Thursday, December 21.

FIRST DIVISION.

BLACKBURN *v.* SHARP & ANOTHER.

Process—Reclaiming Note—Competency—Expiry of Reclaiming Days on a Day on which Clerk's Office not Open—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 54.

Section 54 of the Court of Session Act 1868 enacts that where the leave of the Lord Ordinary has been obtained, "a reclaiming note, presented before the whole cause has been decided in the Outer House, may be lodged within ten days from the date of the interlocutor granting leave with one of the clerks of the Division of the Court in which the cause depends, without transmission of the process or any part thereof."

Where the time for lodging a reclaiming note under section 54 of the Court of Session Act 1868 expired on a day when the clerk's office was not open, *held* that the reclaiming note was competently lodged on the first day thereafter on which the clerk's office was open.

In an action pending in the Outer House the Lord Ordinary (DUNDAS) pronounced an interlocutory judgment on 6th December 1905, and on the same day granted leave to the defenders in the action to present a reclaiming note against this interlocutor.

The ten days within which, under the provisions of section 54 of the Court of Session Act 1868, a reclaiming note might be lodged expired on Saturday 16th December. The clerk's office in the Register House is not open on Saturdays.

The reclaiming note was boxed on Saturday, 16th December, but was not lodged till the following Monday.

On December 21 the reclaimers enrolled the case in the Single Bills for the purpose of moving that it be sent to the Summar Roll.

Counsel for the respondent moved the Court to refuse the reclaiming note as incompetent in respect that it had not been timeously lodged. He argued that the provisions of section 54 of the Court of Session Act 1868 requiring the reclaiming note to be lodged within ten days were imperative—*Ross* v. *Herde*, March 9, 1882, 9 R. 710, 19 S.L.R. 481; *Watt's Trustees* v. *More*, January 16, 1890, 17 R. 318, 27 S.L.R. 259.

The reclaimers argued that the cases founded on by the respondent had no application, as in both these cases there had been a failure to box within the required number of days from the date of the interlocutor reclaimed against. In this case the reclaiming note was timeously boxed on Saturday, 16th December, and it was not lodged on that day simply because the clerk's office was closed on Saturdays. That being so, the provisions of section 54 of the Act were sufficiently complied with by the reclaiming note being lodged on the first day thereafter on which the clerk's office was open—*Henderson* v. *Henderson*, October 17, 1888, 16 R. 5, 26 S.L.R. 11.

The Court repelled the respondent's objection to the competency of the reclaiming note.

Counsel for the Pursuer and Respondent—Blackburn. Agents—Mackenzie & Black, W.S.

Counsel for the Defenders and Reclaimers—W. T. Watson. Agents—Reid & Crow, Solicitors.

Tuesday, November 28.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

SAWREY-COOKSON *v.* SAWREY-COOKSON'S TRUSTEES.

Reduction—Minority—Misrepresentation—Essential Error—Trust Conveyance by Lady in Contemplation of Marriage—Averments—Relevancy.

In an action of reduction of a trust-conveyance raised by a lady with consent of her husband against the trustees, the pursuer averred that when she executed the deed she was a minor and knew nothing of business; that she was told by her father, whom she trusted, that she had better sign it, and that the deed was merely a testamentary arrangement of her fortune; that she now discovered that it was alleged to be an irrevocable deed under which she had tied up her whole fortune, even as against herself. *Held* that her averments were relevant.

International Law—Conflict—Trust-Deed Executed by Scotchwoman in intuitu of English Marriage—Deed in Scottish Form and Majority of Trustees Scottish—Revocability of Trust Conveyance—Power to Revoke.

Prior to her marriage a Scotchwoman executed a trust conveyance by which she conveyed her estate to trustees. The deed was executed *in intuitu* of an English marriage, but it was in Scottish form, and two of the three trustees nominated in it were Scotch. *Held* (1) that the question of the revocability of the deed fell to be determined by Scotch, and not by English law; but (2) that averments that "by the law of England the effect of marriage is to incapacitate a wife from affecting or revoking, even with the consent of her husband, rights already created by her by any unilateral deed or settlement in contemplation of the marriage," were relevantly made by the defenders and must be the subject of inquiry.

Trust — Revocation — Married Woman—Deed Executed in Contemplation of Marriage—Subsequent Marriage—Power to Revoke.

In contemplation of marriage a lady executed a trust conveyance conveying

her estate to trustees. Subsequent to her marriage she claimed right to revoke it. *Held* that on the authority of *Watt* v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267, had she remained a Scotchwoman she would have been entitled to revoke it. *Watt* v. *Watson* (*cit. sup.*) commented on.

International Law—Conflict—Deed Executed by Lady Domiciled in England Ratifying Trust-Deed Executed by her in Contemplation of Marriage, and when Domiciled in Scotland—Revocability—Averment of English Law—Relevancy.

A lady, subsequent to her marriage to a domiciled Englishman, executed a ratification of a Scottish trust-conveyance granted by her in contemplation of marriage, and when she was domiciled in Scotland. She subsequently claimed right to revoke the ratification. *Held* (1) that the question of the revocability of the ratification was to be determined by English law, and (2) that averments to the effect that by the law of England the ratification was irrevocable were relevantly made in defence, and must be the subject of inquiry.

Reduction — Ratification by Married Woman with Consent of her Husband of Conveyance Executed by her when Unmarried — Misrepresentation — Error —Concealment—Relevancy.

A lady having applied to the trustees acting under a trust conveyance granted by her prior to marriage to pay her part of the trust funds, the trustees refused to do so unless she granted a ratification of the trust conveyance. After negotiations in which she had independent legal advice, and in which the parties dealt with each other at arm's length, she executed the ratification. In a subsequent action, in which she claimed to reduce the ratification, she averred that she had signed it under essential error; that the trustees had failed to inform her that the trust-conveyance was revocable; and that she had been induced to execute the ratification by misrepresentations on the part of the trustees, and in consequence of statements made on their behalf that it was truly of the nature of a receipt. *Held* (*rev.* the judgment of Lord Ardwall, Ordinary) that the pursuer's averments were irrelevant.

This was an action at the instance of Mrs Catherine Anna Stirling Sawrey-Cookson, wife of James Freville Rawlinson Sawrey-Cookson, and residing with him at the Old Palace, Chippenham, Wiltshire, and the said Mr Sawrey-Cookson as her curator and administrator-in-law and for his own interest, against Thomas Archibald Warnock of Portaferry, County Down, Ireland, and Mark Bannatyne, solicitor, 145 West George Street, Glasgow, the surviving trustees acting under a trust conveyance and settlement granted prior to her marriage by Mrs Sawrey-Cookson (then Miss Stirling), with the special advice and consent of her father, the deceased Richard Stirling, dated 5th June, and recorded in the Books of Council and Session 12th July 1890.

The summons concluded for reduction of (1) the said trust conveyance and settlement, and (2) a receipt and ratification thereof dated 17th March, and recorded in the Books of Council and Session 19th April 1894, granted by Mrs Sawrey-Cookson, with consent of her husband, in favour of the trustees; or otherwise for declarator that the trust conveyance and settlement was revocable by Mrs Cookson with her husband's consent.

Mrs Cookson, prior to her marriage, resided with her father in Melville Street, Edinburgh, and had a Scottish domicile. Mr Cookson was at the date of the marriage, and still was, a domiciled Englishman. There was no issue of the marriage in existence, and the capital funds administered by the trustees amounted to upwards of £15,000.

Mrs Cookson, who was then nineteen years of age, by the trust conveyance and settlement in question, in contemplation of her approaching marriage, assigned to the trustees therein mentioned her whole means and estate (excepting as therein specified), reserving power to herself at any time to ask and receive from the trustees, with their consent and approval, on her own receipt, a payment or payments out of the capital of her estate of a sum or sums not exceeding in all £2000, as her own absolute property. The purposes of the trust were briefly these—Payment to the pursuer Mrs Sawrey-Cookson of an alimentary liferent of the free yearly income; payment of a similar liferent to her husband in the event of his survivance; payment of the capital on the death of the survivor of the spouses to the children of the marriage, and failing children, payment of the capital on the death of Mr Cookson, should he survive his wife, to the heirs and representatives of Mrs Cookson, or in the event of her survivance to herself. Mr Sawrey-Cookson was not a party to the said trust conveyance, and it was averred by the pursuers that he was not aware of its existence until some time after the marriage.

With regard to the execution of the trust conveyance and settlement by Mrs Sawrey-Cookson, the pursuers averred:—"(Cond. 6) . . . Some little time before the execution of the deed the pursuer Mrs Sawrey-Cookson was told by her father that it was usual and proper for her prior to her marriage to make what he termed her 'will,' and shortly thereafter he further informed her that a deed for that purpose had been prepared by his agents, and would be presented for her signature. No explanation whatever was given to the pursuer Mrs Sawrey-Cookson of the nature and effect of the deed so prepared beyond this, that, as above-stated, she had then been led by her father to believe that it was of the nature of a testamentary settlement. On 5th June 1890 the pursuer was taken by her father to the office of Messrs Hamilton, Kinnear, & Beatson, W.S., Edinburgh,

where she and her father executed the deed in presence of two of the staff in the office. The pursuer signed said deed in obedience to her father's wishes and at his request. Prior to signing the same the pursuer had not seen the deed or any draft thereof, or been given any opportunity of examining or considering its terms, or of advising with others as to the propriety of her signing the same. The deed was not read over to her at the time of its execution, and neither then nor at any time prior thereto was the nature and effect of said deed explained to her. The pursuer Mrs Sawrey-Cookson, who was, as before stated, then in minority, was not represented by any independent legal adviser, and at the time she executed the said deed was in complete ignorance of its true nature and effect. Said deed was signed by her in the erroneous belief, induced by the representation of her father, as above stated, that the deed was merely of a testamentary character. The pursuer was not aware that said deed was of the nature of a matrimonial trust intended to take immediate effect, and to be irrevocable, and its proposed purpose and effect was not explained to, but was on the contrary concealed from, her by her father and those advising in the matter. Had the true character of the deed been explained to the pursuer she would not have signed the same." The defenders in answer averred that Mrs Cookson was at the time of executing the deed fully aware of its purpose.

With regard to the execution of the receipt and ratification, the pursuers averred:—"(Cond. 8) In or about May 1892 the pursuer Mrs Sawrey-Cookson, in terms of the reserved power in her favour contained in the deed, requested and obtained from the trustees payment of a sum of £500, and thereafter she on various occasions made application to the trustees for further payments up to at least the limit of £2000 prescribed by the deed. These applications were uniformly refused. In or about the beginning of 1894, owing to expenditure on a new residence and other causes, the pursuer Mrs Sawrey-Cookson's financial needs became pressing, and some creditors were threatening action. She again appealed to the trustees, who declined to consider the same unless she and her husband were prepared to ratify the trust deed. To this course the pursuer Mrs Sawrey-Cookson declined to assent, and certain correspondence on the subject then ensued between her then solicitors . . . and Messrs Petch & Smurthwaite, solicitors, London, acting for Messrs Bannatyne on behalf of the trustees. The trustees however adhered to the position that ratification of the deed must precede any capital payment by them to Mrs Sawrey-Cookson. It was represented to the pursuer Mrs Sawrey-Cookson that any action at her instance to enforce her demand against the trustees would be most prejudicial to her father's health, and also that on her signing the document in question all her then debts would be settled by the trustees. The pursuer Mrs Sawrey-Cookson throughout protested to her father and to the defenders and their advisers that she was being coerced into ratifying the trust deed, and that undue advantage was being taken of her and her husband's then financial straits. She was informed that bankruptcy proceedings would issue against her at the instance of creditors, and that no alternative was open to her other than compliance with the trustees' conditions. The pursuer Mrs Sawrey-Cookson was further at the time in a weak state of health and suffering from a severe mental strain owing to the embarrassed state of her affairs. Ultimately, under the pressure brought to bear on her by the trustees and those representing them, and in view of her urgent financial difficulties, the pursuer Mrs Sawrey-Cookson and her husband were forced to comply with the trustees' demand that she should confirm the trust deed, and the receipt and ratification hereinafter mentioned was accordingly signed. . . . . (Cond. 10) Said receipt and ratification was granted by both pursuers, as the trustees were well aware, in consequence of the financial pressure to which they were at the time subjected. When said document was first presented to the pursuer Mrs Sawrey-Cookson for signature on 16th March 1894 she declined to sign it on the ground that the trustees were, in the circumstances, putting undue pressure upon her. . . . The pursuer Mrs Sawrey-Cookson was apprehensive that by signing said receipt and ratification her right to reduce the trust conveyance on the grounds before mentioned might be in some degree prejudiced, and it was mainly for this reason that she declined to sign the document when first presented for her signature. She subsequently however had an interview with Mr Smurthwaite, who was acting for the trustees, and who is her brother-in-law. Mr Smurthwaite stated to the pursuers that the document was truly only of the nature of a receipt, and was only required by the trustees as 'evidencing her good faith,' and that her father was prepared to assist solely on the condition that she signed the same. Said statements were in point of fact untrue. In consequence of said statements, and of the pressure brought to bear on her, the pursuer Mrs Sawrey-Cookson was however induced to sign the document. . . . When signing said document she stated that she did not do so of her own free will but 'under duress.' The said document contained no recital of the clauses of the trust-deed, and in signing it the pursuer's husband understood that he was merely as his wife's guardian signifying his approval of the monetary transaction then in hand. . . . The trustees and those advising them were, it is believed and averred, at the time fully cognisant that it was within the power of the pursuer Mrs Sawrey-Cookson to recall the trust-deed, but, contrary to their duty, they concealed this both from the pursuers and their advisers. Neither the pursuer Mrs Sawrey-Cookson nor her husband were at this time aware, nor had they been advised, that it was within Mrs

Sawrey-Cookson's power, and that she was legally entitled, to revoke the trust-deed, and they both signed said document in complete ignorance of their legal rights, and in particular of the pursuer Mrs Sawrey-Cookson's right to revoke said trust-deed. Had the pursuer Mrs Sawrey-Cookson and her husband been aware that said trust-deed was revocable they would have declined to sign the deed of ratification. . . . Said receipt and ratification was executed by the pursuers *sine causa* in ignorance of their legal rights, and under essential error as to its import and effect.

. . . . . .

. . *With reference to the defenders' averments added by way of amendment, it is denied that the law of England is to the effect stated, or at least has any such effect in cases where the deed sought to be ratified either contains a clause of revocation or is otherwise revocable at the will of the granter, or is truly testamentary in character.*" (The words in italics were added by way of amendment in the Inner House.)

In answer the defenders stated that the pursuers in granting the ratification were fully aware of all their rights and had an independent legal adviser. They "explained that the trust-deed was executed by the pursuer Mrs Cookson in contemplation of her marriage with a domiciled Englishman, and that the revocability of said deed falls to be decided by the law of the matrimonial domicile—*videlicet*, the law of England, according to which a unilateral settlement made by a wife prior to and in contemplation of marriage is after the marriage irrevocable by either or both of the spouses. *In any event, on her marriage and consequent acquisition of an English domicile, Mrs Cookson by the law of that country became incapable of affecting or revoking the said trust deed, either with or without the consent of her husband. By the law of England the effect of marriage is to incapacitate a wife from affecting or revoking, even with the consent of her husband, rights already created by her by any unilateral deed of settlement in contemplation of the marriage.* The trust deed by Mrs Cookson thus became irrevocable on her marriage. Further, the meaning and effect of the receipt and ratification fall to be decided by the law of England, which was the *lex domicilii et loci actus*, and according to which a voluntary or contractual postnuptial settlement by one or both, respectively, of the spouses, or a postnuptial settlement in pursuance of ineffectual antenuptial marriage articles, are all irrevocable at the instance of either or both of the spouses. The said ratification was thus irrevocable." (The words in italics were added in the Inner House.)

The pursuers pleaded — "(1) The writs under reduction having been executed under essential error as to their import and effect, as condescended on, the pursuers are entitled to decree of reduction as craved. (2) The writs under reduction having been executed under essential error as to their import and effect, induced by misrepresentation and concealment as condescended on, the pursuers are entitled to decree of reduction as craved. (4) The pursuers are entitled to decree of declarator as craved, in respect—(*a*) said trust conveyance and settlement was and is revocable by the pursuer, at least with her husband's consent; and (*b*) the nature and effect of said trust conveyance and the pursuer's right to revoke the same were in no wise affected *by Mrs Cookson's marriage or by her consequent acquisition of an English domicile, or* by the granting of the said receipt and ratification." (The words in italics were added in the Inner House.)

The defenders pleaded—"(1) The pursuers' statements are irrelevant. (3) The defenders are entitled to absolvitor, in respect that (*a*) the trust conveyance and settlement having been executed by the pursuer Mrs Cookson in contemplation of her marriage with a domiciled Englishman, the revocability thereof falls to be decided by the law of England, according to which it is irrevocable at the instance of the pursuers; (*b*) *separatim, in respect that the capacity of the pursuer Mrs Cookson to revoke said trust-deed and conveyance falls to be decided by the law of England, and that according to that law she is incapable of revoking said deed either with or without the consent of the pursuer Mr Cookson;* (*c*) in any event, the receipt and ratification having been executed in England by spouses domiciled in England, falls to be construed and given effect to according to the law of England, and accordingly the receipt and ratification is irrevocable, and renders said trust conveyance and settlement irrevocable at the instance of the pursuers." (The words in italics were added in the Inner House.)

On 14th June 1905 the Lord Ordinary (ARDWALL) pronounced this interlocutor—"Finds (1) that the trust conveyance and settlement libelled, taken by itself, is revocable by the pursuer Mrs Sawrey-Cookson; but (2) that standing the receipt and ratification also libelled, the pursuers are barred from reducing or revoking the said trust conveyance; (3) that the pursuers allege that they are entitled to have the said receipt and ratification reduced, as having been executed under essential error as to its import and effect, induced by misrepresentation and concealment: Therefore, before further answer, allows to the parties a proof of their averments relating to (*First*) the granting and execution of the receipt and ratification under reduction; and (*Second*) the law of England applicable to both and each of the deeds under reduction." . . .

Opinion.—"In this action Mrs Catherine Anna Stirling or Sawrey-Cookson, with consent of her husband, and he for his own interest, seek to reduce a trust conveyance executed by Mrs Cookson before her marriage, and a receipt and ratification granted by Mrs Sawrey-Cookson and her husband on 17th March 1894; alternatively, declarator is asked that the said trust conveyance is revocable by Mrs Sawrey-Cookson; that she is entitled to revoke it; and that upon

such revocation the defenders, who are the trustees under the trust conveyance and settlement, are bound to denude of the whole trust-estate in favour of Mrs Sawrey-Cookson.

"The first question argued to me was whether the trust-conveyance executed by Mrs Sawrey-Cookson was revocable by her prior to the execution of the receipt and ratification under reduction. It was conceded by counsel for the defenders that if that question is to be judged by the law of Scotland, the present case is ruled by the decision in *Watt* v. *Watson*, 16th January 1897, 24 R. 330, but he maintained that as the trust conveyance and settlement was truly a matrimonial deed, in respect that it bore to be executed in view of an intended marriage, and contained provisions in favour of the granter's future husband and possible children, the question of its revocability fell to be decided by the law of the matrimonial domicile; that the matrimonial domicile admittedly was English, and that by English law such a deed was not revocable by either or both of the spouses. I am of opinion that the question of the revocability of the deed must be judged of by the law of Scotland, that being the law by which it was intended at its execution by the parties that the deed should be governed. Several considerations support this view. (1) The deed itself is in Scottish form, was executed in Scotland by a domiciled Scotchwoman, with the consent of her father as her curator, who was also domiciled in Scotland; (2) it appears to have been intended that the trust should be managed in Scotland by the family law-agent, who was nominated one of the trustees, and power to employ whom as law-agent is specially given in the trust-deed; (3) by the second and third purposes of the trust, alimentary liferents are given, and such provisions are ineffectual according to the law of England—see Lord Shand's opinion in *Corbet* v. *Waddell*, 7 R. 208; (4) in the event of there being no children of the marriage, and of the truster dying intestate, the fee of the trust estate is destined 'to my own legal representatives whomsoever according to the law of Scotland'; (5) further, there is a declaration that the provisions conceived in favour of the husband and children of the marriage are to be in full of all claims arising to them, whether under the Married Women's Property (Scotland) Act 1881, or under any other statute or at common law, and further in the same clause, all of which is conceived in terms applicable to a Scotch trust, the *jus mariti* and right of administration and curatorial power of husbands is excluded from provisions descending to females.

"It was ably argued for the defenders that while the interpretation and effect of the deed itself might fall to be judged of according to the law of Scotland, yet the rights of the parties interested in the deed to revoke it fell to be regulated by the law of the matrimonial domicile. I cannot assent to this reasoning. I consider that the revocability of a deed must be judged of by the law which regulates the legality and operation and effect of the deed in other respects, and so judging the matter I am of opinion that the deed of conveyance was revocable. (See *Corbet* v. *Waddell*, quoted *supra*, and *in re Fitzgerald*, L.R. 1904, 1 Ch. D. 573, and *Duncan* v. *Canon*, 18 Bevan, 128.)

"The next point for decision is as to the effect of the receipt and ratification under reduction. It was maintained for the pursuers that this deed must follow the same rule as the trust conveyance, it being an ancillary deed to it, and indeed primarily, a receipt for moneys payable under it, and the case of *Duncan* v. *Canon*, above cited, and *Tweedie* v. *Maunder*, L.R., 1901, 1 Ch. D. 547, were referred to. I cannot assent to this argument. The deed in question is not only a receipt but a ratification. The following is the clause of ratification:—'Further, I, with consent and concurrence of my said husband, and he for all right competent to him in the premises, do hereby not only ratify, adopt, and confirm the said trust conveyance and settlement, and the whole heads, clauses, and provisions therein contained, but also ratify and approve the whole actings of the said trustees thereunder.' The deed contains a clause of registration, and is duly signed by both pursuers and authenticated in the English form. I accordingly consider this deed a valid ratification and adoption by both the spouses of the trust conveyance, and it certainly would be a novel doctrine to hold that all deeds of ratification were subject to revocation or reduction in the same way as the deeds which they purport to ratify. It would follow, of course, from such a doctrine that ratification of one deed by another would be impossible.

"It was practically admitted by the counsel for the pursuers that this deed, if allowed to stand unreduced, would be a complete answer to an action of reduction at the instance of the pursuers of the original trust conveyance, and, as already stated, I think that standing unreduced it is equally valid as a bar to revocation by the pursuers or either or both of them.

"The pursuers maintained further that the receipt and ratification, apart from its ancillary relation to the other deed, is itself revocable by the law of Scotland, just as it would have been if it had been a repetition *in extenso* of the original trust conveyance which it bears to adopt and ratify.

"I am of opinion, on the contrary, that it is irrevocable. It must be noticed that the trust conveyance is adopted not only by the wife but by the husband, and I think that this amounts in law to the execution of a postnuptial contract, for reading the two deeds together I think that is the legal result which must be arrived at. Now, even supposing the deeds to be judged of by the law of Scotland, I think that upon the authority of such cases as *Allan* v. *Kerr*, 8 Macph. 34; *Low's Trustees*, 5 R. 185; and *Peddie*, 18 R. 491, such deed being a reasonable marriage contract is not revocable at the

instance of either or both of the spouses. But I consider further that the receipt and ratification being a matrimonial deed executed in England *stante matrimonio* must be given effect to as an English deed, and according to the averments of the defenders, which will require to be proved, not being admitted, such a deed is irrevocable.

"The pursuers, however, maintain that they have set forth a relevant case for reduction of the said ratification on the ground of essential error as to its import and effect, induced by misrepresentation and concealment on the part of the defenders. I must say that I have difficulty in holding that a relevant case has been stated, but having regard, particularly, to the averments regarding Mr Smurthwaite's intervention, I am not prepared to dispose of the case without a proof. In the view I have taken of the case, there seems no reason for a proof in support of the reductive conclusions so far as affecting the trust conveyance. As there requires to be a proof regarding the law of England bearing on the question of revocation of the receipt and ratification, I think it as well that there should be also a proof regarding the law of England as regards the revocability of the trust conveyance; such proof should not add much, if anything, to the expense, and it would obviate the necessity for further proof in the event of my first finding being hereafter held to be erroneous."

The pursuers reclaimed, and argued—Both the trust conveyance and the ratification were revocable. The ratification was purely ancillary to the principal deed, and fell to be construed by the same law. The ratification was not a deed between the spouses, but a receipt by the lady to certain trustees. The main cause for which it was granted was to secure the trustees. It was prepared in Scotland, was in Scotch form, and bore to be executed in virtue of a reserved power in a Scotch deed. It ought therefore to be construed according to the law of Scotland—*Duncan* v. *Canon*, 1853, 18 Beav. 128, *aff.* 1855, 7 De G. M. & G. 78; *De Nicols* v. *Curlier*, [1900] A.C. 21. The effect of the ratification was to confirm the deed as it was—*i.e.*, subject to revocation—and no amount of ratification could render such a deed irrevocable, or defeat the inherent power of the spouses to revoke it. The ratification was not a postnuptial contract, but even if it were it would be revocable as a donation to the husband, who gave nothing in exchange for it. There was no issue of the marriage in existence, and therefore no *jus quæsitum*. In the case of *Low's Trustees*, referred to by the Lord Ordinary, the deed was a unilateral one by the husband, equivalent to a reasonable provision, and therefore irrevocable. The pursuer was entitled to an issue of essential error. As to Mrs Cookson's alleged incapacity by the law of England to revoke the trust conveyance, the following authorities were referred to—*Duncan* v. *Canon* (*cit. sup.*); *Peillon* v. *Brooking*, 1858, 25 Beav. 218; *Pouey* v. *Hordern*, [1900] 1 Ch. 492; *Tweedie* v. *Maunder*, [1901] 1 Ch. 547; *Bald* v. *Bald*, 1897, 76 L.T. 462.

Argued for respondents — The trust conveyance fell to be governed by English law. That was the intention of parties. The deed was made in contemplation of marriage, and in view of the fact that after marriage the parties would be domiciled in England. By the law of England the deed was irrevocable. After her marriage Mrs Cookson was domiciled in England, so that the *lex loci contractus* and the *lex loci domicilii* were the same. The law of England therefore determined her capacity to revoke the trust conveyance—*Cooper* v. *Cooper*, February 24, 1888, 15 R. (H.L.) 21, 25 S.L.R. 400. By the law of England the trust conveyance was irrevocable, and therefore Mrs Cookson after her marriage was not entitled to revoke it—Westlake, Private International Law, 45; Dicey, Conflict of Laws, 543, rule 146; *Guepratte* v. *Young*, 1851, 4 De G. & S. 217. The present case was more in the category of *Lashley* v. *Hog*, [1804] 4 Paton, 581, than of *De Nicols* v. *Curlier* (*cit. sup.*). Reference was also made to *Fitzgerald*, [1904] 1 Ch. 573; and *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200, 17 S.L.R. 106. The ratification adopted and rendered contractual a deed which was previously not contractual. The trust conveyance and the ratification read together were equivalent to a postnuptial settlement in the law of Scotland, and as there was nothing unreasonable about it it was irrevocable—Fraser, H. & W. ii, 1503; *Allan* v. *Kerr*, October 21, 1869, 8 Macph. 34, 7 S.L.R. 9; *Peddie* v. *Peddie's Trustees*, February 6, 1891, 18 R. 491, 28 S.L.R. 336. All that was necessary in order to render the trust conveyance contractual was the husband's consent. That was given in the ratification, and therefore standing the ratification the trust conveyance was irrevocable—*Barras* v. *Scottish Widows' Fund Society*, June 27, 1900, 2 F. 1094, 37 S.L.R. 831. There were no averments that the pursuers were induced to grant the ratification by misrepresentation. Mere averments of essential error were not enough—*Gray* v. *Binny*, December 5, 1879, 7 R. 332, 17 S.L.R. 210; *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469. Mrs Cookson had a separate legal adviser. That was an element to be considered — *Menzies* v. *Menzies*, March 17, 1893, 20 R. (H.L.) 108, at p. 142, 30 S.L.R. 530. Moreover, the parties were then dealing at arm's length, so that concealment was out of the question. In any event, the defenders were entitled to a proof of their averments as to the law of England.

At advising—

Lord President—Miss Stirling, a Scottish lady who had a certain amount of fortune, became engaged to an Englishman of the name of Sawrey-Cookson. Acting under the advice of her father, she, before she was married, executed a trust conveyance and settlement which dealt with her property. I do not need for the purposes

of this case to go minutely into the provisions of the trust conveyance and settlement further than to say, in popular language, that it tied her fortune up and prevented her husband having access thereto. She afterwards married Mr Sawrey-Cookson, who, as I have already pointed out, was an Englishman. Under the provisions of the trust conveyance and settlement there was a power in the trustees, upon the demand of Miss Stirling, to give her a certain sum of money, limited, I think, to £2000, out of the property. The trustees were not in any way bound to do so unless they wished. The spouses seem at an early period to have got into pecuniary difficulties, and accordingly Mrs Cookson made a requisition to the trustees to advance her out of this money a sum amounting to not more than £2000. The trustees—I am going rapidly over the facts of the case at this moment—were unwilling to do so, except upon condition that she and her husband should execute a ratification of the trust conveyance and settlement which she had made before she was married. Upon these terms a certain amount of money was paid to Mrs Cookson, and she and her husband gave a receipt for the money she received, and executed a ratification of the trust conveyance and settlement. The spouses seem again to have been in need of money, and the present action is a demand by Mrs Cookson, with the consent of her husband, upon the trustees to denude of the whole trust estate, upon the ground that it is revocable at the instance of Mrs Cookson and has been so revoked. The action is defended by the trustees upon the ground that they have no power to denude in the way asked.

The action is supported not only by certain views of the law applicable to the case, but also by averments to the following effect:—The pursuer says that as regards the original trust conveyance and settlement she was really misled by her father and his advisers, that she was at that time a girl of seventeen or eighteen, and did not understand business; that she was led to believe that all that she was doing in executing this trust conveyance and settlement was to make certain testamentary arrangements as to her property; and that it was never explained to her, and she did not know, that she was in any way entering into an irrevocable settlement of her property. There is the further averment that, as regards the receipt and ratification which I have already referred to, she also was induced to execute it by material misrepresentation, and that she, in giving her consent to that deed, was under essential error. The Lord Ordinary has made certain findings upon this matter, and he has allowed parties a proof of their averments relating to (first) the granting and execution of the receipt and ratification under reduction, and (second) the law of England applicable to both and each of the deeds; and this reclaiming note is brought against that judgment.

I think it most convenient for the lucid treatment of this case not to proceed directly to the Lord Ordinary's grounds, but to take the case, if I may say so, chronologically, in the order of the incidents which happened. Now, the first point in the case is the execution of the trust conveyance and settlement by this lady, when she was an unmarried Scottish girl under age. I do not doubt that the averments here of the facts are relevant to support the reduction of the deed, because I think if the lady says—"I was a girl of seventeen or eighteen and naturally knew nothing of business, and I was told erroneously by my father, whom I trusted, and his advisers, that I had better sign a certain deed, and I was assured that the deed was merely a testamentary arrangement of my fortune, whereas I now discover that it is alleged to be an irrevocable deed under which I have tied up my whole fortune even as against myself"—I do not doubt that is a relevant ground for reduction; and I do not imagine that in that matter the Lord Ordinary differs from the conclusion that I have arrived at, although in the view he comes to take of the second question that becomes immaterial.

Of course that matter can only be inquired into by proof; but passing from that, and assuming for the moment that the proof fails upon that subject and that consequently the deed is not reduced, the first question that arises is—What class of deed is this? It was contended by the defenders in this case that because this lady was going to marry an Englishman, and the deed was executed *in intuitu* of an English marriage, it must be construed as an English deed. I am satisfied that that view is erroneous. I think it is quite plain that this deed is a Scottish deed, and must be so construed. The structure of the deed is Scottish,—there is, for instance, a clause of registration, which is undoubtedly Scottish, the trustees are Scottish, and it seems to me that the whole idea of the deed leads to the view that it should be Scottish, because if there was any idea at all in that girl setting her hand to a deed, not of the class of a marriage contract, but of a settlement of her whole estate in view of marriage, the object must have been that her advisers wanted to keep her estate under the domination of a trust which should be under the law to which they were accustomed, and not allow her estate to be dealt with by a law which to them was unfamiliar. Therefore I have no hesitation in coming to the conclusion that the first deed was a Scottish deed. Now, being a Scottish deed there can, I think, be no doubt that if this lady had remained a Scottish woman the deed would have been itself a revocable deed, because that is the effect of the decision of a Seven Judges case—*Watt* v. *Watson*, reported in 24 R. p. 330. There was a division of opinion in *Watt* v. *Watson*, and it obviously is a case in which there is a good deal to be said on both sides; but I do not think your Lordships can have any doubt that the point was deliberately raised and determined in *Watt* v. *Watson*, and if *Watt* v. *Watson* is wrong the only tribunal that can put it

right is the House of Lords. Therefore I am clearly of opinion that, had that lady remained a Scotswoman, there is no doubt that it would have been in its essence a revocable deed. On that point the Lord Ordinary is of the same opinion.

Now, the next event that happened was the marriage, and according to well-known principles of law, as to which there is no dispute, the lady on marrying a domiciled Englishman became a domiciled Englishwoman. The Lord Ordinary has dealt with this matter thus:—After having stated that the deed was a Scottish deed, he says—"I consider that the revocability of the deed must be judged of by the law which regulates the legality and operation and effect of the deed in other respects, and so judging the matter I am of opinion that the deed of conveyance was revocable." As regards the proposition his Lordship there lays down I have no fault to find with it. I have already said the deed was Scottish, and as such, under *Watt* v. *Watson*, it had the quality of revocability, and in the state of the record at that time I do not wonder that his Lordship did not go further; but in the discussion that took place before your Lordships it became apparent that the defenders here really wanted to put forward a plea for which at that time they had no materials on the record. But they amended their record in the course of the discussion, and they amended it in this wise, that they put in a perfectly distinct averment that by the law of England a married lady has no capacity to revoke a deed of this sort. I humbly think that that is a good plea. Of course I am not giving naturally any opinion as to whether the substratum of fact upon which it is founded is a good substratum or not, but what the defenders have now averred is this—"In any event on her marriage and consequent acquisition of an English domicile Mrs Cookson by the law of that country became incapable of affecting or revoking the said trust deed either with or without the consent of her husband. By the law of England the effect of a marriage is to incapacitate a wife from affecting or revoking, even with the consent of her husband, rights already created by her by any unilateral deed or settlement in contemplation of the marriage." I think, upon the principles that were laid down by the House of Lords in the well-known case of *Cooper*, that is a good plea, but at the same time it is a plea which I think we must be very careful not to allow to stray beyond its own province. The question is not whether, according to English law, a married lady cannot revoke a settlement which she has made before marriage; by the English law it may very well be that that is so. But you have to press the matter further, you have to find out whether, if that is the English law, it depends upon non-revocability in the deed or want of capacity in the revoker. I think I can best make clear what I am saying by taking an illustration from the Scottish law. I take two cases. I take *Watt* v. *Watson* and I contrast *Watt* v. *Watson* with *Menzies* v. *Murray*. Now, it is to be observed that the capacity of the lady in *Watt* v. *Watson* and *Menzies* v. *Murray* was exactly the same. They were both married ladies, and they were both married ladies proposing to revoke antenuptial deeds *stante matrimonio;* but in *Watt* v. *Watson* it was held that the revocation was good, and in *Menzies* v. *Murray* it was held that the revocation was bad. That shows clearly that the point in these cases was that the deed in the case of *Watt* v. *Watson* had the quality of revocability, and that in *Menzies* v. *Murray* it had the quality of irrevocability. Therefore it seems to me that the question which is to be put to the English lawyers in this case is not whether, if you found a deed of this class in England, could a married woman revoke it—because I think that would be begging the question—but it is this—supposing in England a single woman had executed a settlement of her fortune and had put in it an express clause of revocation, so that the deed upon the face of it bore that it was a revocable deed, then, according to English law, would the effect of her marriage be such that she was incapable of executing the power of revocation which the deed had given her, and which had she remained single she could have exercised. Still to that limited effect I think it is a good plea. For the way the Lord Ordinary has dealt with it I do not blame his Lordship, because I do not think the pleadings were in a position in which he could have taken up the plea in the sense in which I have taken it up.

Now I pass to the next phase. The next thing is that these parties got some money from the trustees, they signed a receipt, and they executed a ratification. By this time they were, of course, a domiciled Englishman and Englishwoman, and therefore I think it is abundantly clear that this deed, whatever it is, must be judged of by the law of England. Now, there is quite a good averment here that by the law of England such a ratification is first of all a good ratification—in other words, that its effect is to ratify and make good something that was revocable before, and it is also said that by the law of England the ratification would be itself irrevocable. I think that is a good plea, and the Lord Ordinary on this matter is of the same opinion. But it is further said that upon the facts this deed of receipt and ratification is itself reducible, and the Lord Ordinary upon that matter has allowed a proof. That is the part of the case in which I disagree with the Lord Ordinary. I do not think that the averments which are here made are relevant to allow a proof for the reduction of the second deed. They are very different averments, and necessarily so, from the averments which I have already held relevant upon the first deed. In the first deed you have the case of a girl seventeen or eighteen years of age knowing nothing about business, naturally depending upon her father and his advisers, and practically signing anything that is put before her, and it may very well be that she

signed it under truly essential error as to the nature of the deed which she was signing, such essential error being induced by the persons who got her to sign it. But what is the state of the facts when we come to the second deed. By this time the lady was of full age and married to an impecunious husband, who obviously had very direct views as to the ways of raising money. They pressed the trustees again and again to give them money out of the trust funds. I am only here going upon her own statements, and not upon any statements of the defenders. The trustees at once took the position that they would not give them any money—for everybody admits that they were not bound to do so—unless the spouses would execute a ratification of the original trust conveyance. For instance, in Cond. 8 the pursuers say this—"In or about May 1892 the pursuer Mrs Sawrey-Cookson, in terms of the reserved power in her favour contained in the deed, requested and obtained from the trustees payment of a sum of £500, and thereafter she, on various occasions, made application to the trustees for further payments up to at least the limit of £2000 prescribed by the deed. These applications were uniformly refused. In or about the beginning of 1894, owing to expenditure on a new residence, and from other causes, the pursuer Mrs Sawrey-Cookson's financial needs became pressing, and some creditors were threatening action. She again appealed to the trustees, who declined to consider the same unless she and her husband were prepared to ratify the trust deed. To this course the pursuer Mrs Sawrey-Cookson declined to assent, and certain correspondence then ensued between her then solicitors and the solicitors acting for the trustees. The trustees, however, adhered to the position that ratification of the deed must precede any capital payment by them to Mrs Sawrey-Cookson." After a long story about the negotiations, which I pass over, the pursuers go on to say—"Ultimately, under the pressure brought to bear on her by the trustees and those representing them, and in view of her urgent financial difficulties, the pursuer Mrs Sawrey-Cookson and her husband were forced to comply with the trustees' demand that she should confirm the trust-deed, and the receipt and ratification hereinafter mentioned was accordingly signed."

In view of that description of what was going on by the pursuer herself it seems to me idle to say, as she now says, that she was in ignorance of what her legal rights, as regards either reduction or revocation of the first deed, were. At that time she was at arm's length with the trustees, she was represented by advisers of her own, and if she did not know the law she ought to have known it. Besides that, just let us press the matter and see how really out of the question her present averments are. She says—"I was under essential error induced by the representations of my opponents, because I did not know that I could revoke the first deed, and I ought not to have been asked to sign the ratification unless I had been properly told that I could revoke the first deed." The view here of the opposing parties to this moment is that she is not entitled to revoke the first deed. That is a view upon which they may be wrong, but upon which they have at least a good deal to say for themselves upon their view of the English law. In other words, her essential error amounts to this, that she was under essential error because the opposing parties did not tell her that the law was exactly the opposite of what they then thought and now think it to be. I think, when pressed, this averment is an absurd averment, and that consequently it is out of the question for your Lordships to allow any proof upon these averments relevant to set aside the second deed.

Upon the whole matter it seems to me to come to this. There are relevant averments to set aside the first deed upon the facts. There is a relevant averment to the limited extent that I have explained upon English law as to the capacity of the lady to revoke the first deed, which by Scottish law I hold to be revocable. And there are also good averments upon English law as to the effect of the second deed upon the first deed, in the view that the first deed was either revocable or reducible—it does not matter which.

The real question that now comes is—what is the most convenient way of dealing with the case. I think after what I have said, and if your Lordships agree with me, obviously the most convenient way of dealing with the case is not at present to go into the facts of the case upon the first deed, but to find out what is the English law upon the two averments which are made upon the English law, because on a certain view of the English law the answer to these questions may not necessitate any inquiry into the facts at all. Accordingly, I am of opinion that we should recal the Lord Ordinary's interlocutor, which, as I have said, I think is wrong, in allowing the proof he has done in one instance, and, *hoc statu* and before further answer, allow the English law to be ascertained upon these two points. When we have got the English law ascertained the case will be disposed of, or it will be in a condition in which we must either have yea or nay upon the averments and facts as to the first deed.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor and, *hoc statu* and before further answer, direct the English law averred by the defenders to be ascertained under the provisions of the Act 22 and 23 Vict. cap. 63, and appoint the parties to prepare a case under said Act for the approval of this Court."

Counsel for the Pursuers and Reclaimers—C. N. Johnston, K.C.—C. D. Murray. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for the Defenders and Respondents—Guthrie, K.C.—Hon. W. Watson. Agents—Hamilton, Kinnear, & Beatson, W.S.