cunningham in the expenses of the competition," &c.

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