The defender reclaimed, and argued—An attempt like this to take any part of a sequestrated estate out of the *universitas* which was vested in the trustee by statutory title was contrary to the provisions of the Bankruptcy Acts.—Bankruptcy (Scotland) Act 1856, sec. 155; *Anderson*, March 13, 1866, 4 Macph. 577.

Argued for pursuers—If there was no provision in the Bankruptcy Acts for such a proceeding as that proposed by the pursuers here, there was certainly none against it. The pursuers' demand was a reasonable one, and the objections to it were frivolous. The pursuers' case was an appeal to the *nobile officium* of the Court.

At advising—

Lord Justice-Clerk—In this case we have to consider a rather unusual application. The question is one of the highest equity, and I see no reason why it should not be held competent for us to deal with it in the circumstances, which are these—sequestration was made of the property of a deceased debtor, who had left ample funds for the satisfaction of all claims against his estate, and a large surplus besides. The sequestration has been going on for some time, and there is shown to be a balance of about £50,000. The pursuer, who is the heir-at-law of the deceased, asks that the heritable estate to which he is heir, amounting to about £38,000, of course with the burdens upon it, should be given over to him. Now, so far as we can see, the obligations of the estate do not now exhaust or nearly exhaust the estate, nor according to any reasonable probability will they do so. In these circumstances I think there would be great hardship to the heir-at-law if he were kept out of his estate. No reason has been suggested why such a large sum should go on being administered by the trustee in the sequestration when every creditor either is or is certain to be satisfied in full.

Lord Young—I entirely concur. In the ordinary course where a sequestration comes to an end, and any balance remains in the hands of the trustee, he gives it over to the debtor. Of course a balance cannot be handed over to a deceased debtor, but it can to the party who is in right of it, and the person in right of the heritable estate of the deceased here is the pursuer. He produces his service, and that is his position and the foundation of his claim. The trustee objects that the sequestration is not at an end—a number of trifling things remain to be done which will occupy time. But he has in his hands £50,000 of a surplus, and so far as concerns the heritable estate the pursuer says, "I am the party entitled thereto, and there is a surplus, and I want that to which I have right." I assume that the pursuer satisfied the Lord Ordinary as to his true position. In any event the heritable estate will eventually be his, he being the heir-at-law, and the debtor being dead. If so, it is certainly reasonable that he should contend that this heritable property which now belongs to him should not be kept up in the hands of the trustee pending the discussion of claims with which he has no concern, and to await the result of the winding-up of the sequestration. It is conditionally establishing a right according to which this surplus is to go. The interlocutor of the Lord Ordinary has given it to the right party. I think it is reasonable and should be adhered to.

Lord Craighill—I concur. I think this is a reasonable action in the circumstances, and I also think that the Lord Ordinary's judgment is a reasonable judgment upon the action. It would be a cause of great regret if the pursuer were to be kept out of his estate and thus deprived of the advantage of managing his own property to which he has now succeeded, the expenses of doing which would necessarily be much greater in the trustee's hands than in his own. It might have been that there were provisions in the Bankruptcy Act which would have precluded such a claim as is here made, but looking to section 155, which provides that any surplus of the bankrupt's estate and effects that may remain after payment of his debts with interest, and the charges of recovering and distributing the estate, shall be paid to the bankrupt or to his successors or assignees, it does not seem to apply, but merely indicates what is to be done with the property after all debts are paid. But here there is enough, and more than enough, for payment of all debts still undischarged. It is therefore clear that the statute does not provide for such a case as this, so it is reasonable and for the interest of all concerned that the demand of the pursuer should be complied with. I think it is right that we should have power to do that which the Lord Ordinary has done, since by such an expedient no one is prejudiced.

Lord Rutherfurd Clark concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—Dickson. Agent—William Finlay, S.S.C.

Counsel for Defender (Reclaimer)—J. P. B. Robertson—Jameson. Agents—J. & J. Ross, W.S.

Saturday, December 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

LAIDLAW *v.* MILLER (LAIDLAW'S TRUSTEE).

(*Ante*, 14th July 1882, vol. xix. p. 819).

Husband and Wife—Bankruptcy—Wife's Claim in Husband's Sequestration—Interest.

A wife became entitled *stante matrimonio* to certain property exclusive of the *jus mariti* and right of administration of her husband. She conveyed this property in security of loans obtained by her husband for the purposes of his business, and ultimately, the loans were repaid out of it *Held* that she was entitled to rank on her husband's bankrupt estate for the amount so paid by her on his account, but that she was not entitled to interest on that sum, since such interest could not have been claimed from her husband if he had remained solvent.

The circumstances of this case are set out in detail in the report of *Newlands* v. *Miller* (*Laidlaw's Trus-*

tee), *ante*, vol. xix. p. 819. As there reported, Mrs Laidlaw, wife of Laidlaw, the bankrupt, became entitled during the subsistence of the marriage to a share in the trust-estate of the deceased William Stewart, excluding therefrom her husband's *jus mariti* and right of administration. By the marriage-contract between Mr and Mrs Laidlaw the *jus mariti* and right of administration were also excluded. Mrs Laidlaw, however, as already reported, had assigned her interest in Stewart's trust in security of a loan to her husband of £300, and of another loan of £2000, and eventually these loans were repaid out of that estate. The loans were for the husband's behoof—the money being required for his business as a hotel-keeper, and for building speculation in which he was engaged. He was the sole debtor in the bonds by which the debts were constituted, Mrs Laidlaw, however, being a party to them to the effect of assigning her interest in Stewart's estate as a security for payment of the debt. In all, including the payment of the two bonds above mentioned, Mr Laidlaw obtained the whole sum of £3246, 10s. 5d. coming to his wife from Stewart's trust. She had no separate legal adviser. No part of the £3246, 10s. 5d. was ever repaid. Laidlaw having become bankrupt, as already reported, and Hugh Miller, C.A., having been elected trustee, Mrs Laidlaw on 31st July 1882 lodged a claim with him as trustee for £3246, 10s. 5d., on the ground that she was a creditor of her husband to that extent. She also claimed a sum of £785, 7s. 8d., being interest at 5 per cent. on that sum from 6th May 1873, when her husband obtained possession of her share of Stewart's estate, to 8th March 1878, the date of his sequestration. The trustee rejected the claim, explaining as the grounds of his deliverance that the claim now made by Mrs Laidlaw was for the sum formerly claimed by Mr Newlands, S.S.C., as marriage-contract trustee of Mr and Mrs Laidlaw, which claim was rejected by the Court; that the trustees of Mr Stewart had been discharged of the money by a discharge by the claimant and her husband; that there was no loan by the claimant to her husband; and that the husband's evidence in the previous litigation on Mr Newlands' claim was inconsistent with the present claim by the wife.

Mrs Laidlaw appealed to the Lord Ordinary on the Bills (LORD KINNEAR).

The parties agreed by minute that the proof in the former appeal from the trustee's deliverance on Newlands' claim should be held applicable to the appeal by Mrs Laidlaw.

The Lord Ordinary on 18th November 1882 sustained the appeal "to the extent and effect of ranking the appellant for the amount of her claim, exclusive of her claim for interest," and remitted to the trustee to rank the appellant accordingly.

"*Opinion*.—The appellant during the subsistence of the marriage became entitled under the will of the late William Stewart to one-fourth part of the residue of his estate, exclusive of the *jus mariti* and right of administration of her husband. Her share of the estate amounted to £3246, 10s. 5d., and she now claims to rank as a creditor upon her husband's sequestrated estate for that amount with interest.

"It appears that before Mr Stewart's estate was divided she at her husband's request assigned her interest in it in security of two loans—one of £300 and the other of £2000—advanced to him, and applied exclusively to his own uses and purposes. The nature of the transaction is clearly apparent upon the face of the bonds, under both of which the husband is the sole debtor, the appellant becoming a party to them merely for the purpose of assigning her separate estate in security of her husband's debt. It is not disputed that both of these loans were in fact repaid out of the appellant's separate estate, the testamentary trustees having applied her share of residue so far as necessary in extinguishing the bonds. And it is not disputed that the balance was paid to or for behoof of the bankrupt, and applied by him to his own purposes. No part of the residue therefore appears to have come into the appellant's hands, and no part of the sums belonging to her which were paid to her husband, or applied in payment of his debts, has been repaid to her by him.

"In these circumstances it appears to me that at the date of the sequestration the appellant was a creditor of her husband for the whole amount of the separate estate belonging to her which he is thus shown to have received.

"It is said that she gave the money to her husband, or allowed him to receive it *animo donandi*. If this were so, the gift would be revocable as a donation *inter virum et uxorem*, notwithstanding the insolvency of the husband. (*Williams* v. *Williams*, 7 D. 111.) But the assumption of donation is in my opinion excluded by the evidence, since it appears that the appellant trusted entirely to her husband, and acted in utter ignorance of her legal rights.

"The case of *Cuthill* v. *Burns*, 24 D. 849, on which the respondent's counsel relied, appears to me to have no application, since the appellant received no consideration, so as to give to her loan or donation to her husband the character of a remuneratory grant.

"It was conceded that the question raised by the present claim is not ruled by the judgment of the Court upon the previous claim of Mr Newlands.

"I am therefore of opinion that the appellant is entitled to be ranked for the principal sum of £3246, 10s. 5d.

"But I think the claim for interest is untenable. The appellant could not have compelled her husband to account for the interest of her moneys in his hands if he had remained solvent, and therefore cannot rank for interest upon his sequestrated estate."

The trustee reclaimed, and argued — By the terms of the marriage-contract the husband was entitled to a liferent of his wife's means, and so to the liferent of anything which she might recover from his estate. Mrs Laidlaw consented to this money being paid to her husband, and signed the discharge to Stewart's trustees. It was therefore a joint-adventure, and she took her chance along with her husband in his business affairs. No claim was ever made for this money until four years after it had been paid over, and the wife was not entitled to rear up this debt against his estate to the prejudice of his creditors.

Authority—*Meldrum* v. *Wilson*, Dec. 7, 1842, 15 Jur. 90.

Argued for Mrs Laidlaw—This money was not

advanced by her to her husband *animo donandi;* but even if it had been so, the transaction was revocable, and she is now entitled to claim a ranking.

At advising—

Lord President—As regards the main question here, the whole matter seems to me so clear that it is not necessary that I should give any detailed expression of opinion upon it. The proceeding by which the money found its way into the hands of the husband was fully investigated in the last case of *Newlands* v. *Laidlaw's Tr.*, and there can be no doubt that he got it either as a loan or as a donation from his wife. It is no matter which is the true state of the case, as either would afford a good ground of claim. But it is now said that this money was really settled by the terms of Mr and Mrs Laidlaw's marriage-contract, and that the husband was entitled to a liferent of it, and that that right attaches to any salvage the wife may receive from her husband's estate. I think that there is no ground whatever for that contention. The spouses by mutual consent took this sum out of the marriage-contract trust, or rather they never permitted it to get into it, for they intercepted it between the trustees of the late Mr Stewart and the marriage-contract trustee. They then discharged Stewart's trustees, as they were quite entitled to do, and thereafter the money was, I think, quite free of any conditions under the marriage-contract. The condition under which, if it had ever got into the hands of the marriage-contract trustee, it would have been held, was that the husband should have *stante matrimonio* the use of it *ad sustinenda onera matrimonii*, but there was also constituted a security to the wife against her husband and against his creditors. If, then, on the one hand, the wife gave up her security, it can never be maintained that the husband can still keep his corresponding advantage of getting the interest of the money. If that is so, then the marriage-contract can have nothing whatever to do with this money; and no right which the husband would have had under that contract can be given effect to.

Lord Mure—It is quite clear, when our decision in the former case is looked at, that the circumstances are very distinctly put by the Lord Ordinary in those passages of his opinion where he refers to the question of loan or donation. By William Stewart's settlement this lady got the sum in question, which was covered by the provisions of her marriage-contract, but belonged to her exclusive of her husband's *jus mariti* and right of administration, and the spouses received the money and discharged Stewart's trustees, as they were quite entitled to do. That being so, we held that the marriage-contract trustee could not claim for it in Mr Laidlaw's sequestration. The Lord Ordinary says that it was conceded that the question in the present claim is not ruled by our judgment in the former case. Now, what was the nature of the transaction by which this money passed into the hands of the husband's creditors? If we refer to the evidence, we find that that money was taken from the wife, without her knowledge or consent, and applied in payment of her husband's debts. But even if it had been otherwise—if, as the Lord Ordinary says, she had given the money to her husband, or allowed him to receive it *animo donandi*—the gift would be revocable as a donation *inter virum et uxorem* notwithstanding the insolvency of the husband; but the assumption of donation is excluded by the evidence. I concur in that view of the Lord Ordinary, and think this claim should be allowed.

Lord Shand concurred.

Lord Deas was absent.

The Court adhered.

Counsel for Reclaimer—Mackintosh—Wallace. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Shaw. Agent—Andrew Newlands, S.S.C.

Saturday, December 16.

SECOND DIVISION.

[Sheriff of Fife.

MITCHELLS *v.* MOULTRYS.

Process—Proof—Husband and Wife—Writ or Oath—Reference to Oath—Debt Contracted by Wife before and after Marriage—Competency of Reference to Oath respectively of Husband and Wife—Act 1579, *c.* 83.

It is competent to refer to the oath of the husband the constitution and resting-owing of a debt incurred by the wife before marriage. But where the husband is sought to be made liable for a debt incurred by his wife after marriage, it is competent to refer to her oath only the constitution of the debt; the resting-owing must be referred to his oath.

Terms of letter *held* (distinguishing case from *Fiske* v. *Walpole*, 22 D. 1488), not to satisfy the requirements of the Act 1579, c. 83, as to proof of debt by writ.

J. & D. Mitchell, drapers in Pathhead, sued Mrs Moultry and her husband David Moultry, in the Sheriff Court of Fife, under the Debts Recovery Act 1867, for an alleged debt of £26, 5s. 8d. The pursuers averred in a minute given in by them, as appointed by the Sheriff-Substitute, that prior to her marriage, which took place in June 1875, the female defender had incurred a debt to them amounting at that date to £27, 17s. 3½d., and that after her marriage she and her husband had incurred a further account of £13, 9s., ending 17th July 1876. The minute referred to went on to state that the defenders had since the date of their marriage made several payments to account to the amount of £19. These payments having been made indefinitely, the pursuers claimed to be entitled to apply them to the least secured part of their debt, being that contracted prior to the marriage.

They produced the following letter from the female defender:—

"Mr Mitchell. *Pathhead*, 18*th March* 1880.

"Dear Sir—It is with the deepest sorrow at heart I answer your letter. I am truly sorry that I can't spare anything before six weeks, as it takes