marriage. The unanimous decision of the Court in *Menzies* v. *Murray* necessarily involves this. The case was decided on the assumption that all parties in any way interested in the trust funds consented to the termination of the trust; and therefore the trust was kept up solely for the protection of Mrs Murray, and against her wish.

In the present case I agree with the Lord Ordinary that where the provisions sought to be revoked are made by a woman before marriage in regard to her own funds, and solely for her own benefit and protection during marriage, the fact that the husband is not a consenting party to the deed cannot enhance the wife's right to revoke it.

I do not think that the statutory provisions for the protection of the property of married women affect the question. While the wife's separate estate remains distinct and unmixed with that of her husband, those provisions afford protection against the husband's creditors in the event of his bankruptcy. They also afford protection against the husband himself when his wife is living separate from him. But they do not afford any effectual protection to her against his solicitations and her own inclinations, when she is on good terms and living with him; and that is exactly the case for which such a trust is required.

I have said nothing as to the expediency of holding a married woman to such self-interdiction against her will, because the decisions by which I hold we are bound, and which in my opinion apply equally to marriage-contracts and unilateral deeds, are based upon and recognise the policy of such a rule.

But even if the question were still open, I am not satisfied that the balance of considerations is in favour of freedom of revoke. There may no doubt be individual cases in which to hold such a trust irrevocable may cause inconvenience and hardship, but this to my mind is more than compensated in the great majority of cases by the security afforded of the wife's separate estate. The alternative to holding such a trust irrevocable would be that when the intending husband did not consent there would be no means by which a woman could protect her property during marriage without conferring an indefeasible right upon third parties, which would continue even after the marriage was dissolved by the death of the husband.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

The LORD PRESIDENT, The LORD JUSTICE-CLERK, LORD ADAM, and LORD KINNEAR concurred with Lord M'Laren.

At advising, the LORD PRESIDENT delivered the judgment of the Court to the following effect—In terms of the opinions delivered, we recal the interlocutor of the Lord Ordinary and grant decree of declarator in terms of the declaratory conclusions. As to the reductive conclusions, they were supported by averments that were sent to proof, but we did not find it necessary to submit that matter to the consideration of the Seven Judges. As proof was allowed on that matter, and the question was fully argued, and as it involves character and conduct, and furnishes an independent ground for attacking the deed, it is right that it should be known that the Court grant absolvitor from the reductive conclusions. Therefore we assoilzie from the reductive conclusions of the action. Then we declare that the deed is revocable by Mrs Watt with the consent of her husband, and that she is entitled to revoke the said deed accordingly, and that the defenders are bound to reinvest the pursuer in her estate, and to execute all deeds that are necessary to complete her title to the estate. We find the trustees entitled to their expenses out of the trust-estate as between agent and client, and we do not find it necessary to make any finding as regards expenses for the pursuer, since we have granted decree in terms of the declaratory conclusions. It is also proper to add, that while we find that the trustees are bound to execute all necessary deeds to reinvest the pursuer in her estate, these deeds will be paid for by the pursuer.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Assoilzie the defenders from the reductive conclusions of the summons: Find and declare that the deed of provision and trust libelled is revocable by the pursuer Mrs Watt with consent of her husband, and that she is entitled to revoke the said deed accordingly; also that the defenders are bound to reinvest the pursuer in the estate conveyed to them by her, and to execute all deeds necessary for the purpose of completing her title to said estate, and decern: Find the trustees, defenders, entitled to their expenses out of the trust-estate as between agent and client, and remit," &c.

Counsel for the Pursuer—Salvesen—Findlay. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Defenders — Sol.-Gen. Dickson—Ure—J. C. Watt. Agent—J. Gordon Mason, S.S.C.

Friday, January 15.

SECOND DIVISION.

[Sheriff of Lanarkshire.

W. M. BARKLEY & SONS *v.* SIMPSON.

Reparation—Agent and Principal—Breach of Mandate—Relief—Measure of Damages.

A, a coal merchant in Belfast, instructed B, a shipping agent in Glasgow, to charter a vessel to convey a cargo of coal from Glasgow to Belfast. A charter-party was therefore entered into between B and C, a shipowner in Glasgow. By the charter-party C was taken bound to deliver "as customary."

When B sent a copy of the charter-party to A, the latter objected to the discharging clause as being contrary to his instructions, and asked B to get it altered to a clause requiring the discharge to be "into lighters in turn." C, when requested by B, refused to alter the clause, but this refusal B did not intimate to A. On the arrival of the ship A refused to take delivery on the quay, which was the customary mode of delivery, and insisted that the coal should be delivered into lighters. After the expiry of the twenty-four hours allowed for discharging, C discharged and stored the cargo and held it under his lien for freight and demurrage. The cargo was afterwards sold, and realised less than the invoice price. C then sued A for damages, freight, demurrage, and disbursements. After the action had been raised, A and C agreed to submit their differences to arbitration. In this arbitration B was examined as a witness. The arbiter held that A was bound under the charter-party to take delivery on the quay, and found him liable to C in demurrage, the cost of discharging and storing the cargo, and in five-sixths of the expenses of the arbitration.

A then raised an action against B for (1) the demurrage and costs of discharging and storing the cargo; (2) the whole expenses of the arbitration; and (3) the amount lost on the coal.

The Court *assoilzied* B, holding (1) that A had acted unreasonably in refusing to take delivery of the coal, his proper course being to have taken delivery and thereafter sued B for any extra expense incurred by reason of the cargo not having been delivered into lighters, and (2) that even if B's liability for the other items of the pursuer's claim were assumed, he could not be made liable for the expenses of the arbitration, as he was not a party to the proceedings, and had not their dependence intimated to him.

W. M. Barkley & Sons, coal merchants, Belfast, raised an action in the Sheriff Court at Glasgow against John Simpson, shipping agent, Glasgow, for £367, 7s. 6¾d.

The facts giving rise to the action were as follows—In March 1894 the pursuers instructed the defender to charter a vessel for them to convey from Glasgow to Belfast a cargo of coal, the coal being destined for the Belfast Gas Company. A charter-party was therefore entered into between the defender and Messrs Paton & Hendry, shipowners, Glasgow. The discharging clause inserted in the charter-party was one by which the shipowners were taken bound to discharge "as customary." Under such a clause the ship was only bound to discharge the coals at the quay, delivery being taken within twenty-four running hours. On 30th March 1894 the defender sent to the pursuers a copy of the charter-party he had executed for them. On receipt, the pursuers took exception to the terms of the discharging clause as being contrary to their instructions to him, and requested him to get it altered to a clause requiring the shipowners to discharge "into lighters in turn." When requested by the defender to alter the clause, Paton & Hendry refused to do so, but this refusal the defender did not communicate to the pursuers. The ship arrived at Belfast on the evening of 4th April. The pursuers refused to take delivery of the coals at the quay, insisting that they should be delivered into lighters. The ship refused to deliver except at the quay. After the twenty-four hours for discharging had expired, the shipowners landed and stored the cargo and held the same under their lien for freight and demurrage. The cargo was afterwards sold, and realised less than the invoice price. The shipowners then sued the pursuers for damages for breach of contract, freight, demurrage, and disbursements. After the action was raised, the shipowners and the pursuers agreed to submit their differences to arbitration. In this arbitration the defender was examined as a witness. The result was that the pursuers were practically unsuccessful in their contention. The arbiter found that under the charter-party the pursuers were bound to take delivery of the coals on the quay, and found them liable to the shipowners in demurrage, the cost of landing and storing the coal, and in the expense of the arbitration less one-sixth of the taxed amount. The pursuers then raised the present action against the defender for £367, 7s. 6¾d., consisting of (1) £102, 10s. 6d., the demurrage and cost of landing and storing the coal; (2) £127, 14s. 2d., the expenses of the arbitration incurred to the shipowners; (3) £78, 6s. 7d., the expenses incurred to their own solicitors: and (4) £58, 16s. 3¾d., the amount lost in the coal by the sale thereof, being the difference between the amount realised and the invoice price. The ground on which the defender was alleged to be liable was that the pursuers had suffered loss or damage to that amount "through the defender's failure to comply with their instructions" by entering into the foresaid charter-party without his authority.

On 22nd November 1895 the Sheriff-Substitute (ERSKINE MURRAY) pronounced an interlocutor, in which, after various findings in fact, he found in law "(1) that, except as hereinafter excepted, the above losses and expenditure were caused to the pursuers through the act or neglect of the defender when acting as their agent, and that he is liable to them in repayment thereof; (2) that as regards the item of £41, 1s. 3d. for freight, that was an item which the pursuers would have been in the circumstances fairly bound to pay even had the arbitration been successful, and therefore is not one for which the defender can be held liable; (3) that as regards the item of £45, 7s. 3d., as this might have been avoided by the pursuers had they, when they offered to take delivery on the quay, accompanied their offer with an offer under protest, of freight and demurrage, this item also is one for which the defender is not

fairly chargeable; (4) that of the arbitration expenses, half thereof may fairly be held as attributable to the fault of the defender, being £103, 0s. 4½d: Therefore finds that if judgment is to be given on the evidence now in Court, the defender would be liable to pay to the pursuers the balance, being £177, 18s. 8d. with interest as craved."

The defender appealed to the Sheriff (BERRY), who on 29th July 1896 adhered.

The defender appealed, and argued—If it were assumed that the defender was at fault in not getting the proper clause of discharge put into the charter-party, the measure of his fault was the difference between the expense of carrying the coal in lighters to the gas-works, and the expense of carrying it in carts from the quay. If the pursuers had taken delivery on the quay, and conveyed the coal in carts to the gas-works no extra expense might have been incurred on account of the mistake in the terms of the clause. But the amount sued for was all incurred by reason of the pursuers refusing to take delivery on the quay, and thus acting unreasonably and unwarrantably. The defender was not liable for the expense so incurred. At all events, the defender was not liable for the expenses incurred in the arbitration proceedings, proceedings to which he was not a party, and of which no legal intimation had been given to him. If it were assumed that there was fault on the part of the defender, it was impossible to suppose that the expenses incurred by the pursuers, the amount now sued for, were the natural or approximate consequence of that fault. If they were not the natural or approximate consequence the defender was not liable—*Hadley* v. *Baxendale*, 1854, 9 Exch. 341; *Baxendale* v. *London, Chatham, and Dover Railway Company*, 1874, L.R., 10 Exch. 35; *Ovington* v. *M'Vicar*, May 12, 1864, 2 Macph. 1066; *M'Gill* v. *Bowman & Company*, December 9, 1890, 18 R. 206; *Campbell* v. *A. & D. Morison*, December 10, 1891, 19 R. 282.

Argued for pursuers—The whole of the expenses sued for had been incurred by reason of the defenders' mistake in getting the wrong clause of discharge inserted in the charter-party. He having done this in violation of his instructions, was the person primarily liable for the loss occasioned to the pursuer. The arbitration proceedings were the natural sequence of the defenders' mistake and the difference with the shipowners that followed therefrom. He must therefore be held liable for expense reasonably following upon his neglect—*Hughes* v. *Graeme*, 1864, 33 L.J., Q.B. 335; *Hammond & Company* v. *Bussey*, 1887, L.R., 20 Q.B.D. 79. It was said that no intimation of the arbitration proceedings had been given to the defender. But he had been called as a witness in the proceedings, and that was sufficient notice. Even if it were not, the want of notice did not bar the claim—*Duffield* v. *Scott*, 1789, 3 Term Reports 374; *Smith* v. *Compton*, 1832, 3 B. & A. 407; *Jones* v. *Williams*, 1841, 7 M. & W. 493.

At advising—

LORD TRAYNER—The manner in which this case was presented to the Sheriff for decision is calculated to produce some confusion, but when the real question between the parties is reached I cannot say I think it attended with difficulty. The facts admit of being stated very shortly—[*His Lordship here narrated the facts*].

The Sheriff has sustained the claim to the extent of £177, 18s. 8d. He disallows the claim for repayment of freight, which is obviously right, and was admitted to be so by the pursuers' counsel. He disallows further the claim connected with the discharging and storing of the coal for a reason which I shall afterwards notice, and he disallows one-half of the expenses occasioned by the arbitration. The only two items of the pursuers' claim which he finds the pursuers entitled to as claimed are demurrage, and the loss sustained by the sale of the coal. I am unable to follow the logical sequence of the Sheriff's findings. It appears to me that if the pursuers are entitled to any decree at all on this action they are entitled to something more than the Sheriff has awarded, and if not entitled to what the Sheriff has disallowed, then not entitled to what the Sheriff has given. What I mean by this will be made clear by considering the ground on which the Sheriff has disallowed the charge connected with the discharging and storing of the coal. He says that "as this might have been avoided by the pursuers had they, when they offered to take delivery on the quay, accompanied their offer with an offer under protest of freight and demurrage, this item is one for which the defender is not fairly chargeable." But if it is a good ground for refusing this part of the pursuers' claim, that that item of their loss could have been avoided by their making the offer to which the Sheriff refers, it would follow that the defender is not "fairly chargeable" with any damage or loss whatever which could have been avoided by such an offer if made. Now, it appears to me that that ground, logically carried out, strikes at almost the whole of the pursuers' claim, for if the offer referred to had been made and acted upon by the pursuers, the greater part of their alleged loss and damage would have been avoided. The offer alluded to was made under these circumstances. The pursuers having refused to take delivery of the cargo at the quay, the shipowners intimated that if this refusal was persisted in they would land and store the cargo under their lien until their freight and demurrage were paid. The pursuers, on the same day, offered, "without prejudice to the charter-party," to discharge the cargo and place it in their own store, but offered no payment or security for the freight or demurrage. Had they offered (even under protest) to pay freight and demurrage, the coal would have been delivered to them, there would have been no legal proceeding or arbitration, and no forced sale of the coal involving a loss. In short, this course, if adopted, would have avoided practically the whole loss and damage now in question.

Then, again, I am unable to see any rea-

son why the defender has been held liable for one-half of the arbitration expenses, and only one-half. If by his fault the pursuers suffered loss to the extent of these expenses, they should be indemnified for the whole, not the half, of their loss. The Sheriff says that "on the whole the amount of these expenses, which may fairly be held to have been caused by the fault of the defender, may be stated at one-half." I confess I cannot follow this. If the fault of the defender caused any part of the expenses of the arbitration, it caused the whole, for the question in the arbitration—and there really was but one question—was, what did the charter-party mean, and what were the rights and obligations of the parties under the discharging clause when properly construed? It all turned on the discharging clause, which, according to the pursuers' account the defender had, contrary to his instruction, inserted in the charter-party. I am unable to see any reason for thus splitting up the defender's claim. They are, in my opinion, entitled to all they ask or nothing.

I am of opinion that the pursuers are not entitled to succeed in this action, and for a reason very much the same as that on which the Sheriff refuses them the item of £45, 7s. 3d of the expenses of discharging and storing the coal. I think the pursuers could and should have avoided the loss for which they seek now to be indemnified by the defender, and that the loss which they have sustained was not the consequence of what the defender did, but the result of their own actings.

When the pursuers received the copy of the charter-party on 31st March, four days before the vessel left Glasgow with the coals, they saw they were bound to discharge the coals "as customary." They knew or should have known what that meant. They knew it was not what they wanted, nor what they had instructed the defender to agree to as the discharging clause. They knew further that their request to have the discharging clause altered had not been replied to, and therefore, so far as their knowledge went, the charter remained in the, to them, objectionable terms. In such circumstances I think their duty was plain. Their agent had made a contract for them; they must fulfil it, and claim any relief from him competent to them in the circumstances. They should at once have recognised that under the charter-party as executed, the shipowner, in offering to discharge "as customary"—that is, on the quay, was doing all he was bound to do, and they should have taken delivery there. If taking delivery there incurred loss or expense beyond what would have been occasioned by discharging the cargo "into lighters in turn," for that they should have had recourse against their agent, by whose fault or failure to obey his instructions such loss had been occasioned. Such a course, if followed, would have avoided all the loss now claimed. I cannot hold the defender liable in the consequences of the pursuers having maintained a position altogether untenable, having regard to the plain terms of the charter-party executed by their agent, and under which their cargo had been carried. I think the pursuers might have had a good claim, for the difference, if any, between the cost of carrying the coals to their purchaser the gas company, by carts from the quay, and by lighters from the ship's side. But no decree can be given for that in this action, as there is no information or proof before us from which the account of such differences, if any, can be fixed.

The view which I have taken of the case renders it unnecessary to dispose of the question argued before us, whether assuming the defender's liability for the other item of the pursuers' claim, he could, in any view, be made liable for the expenses of the arbitration. Had it been necessary to decide that question, my opinion on it would have been adverse to the pursuers. I know of no case or other authority in our books in which such a claim has been given effect to, where (as in the present case) the person sought to be charged with such expenses was not a party to the proceedings, or had not, at least, had the dependence of them intimated to him that he might protect his own interests therein.

On the whole matter I think the interlocutor appealed against should be recalled and the defender assoilzied.

LORD YOUNG — The whole controversy has arisen out of a litigation of an extravagant kind entered into between Messrs Paton & Hendry and the pursuers, resulting in an arbitration between the parties and decree in favour of the former. The pursuers' conduct in this matter is to me inexplicable. The relation between them and Paton & Hendry was a contract relation standing on a charter-party. It was decided in the arbitration that the meaning of the clause of discharge in the charter-party was what it bears to be on the face of it, that the coals were to be delivered on the quay. Paton & Hendry desired to deliver them on the quay, but the pursuers refused to take delivery. They said, "You must deliver them into lighters," or, I suppose, "if not take them back to Glasgow." Anything more extraordinary on the part of business men I have never seen, and anything more ridiculous it would be difficult to conceive. Even if it be assumed that the pursuers' instructions to the defender were to insert a clause in the charter-party requiring the discharge of the cargo into lighters, their only proper course was to have taken delivery of the coal on the quay and thereafter charged the defender with any extra expense incurred by reason of the coal being carted to the gas-works from the quay instead of being delivered into lighters according to instructions. They might have had a claim against the defender for extra expense incurred by reason of his not carrying out their instructions, but they had no right to refuse to take delivery of the coal from Paton & Hendry, who were acting in terms of the charter-party. The expenses sued for having been incurred by means of the pursuers' inexplicable con-

duct, I have no hesitation in arriving at the conclusion that the defender is entitled to absolvitor.

LORD JUSTICE-CLERK — I shall confine myself to a consideration of the question whether the pursuers took proceedings and carried them on in such circumstances and in such manner as can entitle them to succeed in the present action. The pursuers, without intimation to the defender, embarked on this litigation, and then in the course of it, again without intimation to the defender, entered into an agreement to take the case out of the hands of the official court and submit it to arbiters chosen, without the defender being consulted. Thus throughout the defender was afforded no opportunity for dealing with the matter as it might affect his interests. And what is now maintained by the pursuers is, that they having been held to be wrong in a case conducted entirely by themselves, and without the defender having any control whatever over the proceedings, or any voice as to their mode or their management, he, the defender, must make good all that has been lost to the unsuccessful parties in the litigation. I am entirely unable to assent to that. I think the Sheriffs have erred here in holding that the pursuers were entitled to a decree. I cannot assent to the proposition that parties to a contract are entitled to carry on a litigation at their own hand, and to submit the subject-matter of it to arbiters to decide, all without intimation to the agent who made the contract for them, and on being unsuccessful in the litigation, to demand payment of all they have lost from that agent, because before the litigation he had stated as a fact what they found they were afterwards unable to prove by sufficient evidence, and expressed an opinion as to its effect upon the contract. And I do not think that a refusal so to hold involves any hardship to a principal in such a case, Here the pursuers, if their agent was in fault, might have saved all this expense and kept themselves *indemnis* by taking delivery as the shipowners insisted, and then proceeding against the agent for any loss caused by the mode of discharge being different from that which he had led them to understand he had secured for them, It is plain that any such loss would have been of trifling amount and ascertainable in a less expensive manner than, first, an action in the High Court of Justice in Ireland, then an arbitration before two arbiters and an oversman, and lastly an action practically for relief before this Court. A real sum at issue of probably at the utmost £20 has by these litigations been swelled to what cannot be less now than £500—a result much to be deplored—and which I can see no just ground for imposing upon this defender.

LORD MONCREIFF was absent.

The Court recalled the interlocutor appealed against and assoilzied the defender.

Counsel for the Pursuers—H. Johnston — Hunter. Agent — J. Gordon Mason, S.S.C.

Counsel for the Defender –Ure—A. S. D. Thomson. Agents—Whigham & MacLeod, S.S.C.

Saturday, January 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

COWIE BROTHERS & COMPANY *v.* HERBERT.

Trade-Mark—Infringement—Resemblance—Interdict for Particular Locality.

A firm of export merchants, whose registered trade-mark was a representation of the Glasgow Town Hall, raised an action to interdict a biscuit-maker from using their trade-mark, or any mark substantially the same as their trade-mark, in connection with the sale of biscuits not exported by them. The label used by the defender also displayed the Glasgow Town Hall, but from a different point of view. It was in the Burmese market alone that the pursuers averred infringement of their right. In addition to the pursuers themselves and certain of their employees, three independent witnesses appeared for the pursuers, and testified respectively that the two labels would go under the same name in the interior of Burmah, the natives calling both the picture of a palace, and that there was such a similarity as would mislead native buyers, especially up-country buyers. No evidence was led of actual deception.

Held that the defender must be assoilzied, on the ground that the pursuers had failed to prove such resemblance between the labels as would be apt to mislead purchasers.

Cowie Brothers & Company, export merchants, Glasgow, raised an action in the Sheriff Court of Lanarkshire to have George Herbert, biscuit manufacturer, Glasgow, interdicted from using, in connection with the sale of biscuits not exported or selected or prepared for exportation by the pursuers, the pursuers' trade-mark, or any mark substantially the same as, or only colourably different from, the pursuers' trade-mark.

The pursuers averred that they had for several years exported goods to Rangoon and elsewhere, and had acquired an extensive and favourable reputation for the goods exported by them, of which biscuits formed a part. They further averred that in 1889, in order to protect themselves and the public from imposition, they adopted as a distinctive trade-mark a representation of the Glasgow Town Hall. In particular, they averred that they had used the said mark on tins of biscuits exported by them to Rangoon and elsewhere, and that the said mark was known in the Rangoon market as "El Musjid" or "The Palace." In July 1889 the pursuers were registered as proprietors of the trade-mark in question.

"(Cond. 4) The pursuers have recently