

[Heard 20th February, Judgment 25th April, 1845.]

MRS. FRANCIS RENNIE, with consent of her Husband, and her Husband for his interest and their Children, *Appellants*.

JAMES RITCHIE, Stationer in Edinburgh, *Respondent*.

Trustee.—A deed by a trustee, in whom the trust estate was vested for the purpose of paying the truster's debts, and thereafter exercising a discretion as to the proportion of the rents to be paid to a life-rentrix by way of aliment, whereby the trustee assigned the trust estate to a creditor of the trust, until he should, out of the rents, have discharged his own debt and other incumbrances, *found* to be void as *ultra vires* of the trustee.

Husband and Wife.—*Assignment*.—A deed executed by a married woman, whereby she assigned a fund given for her aliment secluding the *jus mariti*, found to be void, as having been executed without the concurrence of her husband, who at the time was absent from the kingdom for a temporary purpose.

Ibid. et Ibid..—A deed whereby a married woman assigned as a security for repayment of money, paid at her request to her husband to enable him to retrieve his affairs, a fund which had been given for her aliment secluding the *jus mariti*, and which was declared not to be attachable by diligence, or assignable, or subject to any deeds which she might grant, was *found* to be void as defeating the terms of the gift.

ROBERTSON, the brother of the appellant, Mrs. Rennie, died in the year 1832, leaving a trust disposition and settement by which he conveyed his estate to trustees, of whom Captain Robert Barclay was one upon certain trusts, which were expressed in these terms:—

“ *First*, That my said trustees shall, from the produce of my
“ means and estate, provide for and pay all my just and lawful

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“ debts, and deathbed and funeral expenses, and the expense of
 “ executing the present trust, *and that either by a gradual liqui-*
 “ *dation thereof, or otherwise, as they may deem proper or expe-*
 “ *dient.* *Secondly,* That my said trustees shall, in the event of
 “ the said Frances Clementina Robertson or Rennie, my sister,
 “ surviving me, provide and pay to her the free annual profits or
 “ produce of the said subjects and effects hereby conveyed, *or such*
 “ *part thereof as they may deem necessary for the support of her*
 “ *and her family;* and that at two terms in the year, by equal
 “ portions, beginning the first term’s payment thereof at the first
 “ term of Martinmas or Whitsunday that shall happen after my
 “ death, and so on half-yearly during the lifetime of my said sis-
 “ ter, declaring that the foresaid provision to my said sister is
 “ purely alimentary, and exclusive of the *jus mariti* of her present
 “ or any future husband; and that it shall not be attachable by
 “ arrestment or diligence of any kind whatever, nor assignable,
 “ nor subject to any deeds which either she, or her present, or
 “ any future husband may grant in relation thereto, or debts
 “ which they may contract. *Thirdly,* That in the event of my
 “ said sister predeceasing me, or in case of her surviving me,
 “ from and after her death, my said trustees shall hold the said
 “ subjects for behoof of her children procreated of her present or
 “ any subsequent marriage, and shall divide the same equally
 “ among them, and the survivors of them, share and share alike,
 “ the shares of the sons to be payable on their attaining majority,
 “ and those of the daughters on their being married or attaining
 “ majority. But declaring always, that the said provisions to the
 “ said children, shall not become vested interests in them, until
 “ after payment or conveyance thereof, by my said trustees in
 “ their favour respectively, unless any of them shall die before
 “ payment or conveyance, leaving issue, in which event the pro-
 “ vision to him or her so dying shall devolve upon, and be con-
 “ veyed or paid to his or her surviving issue, share and share alike;
 “ and if any of the said children shall die without issue, and

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“ before conveyance or payment of his or her provisions, the same
“ shall belong to and be equally divided among the survivors;
“ and I appoint my said trustees, after the death of my said sister,
“ to pay and apply the annual profits and proceeds of the estate,
“ or so much thereof as they may think necessary, towards the
“ maintenance, clothing, and education of her said children, *and*
“ *that without the advice or interference of the said Richard Rennie*
“ *in any respect*; and my said trustees shall also have power to
“ make such advances to the children of my said sister, from the
“ capital of their shares, as they may deem expedient for establish-
“ ing them, or any of them, in business.”

The settlement gave the trustees a power to sell and to appoint new trustees and factors, and declared that they should each be liable for his own intromissions alone. Barclay was the only trustee who accepted.

Part of the estate left by Robertson, consisted of a shop in the city of Edinburgh, which was burdened with an heritable debt of 1500*l.* Mrs. Rennie was entitled in her own right, to a shop adjoining Robertson's. Ritchie, the respondent, advanced 400*l.* to Mrs. Rennie's husband, and took from Mrs. Rennie, a security over her shop for its repayment. At the request of Barclay, Ritchie made various advances towards payment of the interest upon the 1500*l.* debt, the repair of Robertson's shop, the maintenance of Mrs. Rennie's family, and the advancement in life of her husband, until he had become creditor for a considerable sum of money.

In the year 1834 the affairs of Rennie, the husband, became so desperate, that he escaped to Canada with money supplied to him by Ritchie at the request of Mrs. Rennie, his object in going there being to establish himself as a farmer, and afterwards return and take out his wife and children.

On the 23rd September, 1835, while Rennie was as yet in Canada, Barclay executed a deed in favour of Ritchie, to which Mrs. Rennie adhibited her signature as a consenting party.

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This deed recited Robertson's trust settlement, and "That
" in the execution of the said trust, I, in the year 1832, with the
" concurrence and approbation of the said Mrs. Frances Clemen-
" tina Robertson or Rennie, took the assistance of the said Mr.
" James Ritchie, who at her request, and with my sanction, not
" only made necessary advances from time to time to her, for the
" maintenance and support of her family, but also paid various
" claims attaching to the said property in Princes-street, Edin-
" burgh, and made sundry payments to account of interest of the
" said heritable debt of 1500*l.* sterling, affecting the same; by all
" which the said James Ritchie is now in advance for me, as
" trustee foresaid, the sum of 474*l.* 17*s.* 8*d.*, including interest
" to Whitsunday last on the said sum of 400*l.*, for which he
" holds a disposition, as aforesaid, conform to fitted account,
" docqueted and signed by him and the said Mrs. Frances Cle-
" mentina Robertson or Rennie, and by me, as relative hereto;
" and also considering, that in order to put the said trust-property
" in Princes-street, Edinburgh, into a state for being let more
" productively, it was lately found necessary to make extensive
" repairs and alterations thereon, by which considerable expense
" was incurred to tradesmen and others, whose accounts, amount-
" ing to 355*l.* 11*s.* 9*d.*, conform to list subscribed as aforesaid,
" as relative hereto, are still unpaid: And now, seeing that until
" the said sums of 474*l.* 17*s.* 8*d.*, and 355*l.* 11*s.* 9*d.*, are liqui-
" dated and paid from the said subjects, the said Mrs. Frances
" Clementina Robertson or Rennie has agreed to accept, by way
" of aliment therefrom, for herself and her family, of such sum or
" sums as I or my successors in office may, with reference to the
" terms of the said trust-deed, consider ourselves warranted in
" the circumstances to allow and pay for the above purpose, but
" not exceeding the sum of 60*l.* sterling per annum; and that
" on condition of my granting these presents, in manner under-
" written, the said James Ritchie is willing, not only to abstain
" from using any legal proceedings against me or the said trust-

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“ estate, for recovery of the said debt of 474*l.* 17*s.* 8*d.* due to
“ him, but also to satisfy and pay the claims of the said trades-
“ men and others, upon the said property, amounting to the said
“ sum of 355*l.* 11*s.* 9*d.*, so as to prevent accumulation of expense
“ by any legal proceedings at their instance; and further, to pay
“ the interest of the said debt of 1500*l.* sterling, as the same shall
“ fall due.”

Upon this recital, Barclay, “with the consent” of Mrs. Rennie, assigned the leases of the trust property to Ritchie, and gave him power to receive the rents until the purposes of the assignation should be fulfilled. These purposes were declared to be payment of the debt of 1500*l.*, the premium of insurance on the property, the public taxes, and the interest of the debt of 400*l.*, owing by Rennie to Ritchie. The further purposes of the assignation were declared in these terms:—“*Secondly*, For payment
“ to the said Mrs. Frances Clementina Robertson or Rennie, for
“ aliment to herself and her family, of such sum or sums as I or
“ my foresaids may consider ourselves warranted as aforesaid, to
“ allow and pay to her, for the above purpose, but not exceeding
“ the sum of 60*l.* sterling per annum. *Thirdly*, For payment to
“ the said James Ritchie of such remuneration for his trouble in
“ the premises as may be fixed and determined by parties
“ named; and, *Lastly*, For applying the balance of the said
“ yearly rents or tack-duties towards the gradual liquidation and
“ payment of the several sums of 474*l.* 17*s.* 8*d.*, and 355*l.* 11*s.* 9*d.*,
“ until the same, with interest thereon, at the rate of four per
“ centum per annum, shall be fully paid and extinguished, when
“ the said James Ritchie shall be bound and obliged to repon
“ and retrocess me or my successors in the said trust, in and to
“ the foresaid tack-duty and rents above assigned; it being always
“ in the power of the said James Ritchie, in the event of the
“ rents of the said property falling off, so as to be inadequate to
“ the purposes of these presents, to renounce this security, on
“ giving me, or the trustee acting for the time, six months’ pre-

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“ monition in writing, and to use all legal measures for payment
“ of the sums that may then be due to him, in the same manner
“ as if these presents had not been granted: Providing always,
“ that the said James Ritchie, by acceptance hereof, shall be
“ bound and obliged to hold just count and reckoning with me, as
“ trustee foresaid, or my successors in the said trust, for his intro-
“ missions with the said rents hereby assigned; and that he shall
“ be obliged to lay annual states thereof, properly vouched, before
“ the said Alexander Stewart and Thomas Ranken, upon the
“ 15th day of June in each year, the first state to be furnished on
“ the 15th day of June, 1836, for the period from the date hereof
“ to that time, which assignation above written, I with consent
“ foresaid, bind and oblige myself and my foresaids, to warrant from
“ all facts and deeds done or to be done by me in prejudice hereof.”

A docquet was endorsed upon this deed, which was signed by Barclay and Mrs. Rennie, declaring that they had examined the accounts of Ritchie, that he was a creditor of the trust estate for 474*l.* 17*s.* 8*d.*, and that he was thereby authorized to take credit for that amount in a new account between him and them, and the trust estate.

Rennie did not succeed in the object with which he had gone to Canada, and he returned to his family in Scotland, sometime in the year 1836.

In the month of July, 1837, Ritchie, upon a statement that he had made the various payments which, by the assignation of 1835, he was stated to have either already made, or undertaken to make, brought an action to have it declared that that deed was valid and binding upon the parties to it; his summons containing consequential conclusions for payment out of the rents of the trust estate of the money he had advanced.

The appellants pleaded in defence to this action, and at the same time brought a counter-action against Ritchie and the executors of Barclay, who was now dead, for reduction of the assignation of 1835 and the docquet endorsed upon it, contain-

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ing consequential conclusions for an account of Ritchie's intrusions under the assignation, with the rents of the trust estate, and for payment of the balance on the account, if any.

In support of the action of reduction, the appellants pleaded,

“ I. The assignation is reducible, as being incompatible with the provisions of the trust-deed, by virtue of which, it bears to have been granted, and *ultra vires* of the trustee.

“ II. The docquet subscribed by the pursuer, Mrs. Rennie, ought also to be reduced, as having been granted without due information or protection, to the prejudice of herself, a married woman, and her children, at least, in so far as it affords any support to the assignation, or affects the rights of the beneficiaries under the trust.

“ III. The defender cannot retain the funds in his hands, to the prejudice of the beneficiaries under the trust, in satisfaction of any other advances than such as were purely alimentary, and made for behoof of Mrs. Rennie and her children.”

The respondent and Barclay's executrix, on the other hand, pleaded in defence to the action of reduction:—

“ I. There is no ground, either relevantly stated or truly existing, on which the assignation and docquet can be rightly brought under reduction.

“ II. The action is unnecessary, superfluous, and incompetent, the same grounds of reduction being competently and sufficiently brought into discussion in the declarator of validity at the defender's instance.

“ III. The defender is not bound to enter into any accounting with the pursuers, except on the footing of the deeds now challenged being valid, which he has always been ready to do, and has in fact sufficiently done.

“ IV. In any event whatever, the defender must be regarded and dealt with, in regard to the present subject of discussion, as being, (1st,) a just and lawful creditor of the trust-estate of Lieutenant Robertson, for all the advances made to, or on

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“ behalf of, that estate; and, (2dly,) a just and lawful alimen-
 “ tary creditor of Mrs. Rennie, for all the sums advanced to her
 “ for the maintenance and support of herself, or at her desire, of
 “ any of the other members of her family; and as, in this cha-
 “ racter of creditor, he is entitled to affect the rents of the sub-
 “ jects in question, to an extent at least equal to the sum for
 “ which he holds the assignation in security, all right or interest,
 “ on the pursuer’s part, to prosecute the present reduction, is
 “ thereby excluded.”

The pleas of the parties in the action of declarator at the respondent’s instance, so far as regarded the question decided on this appeal, were substantially the same as in the action of reduction.

In December, 1838, the Lord Ordinary, (*Moncrieff*,) before answer, remitted the action of declarator to an accountant to report as to the accounts of the respondent, and to specify his claims under the different heads under which they were made, as creditor for debts paid of Robertson the original truster, for advances made in respect of the trust estate, for advances made to Mrs. Rennie, for monies advanced to her husband, and for expenses of management and commission. The accountant reported as to these various particulars, and from his report it appeared, that part of the 474*l.* 17*s.* 8*d.*, for which the assignment of September, 1835, had been given, was composed of sums which had been paid by Ritchie to Rennie, at the desire of Mrs. Rennie, while living in family with her for the general purposes of the family, and also upon his going to, and while he was in Canada, for his own purposes.

After obtaining this report, the nature of which, so far as material, will appear from the Lord Ordinary’s note to be found further down, the Lord Ordinary, (on 20th May, 1840,) conjoined the two actions, and pronounced an interlocutor, containing the following among other findings:—

“ Finds, that the question concerning the competency and
 “ validity of the deed of assignation by Captain Barclay, the

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“ trustee, and Mrs. Rennie, so far as it may be necessary to
“ determine the question, is materially different in regard to the
“ interest which may be in the children of Mrs. Rennie, as the
“ parties ultimately entitled to the fee of the property, and in
“ regard to the interest of Mrs. Rennie herself, as in the right of
“ an alimentary provision of a defined character exclusive of the
“ husband’s *jus mariti*; and that any question concerning the
“ validity of the docquets called for is also different from that
“ relating to the deed of assignation: Finds specially, that there
“ is no relevant ground alleged for reducing the docquets, so far
“ as they are probative instruments, under the hand of Captain
“ Barclay, and import deliberate acknowledgments of the cor-
“ rectness of the accounts referred to, and his sanction to the
“ various articles expressed in them, so far as the same might
“ depend on his accession or homologation, without prejudice to
“ the legal effects of the said docquets in other respects, and
“ subject always to the correction of any errors which may be
“ pointed out, and the taxation and disposal of business accounts,
“ as hereinafter reserved: Finds that the deed of assignation,
“ dated 23rd September, 1835, is not legally valid or effectual,
“ in so far as any interests vested in the children of Mrs. Rennie,
“ as ultimate fiars of the property, may be affected in any man-
“ ner in which they could not have been affected, if the said deed
“ of assignation had not been executed: Repels the objections
“ to the accountant’s report generally, and approves thereof, as
“ correctly ascertaining the state of the accounts between the
“ parties, subject to the reservations therein and hereinafter ex-
“ pressed: Finds that the deed of assignation and the docquets
“ relative to it, so far as they import a qualified and temporary
“ assignation by Mrs. Rennie of her liferent right in the future
“ rents of the property, for security and payment of debts con-
“ tracted by her for the aliment of herself and her family, which
“ are found, on investigation, to be just and true debts, are not,
“ in the circumstances in which they were executed by her and
“ Captain Barclay, *liable to reduction at the instance of her or*

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“ *her husband*, and that, so far as they were executed for security
 “ and payment of advances on account of debts which constituted
 “ preferable claims against the trust-estate, or the rents thereof,
 “ she has no title or interest to insist for reduction of them.”

To this interlocutory the Lord Ordinary subjoined a note which contained the following among other observations:—

“ NOTE.—The general character of this case is too clear to
 “ admit of doubt. The pursuer, Mr. Ritchie, has had the mis-
 “ fortune, with no selfish motive even alleged against him, to
 “ involve himself in the affairs of Mr. Rennie and his family,
 “ and through a series of years to make continual advances to
 “ them, out of mere friendship to them, and truly for their bare
 “ subsistence. Mr. Rennie had confessedly no means of his own,
 “ and no employment during all the time, and there is nothing
 “ more certain than that the advances made by Mr. Ritchie were
 “ all made on the earnest solicitation of Mrs. Rennie, for the pre-
 “ servation of herself and her family, and that the particular deed
 “ which is brought under challenge in the extraordinary terms of
 “ the summons of reduction, was substantially no more than what
 “ not only she, but Mr. Rennie also, had in the most express
 “ terms pledged themselves to grant, while drawing with the most
 “ pressing urgency on the friendship and resources of Mr. Ritchie.
 “ It was truly observed in the debate, that ingratitude is not a
 “ legal defence of deeds which may be ineffectual in law. But it
 “ does give a very singular complexion to this case, when it is
 “ seen, on the one hand, that the pursuers of the reduction, after
 “ raising a summons which charged their former friend with the
 “ most infamous and fraudulent conduct, in the very acts which
 “ they had done with their eyes open, when the Lord Ordinary
 “ at once sent that for trial to the jury roll, immediately aban-
 “ doned all those charges, and allowed the cause to be discussed
 “ on the footing that they could not be maintained; and when,
 “ on the other hand, it is found, upon the strictest investigation,
 “ that Mr. Ritchie’s accounts, and his whole conduct, stand per-
 “ fectly pure and correct, admitting of no impeachment of his

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“ honour or integrity, and that if there was error in the transac-
“ tions which bring him into Court, he was only drawn into it
“ by the parties who are now opposed to him, and with the most
“ benevolent motives towards them.

“ The Lord Ordinary has thought it only what is due to a
“ party so situated to say thus much ; and he is convinced that
“ no one who studies the case as he has done can have any other
“ impression. Nevertheless, from the complexity of the transac-
“ tions, and the peculiar nature of the deed objected to, he has
“ found no small difficulty in extricating the cause in a manner
“ satisfactory to himself, according to the justice of the case, and
“ with safety to the law. He is relieved from entering into much
“ detail, by the very clear statement in the accountant’s report,
“ the perusal of which is sufficient to give every one a distinct
“ understanding of the precise nature of the transactions of the
“ parties, and their true rights towards one another. He must
“ own, however, that it was a surprise to him, not having then
“ read the report, that at the end of the debate it came out, that
“ if Mr. Ritchie’s accounts are really correct, and his claims con-
“ stitute just debts against Mrs. Rennie, (of which he has no
“ doubt,) there is truly no remaining subject of controversy con-
“ cerning the assignation, because the debt is either fully paid, or
“ there must be funds in the bank for paying it, and Mr. Ritchie
“ can have no objection when that is done to discharge the assign-
“ nation. There are a few points on which the Lord Ordinary
“ thinks it necessary to add some observations.

“ 1. He has not the least doubt that all the articles objected
“ to under the 3rd article of the accountant’s abstract are correct
“ charges for advances for *aliment* to Mrs. Rennie and her family.
“ The accountant has gone into the particulars with great care.
“ The material objection is, that in a number of instances the
“ money was given to *Mr. Rennie* himself, while *living in family*
“ with his wife, and having no other means of subsistence. The
“ accountant has demonstrated that, in the most material article,

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“ making one-half of the sums objected to, if not a great deal
 “ more, the payment was made *at the express request of Mrs.*
 “ *Rennie* and Captain Barclay. And, both for the reasons stated
 “ by the accountant, and because it appears to the Lord Ordinary
 “ that the particular *mode* of making the payment is of little con-
 “ sequence, when it clearly appears that the money was given for
 “ *the support of the family*, he cannot think that the objection to
 “ any one of these *bonâ fide* payments could with any justice be
 “ sustained.

“ The defenders object strenuously to the sums of 50*l.* and
 “ 20*l.*, which were given to Mr. Rennie when he went to
 “ America. When one reads the correspondence relative to this
 “ matter, it must be thought a very hard objection. Rennie was
 “ bankrupt, and fled from Scotland, and writes, that if he returned,
 “ *he must expect to go to prison*, and then both he and Mrs. Ren-
 “ nie beseech the pursuer, in the most piteous terms, to make these
 “ advances to him that he might go to Canada, promising a deed
 “ of the very nature of that which was ultimately granted. The
 “ money is given, and Rennie is absent for two years, constantly
 “ soliciting more. And when this sum of 70*l.* is at last stated as
 “ part of the *aliment* of this family, being the only means of *ali-*
 “ *ment* of the head of it for two years, it is maintained by *Mrs.*
 “ *Rennie herself* to have been unwarrantedly given, and she and
 “ he together try to throw the pursuer (which is all that can be
 “ done) on the bankrupt husband as his only debtor. The Lord
 “ Ordinary cannot think that this is consistent either with law
 “ or justice. In the simplest view, it was but giving about a
 “ *seventh* part of the income of Mrs. Rennie in two years for the
 “ *aliment* of her own husband, who had no other means.

“ 2. Strong objections are made to the articles embraced by
 “ the 8th head of the abstract. These also are minutely discussed
 “ by the accountant. They relate to repairs and meliorations of
 “ the property. Here again the chief objection is, that the repairs
 “ were not all executed under the express orders of Captain Bar-

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“ clay. It is not denied that they *were executed*, nor is it said
“ that they were *not necessary* or *useful*. It is denied, indeed, in
“ words, that the alterations made increased the rent. But it
“ seemed to be admitted in the debate, that even these alterations
“ were *necessary* for enabling the trustee to let the trust-property
“ profitably at all, because, without joining it with Mrs. Rennie’s
“ separate property, the whole could not be put in a state for
“ advantageous letting. The explanation, however, is, that
“ Captain Barclay very naturally allowed Mr. Rennie to superin-
“ tend the repairs which were required; and the idea of the
“ repairs having been made on the credit of Mr. Rennie, besides
“ being incredible in the circumstances in which he stood, and
“ according to the known rights of the property, is contradicted
“ by the fact, that the tradesmen employed did all consider them-
“ selves as employed for the trust.

“ But, in truth, there is a short answer to these objections
“ (not adverted to); *all these articles* are comprehended in the
“ account which was docketed by *Captain Barclay*, and em-
“ braced by the *assignation*, and whether that deed, *as an*
“ *assignation*, was within Captain Barclay’s power or not, his
“ *probative* acknowledgments of the expense of these repairs
“ and meliorations are liable to no challenge whatever, when
“ the allegations of fraud are withdrawn. He was a man
“ completely *sui juris*, and after he, with the *concurrence of Mrs.*
“ *Rennie herself*, has deliberately recognized and sanctioned these
“ debts, contracted for *repairs of the trust-property*, it is surely
“ out of all question to say that they are not trust debts, merely
“ because they may have been made through the instrumentality
“ of Mr. Rennie. They amount in all only to about *one half-*
“ *year’s rent*, and they were evidently necessary deductions, before
“ the free annual produce allotted to Mrs. Rennie could emerge.

“ 5. When the accounting is extricated, there is little re-
“ maining of practical matter for judgment. But, no doubt, the
“ pursuers of the reduction insist for judgment upon that. The

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“ grounds of reduction which remain, are simply, that Mrs.
 “ Rennie was a married woman, that her husband did not
 “ concur in the assignation, and that the alimentary provision is
 “ declared not to be assignable by the trust-deed. The question
 “ is, whether *Mrs. Rennie and her husband* are entitled to reduce
 “ the deed on these grounds, with reference to the circumstances
 “ under which it was granted. The Lord Ordinary thinks that
 “ they are not. In so finding, he does not mean to decide any
 “ abstract question, but only finds that *these parties are not en-*
 “ *titled to reduce in the circumstances of this case.*

“ In the first place, it is settled by the case of *Monypenny*
 “ *v. Lord Buchan, &c.*, July 11th 1835, that, notwithstanding
 “ the strongest clauses of this nature, excluding arrestment and
 “ assignation, an alimentary provision may be assigned *for ali-*
 “ *mentary debts.* Laying the trustee aside, therefore, *Mrs. Rennie*
 “ could effectually assign *her alimentary right* for security and
 “ satisfaction of alimentary debts *previously contracted*; more
 “ especially, considering the extent of it; and that a reasonable
 “ aliment was reserved. If she had done this simply, it would
 “ have been the same case with Buchan; and the case in this
 “ point is not altered by the intervention of the trustee.

“ In the second place, though *Mrs. Rennie* was a married
 “ woman, the *jus mariti* of her husband was expressly excluded
 “ in the very constitution of the liferent right, by a third party,
 “ her father. This is not the case of a *renunciation* of the *jus*
 “ *mariti* by the husband, in a right conferred by himself. It is
 “ the case of a total exclusion of it by a third party, establishing
 “ the right itself. Yet, even in the other case, the decisions are
 “ very strong in favour of the power of the wife to act by herself.
 “ *See Ivory*, p. 128, and the case of *Keggie v. Christie*, May 25,
 “ 1815, in which a lease granted by a married woman, liferentrix,
 “ without the concurrence of her husband, was sustained, in
 “ respect of a clause of renunciation in a deed of separation.
 “ There was some general words added in that case, and it was

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“ declared that the wife’s receipt should be sufficient. But that
“ was the case of a *renunciation* by the husband of a right other-
“ wise vested in him, which always made a difficulty with our
“ lawyers. Here the *jus mariti* was excluded *from the first* by
“ the act of a *third party*, and there cannot be a doubt that in
“ this case the receipt of Mrs. Rennie herself was a sufficient
“ discharge to the trustee for money paid to her. That accord-
“ ingly was all that was ever required, and she indeed would
“ have been in a pitiable state if it had not been so held. For
“ here there is a strong specialty. At the time when the assign-
“ nation was granted, Rennie the husband had left the country,
“ and *had done so in contemplation of a permanent residence* in
“ a distant part of the empire,—can it be said that Mrs. Rennie,
“ thus left alone with her children, could not deal with the
“ alimentary fund from which the *jus mariti* was excluded,
“ because her husband could not concur with her? She certainly
“ had power to draw and discharge it, otherwise she must have
“ starved. But if, under the difficulties in which her husband
“ left her, she contracted debts for the aliment of herself, and of
“ him, and of the children, could she not assign *a portion of her*
“ *alimentary right for a time for the discharge of these alimentary*
“ *debts*, just as well as Lord Buchan could for the same purpose?
“ The husband, by leaving the country for permanency, had
“ ceased to exercise his office of curatory, even if that were
“ supposed to apply to a fund like this. The wife was living in
“ an actual state of separation, in which she *must* have had power
“ to act for herself, in relation to what was *her exclusive pro-*
“ *perty* to all the effects that were competent, that is, to the
“ effect of satisfying the claims *for aliment* which were due
“ by her.

“ But it is to be observed, besides, that in this case, if there
“ were any difficulty arising from the idea of anything being done
“ without the consent of, or approbation of the husband, as if
“ any undue advantage might be taken, there is the clearest

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“ evidence that what was done, was *substantially what the husband himself had recommended, and solemnly promised should be done*, before a great part of the money was advanced, and the woman had, besides, the advice and concurrence of the trustee, and the very respectable man of business employed by him.

“ It being certain, therefore, that the whole transaction was entered into in the most perfect *bona fides*, the Lord Ordinary is of opinion, that in the special circumstances of the case, there are no sufficient grounds for reducing it at the instance of Mrs. Rennie and her husband. Yet there is, in fact, no real interest now involved in the reduction, except as it may affect the question of expenses, the rights of the parties in these rents being in fact practically resolved.”

The appellants reclaimed to the Inner House, which adhered to the interlocutor of the Lord Ordinary. Subsequent interlocutors of the Lord Ordinary and of the Court, were pronounced, explicating the accounts between the parties, on the footing of the assignation of 1835 being a valid deed.

The appeal was taken against the whole interlocutors.

Mr. Anderson and Mr. Mc Queen for the Appellants.—I. The deed of 1835 was an obvious breach of trust. A trustee cannot capriciously, or without good cause, retire from a trust once accepted, or substitute another in his stead, unless in as far as directly authorized so to do; still less can he denude of the trust-estate and so deprive himself of the exercise of that care and management of the estate, and of that discretion in regard to the objects of the trust, which the truster has in view at creating it. One prominent object which the truster in this instance had in view, was the protection of his sister against the necessities of her husband, but the course pursued by the trustee, was entirely to defeat this object. Another object of the truster was, that the trustee should exercise his personal discretion in regard to the proportion of the income to be allowed to his sister

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for her support, but of the power to do this, the trustee, by the assignation wholly deprived himself, for the discretion was to be exercised from time to time, according to varying circumstances, whereas the assignation fixed the allowance permanently at 60% per annum.

II. The assignation was void as granted by a married woman without the concurrence of her husband, whose marital curatory had in no way terminated by his temporary absence, and whose consent was therefore necessary, in order to the validity of any deed by her, though embracing her separate estate alone, and not affecting any interest of the husband. *Ersk.* I. 6, 22, & 27.

III. The assignation was further void, inasmuch as the life-interest of Mrs. Rennie was not assignable—the annual payment which she was to receive under Robertson's settlement, at the discretion of the trustee, was to be purely alimentary, exclusive of the *jus mariti*, and was not to be assignable nor subject to the debts or deeds, either of her or her husband. As an alimentary fund it was not arrestable, *Ersk.* III. 6, 6, 7, and still less was it assignable, independently of the terms of the settlement, unless for debts purely alimentary, not to the husband or to the family generally, but to the wife herself. *Ersk.* I. 7, 14, and III. 5, 2; *Heriot's Trs. v. Fyffe*, 12 *Jur.* 28. And though this had been doubtful, the clause in the settlement restraining assignation would be sufficient to make the assignation void. Though in the ordinary case, a restraint against assignation may not be effectual as being repugnant to the free use of property which is implied in every gift, unless there be a gift over in case of an attempt to assign, yet in the case of married women, such a restraint is essentially necessary to protect them from the influence of their husbands—without it, a gift to their separate use, or excluding the *jus mariti*, would plainly be ineffectual. It is upon this principle that clauses against anticipation have received effect in England, *Tullett v. Armstrong*, and *Scarborough v. Borman*, 4 *My. and Cr.* 377. And upon the same policy the clause prohibiting assignation [should receive effect in

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Scotland. Here the debt for which the wife's separate estate was assigned, consisted for the greater part, not of money advanced to herself, but to her husband, either while in family with her, or while separated from her.

The *Lord Advocate* and *Mr. C. Baillie* for the Respondent.—

I. The deed of assignation did not transfer the trust from Barclay to Ritchie, it merely assigned the trust estate to him for the temporary purpose of a security for the debts owing to Ritchie on account of the trust estate—the radical right was still in Barclay.

II. The *jus mariti* was expressly excluded, and at the date of the assignation, the husband was in America. To prevent the property being brought to sale for payment of the truster's debts, and secure those repairs which were necessary in order to make the property productive for her own maintenance, was a measure both prudent and necessary. The granting of assignation was therefore a prudent and necessary act to which, in the absence of the husband, his consent was not necessary, *Cunningham v. Cunningham*, 3 *Brown's Supp.* 593, *Keggie v. Christie*, 18 *F. C.* 374. Obligations by a married woman without the consent of her husband, when he is abroad and separated from her are good, where they respect her separate estate, and are necessary for the support of herself or her children, *Hogg v. Little*, *Mor.* 5955, *Russell v. Pattison*, *Ibid.*, *Gairns v. Arthur*, *Mor.* 5954, *Neilson v. Arthur*, *Mor.* 5984, *Churnside v. Currie*, *Mor.* 6082. *Orme v. Diffors*, 12 *Sh.* 149.

III. The whole of the free rents were not by the settlement declared to be alimentary; all to which this character was given, was only such part of them as the trustees should deem necessary. The proportion necessary was, with the consent of Mrs. Rennie, fixed at 60*l.* as the maximum, all beyond that was not alimentary, nor subject to the rules applicable to a fund of that nature, but fell under the general power of the trustee. Even if the whole had been alimentary, assignment, or attachment, by

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diligence would not be absolutely excluded, but only in so far as aliment was proper and reasonable. *Monnypenny v. Buchan*. 13 *Sh.* 1112. *Stair* III., i. 37. *Bank* I., 16. *Waddell v. Waddell*, 15 *Sh.* 121. Here, as already said, the aliment reasonable and proper was fixed at 60*l.*, the payment of which was one of the purposes of the assignation. Beyond that sum it was competent to assign the fund for aliment past due, and so far as this formed part of the consideration for the assignation it was unchallengeable. But as already noticed, the fund assigned was not alimentary; and without the assignation, it would have been in the power of the respondent to have attached for payment of the monies owing to him, not only the rents, but the fee itself of the property. Indeed the assignation was not strictly an assignation by Mrs. Rennie of any thing. It was truly an assignation by Barclay the trustee, as a security for the repayment of monies which the respondent had paid for him, or in other words, had lent him in order to pay for the purposes of the trust.

LORD CAMPBELL.—This cause turns upon the validity of a deed of assignation, dated 23rd September, 1835. The respondent brought a process of declarator to have this deed found valid; and the appellant a process of reduction to have it set aside. The two processes being conjoined, several interlocutors have been pronounced by Lords Ordinary, and by the Second Division of the Court of Session, the effect of which is to decide, that as far as the interest of the appellants is concerned, the deed is valid.

As it appears to me that the conduct of the respondent in the transactions was honourable, and that the object of the parties to the deed was fair, I regret very much to be obliged to come to the conclusion that the deed cannot be supported, and that the interlocutors appealed against ought to be reversed. Notwithstanding the great anxiety displayed by Lord Moncrieff, I am bound to say, that I think the cause has not been “extricated by him with

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“safety to the law.” We have to lament that the Judges of the Second Division have not favoured us with their sentiments upon any of the important and difficult questions which were discussed before them; and we must suppose that they adopted simpliciter the note of the Lord Ordinary.

Three main exceptions were made to the validity of the deed:—1st, That it was a breach of trust in Captain Barclay; 2dly, That it was void by reason of Mr. Rennie, the husband, not being a party to it; and, 3dly, That it was *ultra vires* in assigning an alimentary fund provided for the maintenance of a married woman, declared by the settler not to be assignable.

Lord Moncrieff was of opinion, that Mr. and Mrs. Rennie were not at liberty to object to the validity of the deed of assignation, because they are supposed to have promised Mr. Ritchie a security of this sort for his advances made at their request. But to give effect to such a promise would entirely deprive a married woman of the protection intended for her, by conveying property to a trustee for her sole and separate use. A promise involving a breach of trust could not be enforced, and no such promise by a person under disability can prevent that person, if prejudiced by the breach of trust, from complaining of it.

Now I am of opinion that Captain Barclay was guilty of a breach of trust to the prejudice of Mrs. Rennie, by executing the deed of assignation. By the settlement of Lieutenant Robertson, the second trust was that the trustees should pay to Mrs. Rennie, his sister, if she survived him, the net annual proceeds of the property conveyed, or such part thereof as they might deem necessary for the support of her and her family during her life, “declaring that the foresaid provision for my said sister is purely
“alimentary and exclusive of the *jus mariti* of her present or any
“future husband, and that it shall not be attachable by arrest-
“ment or diligence of any kind whatever, nor assignable, nor
“subject to any deeds which either she or her present or future
“husband may grant in relation thereto, or debts which they

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“ may contract.” By the settlement the trustees are to manage the trust property, paying the settler’s debts, and after the death of Mrs. Rennie, to hold the property for the benefit of her children. But by the deed of assignment, Captain Barclay, the only acting trustee, with the alleged consent of Mrs. Rennie, makes, constitutes, and appoints Mr. Ritchie his lawful cessioner and assignee of the whole trust property, first for the payment of certain charges affecting the trust property, secondly, for payment to Mrs. Rennie “ for aliment to herself and her family of such sum “ or sums as I may consider myself warranted to allow her “ for the above purpose, but not exceeding the sum of 60*l.* per “ annum,” then for payment to Mr. Ritchie for his trouble, and lastly, for repayment to Mr. Ritchie of 474*l.* 17*s.* 8*d.*, and 355*l.* 11*s.* 9*d.* with interest, when Mr. Ritchie was to re-convey to the trustee. But while this deed is in operation, Captain Barclay’s functions, as trustee, are suspended. He cannot manage the trust property, and he cannot exercise his discretion as to whether a greater sum than 60*l.* a year from the annual proceeds of the trust property, should or should not be allowed to Mrs. Rennie for the support of herself and her children. The discretion of the trustees upon this subject was to be exercised from time to time, according to the state of the fund, and the circumstances of the family. No power is given to the trustees appointed by the settlement to name another trustee for the management of the property, or to disqualify themselves from exercising the discretion reposed in them. The deed of assignation, therefore, appears to be *ultra vires*, and a breach of trust, and the offer made by the pursuer to denude the property when the debt due to him is liquidated, must be unavailing.

Secondly, I am likewise of opinion that the deed is void, on the ground that it was executed without the concurrence of the husband. It was admitted at the Bar, that Mr. Rennie’s concurrence would have been necessary if he had been living with his wife, and that it is to be excused only by his absence

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in Canada. There can be no doubt that by the law of Scotland, under certain circumstances, a married woman may contract obligations, and execute deeds, as if she were single, but that is where the husband has been convicted of a crime by which he is civilly dead, or where he has deserted his wife, and the coverture is virtually dissolved or suspended. But here there was merely a temporary separation by mutual consent. Mr. Rennie intending to return to Scotland if he could not advantageously settle in Canada, and Mrs. Rennie intending to follow him thither if he could. The case therefore does not vary from any temporary absence of the husband for business or pleasure, during which his curatorial rights over his wife are not suspended.

The third objection to the deed is still more material. It is not disputed that the law of Scotland recognizes the settlement of property as an alimentary provision for a married woman, and that it may be made not assignable, or subject to debt or diligence, according to the principles upon which many cases have been decided in England, which are all to be found cited in *Tullet v. Armstrong*, 1 *Beran*, 1 and 4 *Milne & Craig*, 377. But it is said that there is an exception in favour of alimentary debts, and that the items in class 3 of the accountant's report, making up the aggregate of 513*l.* 0*s.* 3*d.*, are for alimentary advances to Mrs. Rennie. It is unnecessary here to inquire how far an alimentary fund can be anticipated for past alimentary debts, because it seems to me quite clear that none of these items were the alimentary debts of Mrs. Rennie. The advances were to Mr. Rennie, or for the support of the family while he was living in England, and for the whole amount he was personally liable. The debts, therefore, were the debts of the husband and not of the wife, and for the debts of the husband I am of opinion that an alimentary fund so appropriated for the maintenance of the wife, cannot be assigned.

Lord Buchan's case is not at all in point, and the case of

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Herriot's Trustees *v.* Fyffe appears to be a strong authority, if any were wanting to support so plain a principle.

It thus becomes unnecessary to examine the 400*l.* not contended to be an alimentary debt, for the interest of which the trust property is made subject, nor to enter into any of the other items of the account.

On these grounds I am of opinion that the interlocutors supporting the validity of the deed of assignation, must be reversed.

The pursuer's summons contains an alternative conclusion to take the account, if the deed should be held invalid. But the account has not yet been taken on this footing. It would give me great satisfaction if this could now be done by consent between the parties after the opinion of the House has been expressed; but if this cannot be done, the cause must be remitted, that with the declaration of the invalidity of the deed of assignation, the account may be taken in the Court below on the footing of the original settlement. This, my Lords, is my humble opinion, and therefore I move, your Lordships, that the interlocutors complained of be reversed.

LORD BROUGHAM.—My Lords, I take entirely the same view of the case with my noble and learned friend who has addressed your Lordships. I consider the miscarriage of the Court below upon all the grounds to be clear; indeed, with all possible respect for Lord Moncrieff, (my respect for whom I need not say is equal to that of any person, from my long knowledge of his great talents, his profound learning, and his admirable judicial powers of every description;) I find it impossible to reconcile this case with principle; moreover, I really find it very difficult to reconcile it with another decision of Lord Moncrieff's, I mean the decision in the case of Herriot's Trustees, which appears to me to put part of the case, or one principle involved in the case, very clearly.

My Lords, I listened also to the objection that was taken to

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an account being directed when there was a point of law to be decided. Now, that clearly was not a matter to go before an accountant, or to be mixed up at all with the accounts. And having separated that, and having now come to the resolution of deciding against the validity of the instrument, and of reversing the decree I most heartily join with my noble and learned friend in the wish expressed by him that by some arrangement a further expense of litigation to the parties may be avoided. If your Lordships shall be of opinion that this judgment ought to be reversed, (as you probably will) I would then fain hope that the parties might come to some understanding as to taking the account upon the alternative conclusion of the libel, and thereby upon this point avoid a more than necessary continuance of litigation.

LORD COTTENHAM.—My Lords, it appears to me, that if this interlocutor were to stand, it would be impossible hereafter to secure the interests of married women.

In this country, as in Scotland, it has been found necessary for the interests of society, that means should exist by which either the parties themselves by contract, or those who intend to give a bounty to a family, may secure that for the benefit of the wife and children, without its being subject to the control of the husband. In this country it is well known that that doctrine has been subject to considerable fluctuation from the time that it was first established, though it is now very firmly established, and no difficulty occurs as to the mode of carrying the object into effect.

When first by the law of this country property was settled to the separate use of the wife, equity considered the wife as a *femme sole* to the extent of having a dominion over the property. But then it was found that that, though useful and operative so far as securing to her a dominion over the property so devoted to her support, was open to this difficulty, that she being considered as a *femme sole*, was of course at liberty to dispose of it as a

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femme sole might have disposed of it, and that of course exposing her to the influence of her husband, was found to destroy the object of giving her a separate property. Therefore to meet that, the provision was adopted of prohibiting the anticipation of the income of the property, so that she had no dominion over the property till the payment actually became due. That is the provision of the law as it now stands, and that is found perfectly sufficient for the purpose of securing the interests of married women.

In Scotland much the same course is adopted, the same objects have been worked out, though not precisely in the same way, but still there is by the law of Scotland, a protection in favour of an alimentary fund, and there is a provision that the alimentary fund shall not be assignable. These are two provisions very much corresponding with the provisions which have been adopted in the law of England. But if the present deed were to stand, there would be an end of that protection. This is not only an alimentary fund in its nature, but it is in terms declared to be so. It is declared not to be assignable, but it has been assigned, not for past aliment for the wife and her family, but for expenses incurred for the convenience of the family at large, or for the private expenditure of the husband. I think, therefore, upon that ground, that this deed is clearly bad.

It is also clearly bad as being a direct breach of trust. Captain Barclay had no right whatever to divest himself of the duties which he had assumed, and to transfer to others that discretion which was personal to himself.

It is quite unnecessary to find other grounds upon which to impeach this deed, the first being clearly and manifestly an objection which prevents this deed from acting, and prejudicing at all the interests of the parties, and therefore the interlocutor which gives effect to it, I consider as clearly erroneous. Whatever may be the interests of the parties, they are to be considered as existing independently of the deed.

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My Lords, that is quite sufficient for the purpose of disposing of the subject-matter of this appeal. But although the accounts had been investigated before it was ascertained what the application of the law would be upon the particular finding of the accountant, it may be, that what has already been done may save the expense of future inquiry. That, however, I do not consider is now before us. Because the Court of Session having decided upon the first claim in the summons, the alternative conclusion has not been a matter of consideration in that Court, and I apprehend that the order of this House, suggested by my noble and learned friend on the woolsack, would entirely answer the purpose; that is, reversing the interlocutors appealed from, and referring it back to the Court of Session, to see whether there is anything else that may be done independently of the deed, for the purpose of doing what is right between the contending parties claimant upon this fund. I have no doubt that if the parties can arrange it privately generally speaking it answers the purpose of both parties better, but if they cannot agree, I do not anticipate any difficulty in the justice of the case being satisfied by whatever interlocutor the Court of Session may think proper to make, or may find themselves competent to make upon the pleadings, this House declaring that the deed is to be considered as void.

MR. MACQUEEN.—I hope that your Lordships will consider that this is a case in which justice requires that Mr. Rennie should have the costs in the Court below. We do not ask for the costs in this House. That would be contrary to all rule and practice. But under the circumstances of this case, which are as strong as can be well imagined, here is a trust—

LORD CAMPBELL.—My own opinion is, that this is not a case for costs, because this is a proceeding contrary to the agreement which Mr. Rennie had entered into, although that agreement in point of law is not binding.

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LORD BROUGHAM.—No, we cannot give the costs.

The parties intimating that they were not prepared to arrange matters, it was—

Ordered and adjudged, That the said interlocutors, so far as complained of in the said appeal, be reversed, and it is declared that the deed of assignation of the 28th of August and 23rd of September, 1835, is invalid. And it is further ordered, That with this declaration, the cause be remitted back to the Court of Session in Scotland, to proceed therein as may be just and consistent with this judgment and declaration.

PARSONS—GRAHAM, MONCRIEFF and WEEMES, Agents.
