larger amount of territory along the shore than appears to be the case here, but he had not a barony title, and he had no express right to the seashore in his titles. The challenge was on the part of certain tenants and fishermen in the neighbourhood, and they claimed in the action, in the first place, a right to cut the seaware between high and low water-mark, and secondly, a right to a road there. In that case the Court, with the exception of Lord Cockburn, unanimously held, in accordance with the interlocutor of the Lord Ordinary, that it was quite sufficient as against this public action that the Marquis of Ailsa showed that his lands lay adjacent to the sea and had it as their actual boundary, although he had no direct or express grant of the shore. Lord Wood decided the case on that footing without any proof. Lord Medwyn, Lord Moncreiff, and the Lord Justice-Clerk (Hope) all agreed that it was not a case in which the proprietor could be put to a proof of possession, because the title alleged against his right was not one upon which prescription could run. In the course of the discussion the other day, Lord Moncreiff's opinion to that effect was quoted. The Lord Justice-Clerk gives his opinion in these words:—"I do not require Lord Ailsa to prove possession, because I think the seaweed is a proper pertinent of his lands, and that the public are not entitled to cut and carry away the same to manure lands at a distance away, or to burn kelp *ex adverso* of the proprietor's lands. I do not inquire as to any possession by Lord Ailsa for we are not in that question, and his leases without actual proof would not be evidence of possession if we thought that any actual possession could be required to be proved on the part of Lord Ailsa."

I think that case and the case of *Lord Saltoun* are quite conclusive, and that the interlocutor of the Lord Ordinary should be affirmed.

Lord Craighill—I am entirely of the same opinion. The question at issue between the parties has been more than once decided by the Court, and that being so, I think that the reclaimers have no case.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Young was absent.

The Court adhered.

Counsel for Complainer—J. P. B. Robertson Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Respondent (Reclaimer)—Campbell Smith—Kennedy. Agent—Wm. Officer, S.S.C.

Friday, February 1.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

LAIDLAW AND SPOUSE *v.* NEWLANDS.

(See *Newlands* v. *Miller* (*Laidlaw's Trustee*), *ante*, 14th July 1882, vol. xix. p. 819, and 9 R. 1104; and *Laidlaw* v. *Miller* (*Laidlaw's Trustee*), 16th December 1882, vol. xx. p. 261).

Husband and Wife—Marriage-Contract—Action of Denuding.

By antenuptial contract of marriage the husband conveyed certain estate to trustees for behoof of his widow in liferent and of any person she might name in fee, and bound himself, in the event of there being children of the marriage, to upbring and maintain them in a proper manner, and to make suitable provision for them after his death. The wife accepted these provisions in full of all her legal claims, and conveyed to the marriage-contract trustees the whole estate then belonging or which might pertain to her in any way during the subsistence of the marriage. The husband renounced all his other legal rights over the wife's estate. The trustees were to pay over the produce of the wife's estate to the husband during the subsistence of the marriage, and upon its dissolution to pay the capital to the wife or her heirs, and it was further declared "that the trusts hereby created . . . shall subsist until all the ends, uses, and purposes above written are come to an end."

The husband's estates were sequestrated during the subsistence of the marriage, and subsequently the last surviving trustee under the marriage-contract died. Thereafter the spouses nominated a new trustee, who obtained payment of a share of a succession which came to the wife under a settlement making it payable to her exclusive of the *jus mariti* and right of administration of her husband. The husband's liferent interest during the subsistence of the marriage in this estate was valued, and the amount paid by the marriage-contract trustee to the trustee in his sequestration. The marriage-contract trustee also obtained payment of the wife's legitim from her father's trustees.

The spouses then brought an action to have it declared that the marriage-contract trustee was bound to denude in favour of the wife, exclusive of the *jus mariti* and right of administration of her husband, of the trust-estate conveyed by her in the marriage-contract. There were four children of the marriage alive at the date of the action. *Held* (*diss.* Lord Deas) that the point had been involved in the decision of *Newlands* v. *Miller*, July 14, 1882, 9 R. 1104, 19 S.L.R. 819, and that there being no interest of children or other third parties created by the contract in the funds conveyed by the wife, she was entitled to have those funds conveyed to her by the marriage-contract trustees.

By antenuptial marriage-contract, entered into between Thomas Laidlaw, sometime builder,

Innerleithen, thereafter hotel-keeper, Stirling, and Miss Catherine Stewart, daughter of James Stewart, dated 6th and 7th June 1867, and registered in the Books of Council and Session 16th March 1880, the said Thomas Laidlaw assigned and disponed to Duncan Stewart and the other trustees therein named, and to such other person or persons as might be assumed by virtue of the powers therein contained, two policies of insurance on his own life, and the whole household furniture, &c., in his house at Innerleithen, "in trust always for the ends, uses, and purposes after mentioned." The purposes of the trust were as follows, viz., in the event of the husband predeceasing, to invest the proceeds of the policies, and hold the same and the said household furniture, &c., for his widow in liferent, and for such persons as she might appoint in fee: "*Third*, that in the event of the dissolution of the said marriage by the decease of the said Catherine Stewart before the said Thomas Laidlaw, the said trustees shall forthwith assign, dispone, and make over to the said Thomas Laidlaw and his heirs the whole of the estate and effects hereinbefore disponed to them by the said Thomas Laidlaw: *Lastly*, . . . the said Thomas Laidlaw binds and obliges himself, in addition to the provisions hereby made in favour of the said Catherine Stewart, in the event of there being any children born of the said marriage, to upbring and maintain the said children in a proper manner, and to make suitable provision for them after his death, which provisions above-written, conceived in favour of the said Catherine Stewart, she hereby accepts in full satisfaction of all terce of lands, legal share of moveables, and every other thing that she *jure relictæ* or otherwise could ask, claim, or crave of the said Thomas Laidlaw, or his heirs, executors, and representatives, by and through his death, in case she shall survive him."

Miss Catherine Stewart on her part made over to the same trustees "All and sundry goods, gear, debts, and sums of money, as well heritable as moveable, that are now belonging to her, as also whatever property, means, estate, and effects, heritable and moveable, real and personal, may pertain to her in any way during the subsistence of the said intended marriage, other than the provisions in her favour contained in this contract; and the said Thomas Laidlaw hereby resigns and renounces his *jus mariti*, right of courtesy and administration, and all other rights competent by law to him, or which he could claim or exercise in consequence of said marriage, in relation to all such property, means, estate and effects; and the said Catherine Stewart, with the special advice and consent of the said Thomas Laidlaw, binds and obliges herself and her foresaids, and the said Thomas Laidlaw binds and obliges himself and his foresaids, to make, execute, and deliver all deeds and writings necessary for fully implementing the conveyance last above-written; declaring that the said trustees shall have power to invest the proceeds of the estate and effects of the said Catherine Stewart, when the same shall be received by them, in such securities, real or personal, as they may consider expedient, and shall pay over the produce thereof to the said Thomas Laidlaw during the subsistence of the said marriage, and upon the dissolution of the marriage the said trustees shall pay or make over to the said Catherine Stewart or her heirs the fee or capital of the said estate and effects hereby conveyed by her to them: And declaring hereby that as the said liferent provisions hereby made in favour of the said Catherine Stewart are intended for her aliment and maintenance, the same shall not be assignable or transferable by her in any manner of way during her lifetime, nor be liable for her debts and deeds, nor subject to be attached by the diligence of her creditors by arrestment or otherwise, but shall be applied solely for her aliment and maintenance: Declaring also that the trusts hereby created by the said Thomas Laidlaw and the said Catherine Stewart respectively shall subsist until all the ends, uses, and purposes above-written are come to an end: . . . And it is hereby also agreed that all manner of action and execution shall pass upon this contract in favour of the said Catherine Stewart at the instance of the said trustees or their foresaids; and both parties consent to the registration hereof for preservation and execution."

The spouses were married in 1867, and in 1869, during the subsistence of the marriage, Mrs Laidlaw succeeded to one-fourth share of the residue of the trust-estate of a relative named William Stewart, the trustees under his trust settlement being directed to pay this share to Mrs Laidlaw exclusive always of the *jus mariti* and right of management of the said Thomas Laidlaw, or of any husband she might thereafter marry; and that the receipts and discharges for the same, or other deeds in relation thereto, to be granted by the said Catherine Stewart or Laidlaw alone, without the consent of such husband, should be good and effectual discharges for the same.

Before this succession was distributed advances had been made to the husband by third parties for the purposes of his business, and bonds and assignations in security had been granted by the spouses over the wife's share of the succession, in favour of the creditors. When the distribution took place the testamentary trustees, who were ignorant of the marriage-contract trust, paid off these bonds and other debts incurred by Laidlaw in the course of his business, amounting to £3246, 10s. 5d., and handed over a balance of the amount of the estate then divisible to the spouses, the whole payment so made being on account of Mrs Laidlaw's one-fourth of William Stewart's estate.

Laidlaw's estates were sequestrated on 8th March 1878.

On 28th March 1878 the last remaining and surviving trustee under the antenuptial contract died.

On 28th February 1880 the spouses executed a deed of nomination, by which, on the narrative that all the trustees under their antenuptial marriage-contract had either resigned or were deceased, they nominated Mr Andrew Newlands, S.S.C., Edinburgh, the defender in this action, as trustee under the said contract.

On 18th January 1881 Mr Newlands, acting as trustee under the marriage-contract, lodged a claim in the sequestration for the wife's share of the succession, which had been treated as above narrated, but the trustee in the sequestration rejected the claim, and his deliverance was sustained by the First Division (as reported in the case of *Newlands* v. *Miller*, July 14, 1882, 9 R.

1104, 19 Scot. Law Rep. 819), the Court holding (*diss.* Lord Deas) that the spouses were entitled to keep the fund out of the marriage-contract trust, and had done so, and therefore that the marriage-contract trustee had no title to claim it in the sequestration.

On 31st July 1882 Mrs Laidlaw lodged a claim in her husband's sequestration as being his creditor for £4031, 18s. 1d., being the sum of £3246, 10s. 5d. advanced by her to her husband, with interest down to the date of the sequestration. The trustee in the sequestration rejected this claim also, but the First Division (as reported in the case of *Laidlaw* v. *Laidlaw's Trustee*, Dec. 16, 1882, 10 R. 374, 20 Scot. Law Rep. 261) sustained an appeal against this deliverance, and remitted to the trustee to rank Mrs Laidlaw for the amount of her claim exclusive of interest.

In October 1880 and November 1881 Mr Newlands, as trustee under the marriage-contract, obtained payment from William Stewart's trustees of a sum of £2300 being part of the one-fourth share of William Stewart's estate which had been bequeathed to Mrs Laidlaw in fee. In September 1881 Mr Newlands, as trustee foresaid, obtained payment of a sum of £1800, being the amount paid by the trustees appointed by Mrs Laidlaw's father James Stewart in full of his daughter's claim of legitim. He invested the money on behalf of the trust in bond and disposition in security over certain heritable subjects.

This was an action at the instance of Mrs Laidlaw, and Thomas Laidlaw as her administrator-in-law, and as an individual, against Mr Newlands, as sole trustee under the marriage-contract, seeking to have it found and declared that Mr Newlands was bound to denude of the trust in favour of the pursuer Mrs Laidlaw, and convey to her, exclusive of the *jus mariti* and right of administration of her present or any future husband, the trust-estate, of whatever kind or description, vested in or held by the defender, as trustee under the conveyance by Mrs Laidlaw contained in the said antenuptial contract of marriage. The summons also contained conclusions that the defender had no right to funds belonging to Mrs Laidlaw at the date of the antenuptial contract, or which had come to her during the marriage, and for an accounting and conveyance to her of the bonds and dispositions in security in which the estate was invested.

At the date of raising the action there were four children of the marriage alive, residing in family with the pursuers.

The defender stated his willingness to produce a full statement of his intromissions with the trust funds, and to pay over or convey to the pursuers or to Mrs Laidlaw the whole sums or estate found to be due to her or them in exchange for a valid discharge.

The defender pleaded—"(2) On a sound construction of the said marriage-contract there was thereby constituted a security to the wife against her husband, and against the expenditure of the capital of the estate *stante matrimonio*, and the defender is therefore entitled and bound to continue to hold the estate to which he has acquired right as trustee under the said contract."

On 20th July 1883 the Lord Ordinary (KINNEAR) assoilzied the defender.

It was stated at the bar in the Inner House that his Lordship in giving judgment said that as he considered the *dicta* in *Newlands* v. *Miller*, *supra cit.*, not necessary for the decision of that case, he was not prepared to go back upon the series of decisions culminating in *Menzies* v. *Murray* (*infra*).

The pursuers reclaimed, and argued—This case is ruled by the decision in *Newlands* v. *Miller*, July 14, 1882, 9 R. 1104; Fraser on Husband and Wife, p. 791, and cases there cited. *Ramsay* v. *Ramsay's Trustees*, Nov. 24, 1871, 10 Macph. 120.

The defender replied—This case was ruled by *Menzies* v. *Murray*, March 5, 1875, 2 R. 507. There is a great difference between a conveyance to a wife with bare words excluding the *jus mariti*, and a trust, which is the machinery for making such a declaration effectual.

At the close of the argument the pursuers amended their record by stating that Mr Laidlaw had renounced his liferent interest in his wife's succession to Mr William Stewart on consideration of the sum of £950 paid to the trustee in his sequestration.

At advising—

LORD MURE—Your Lordships have before you now the reclaiming-note at the instance of Mrs Laidlaw and her husband in an action at their instance brought against Mr Andrew Newlands, who is the trustee acting under the antenuptial marriage contract entered into between these two parties many years ago, and who, in place of the original trustees, was selected to act as the trustee under the antenuptial contract; and the reclaiming-note is against the interlocutor of Lord Kinnear assoilzieing the defender Newlands from the conclusions of that action. Now, the general nature of the conclusions of the action was that Mr Newlands should be bound to denude himself of a certain portion of the estate which he had charge of in favour of Mrs Laidlaw and her husband—at least the action is brought with the consent of her husband, in order that the money should be made over to her exclusive of the *jus mariti* and right of administration of her present or any future husband. That is the general nature of the claim, and the question is raised under the terms of the marriage contract which was entered into between these two parties. Now, this question has been twice before your Lordships already in actions about the administration of the sequestrated estate of Mr Laidlaw, and the same question appears to me to have been raised already, particularly in the first of these cases, and to have been substantially disposed of by the decision of the Court pronounced on 14th July 1882. In that case the main question turned entirely upon the same point on which the present question depends, namely, the construction of the antenuptial marriage-contract entered into between Mr Laidlaw and his wife. At that time, Newlands, having been elected trustee under the marriage-contract, lodged a claim in bankruptcy against Mr Miller, the trustee on the sequestrated estate of Laidlaw, and in that case the Sheriff refused that claim. It came up here upon appeal from the Sheriff, and your Lordships, upon considering the matter, came to the conclusion that substantially the Sheriff had given a right judgment, and that it should be affirmed so far as it rejected the claim of Mr Newlands to be ranked on the estate. There was

a special point raised as to the manner in which Newlands had been appointed trustee, but it was not thought necessary to consider that question here. We held that the Sheriff had come to a right conclusion in rejecting his claim. The second case, which was decided on 16th December 1882, was a claim at the instance of Mrs Laidlaw, with the concurrence of her husband, to be ranked on the same estate of the bankrupt Mr Laidlaw. Now, this the trustee (Mr Miller) refused to do, but his deliverance was altered by the Lord Ordinary (Kinnear) upon appeal, and he remitted to the trustee to rank Mrs Laidlaw, and that judgment of the Lord Ordinary was adhered to by this Division of the Court on the 16th of December 1882. Since then the question has been raised again in its present shape, namely, by a demand by Mrs Laidlaw, with the consent of her husband to have the property transferred to her exclusive of the *jus mariti* and right of administration of her husband. That is the general nature of the action, and the claim made on the part of Mrs Laidlaw to have the property made over to her by the trustee has been refused by the Lord Ordinary, and he has assoilzied Mr Newlands from the conclusions of the action. Now, in this reclaiming-note the question has been argued before us, as to whether or no the terms of that antenuptial marriage-contract are such as to preclude Mrs Laidlaw and her husband from making this claim, and a great deal of ingenious argument on both sides has been heard upon that question. But after listening to the arguments we have heard, and after considering the authorities referred to, I have come to be of the opinion that the decision must follow upon the same rule as that we laid down in the first case in which the question came before us on the 14th of July 1882. This is precisely the same point as, it appears to me, was argued before us and decided then; and it is just whether there was not an intention on the part of the parties to that marriage-contract that the trust thereby created should exist during the marriage of the husband and wife. Now, in the earlier case I have referred to that question was raised and was determined. It was then maintained upon the terms of that marriage-contract, that where the interests involved were the interests of the beneficiaries, so long as Mr and Mrs Laidlaw are alive no claim such as was made in the first action could be given effect to. Now, as I read that contract, I think, in point of fact, there was no provision in favour of any of the children or third parties which would have the effect of preventing the fee of the property that was conveyed under it by Mrs Laidlaw from vesting in her, subject to such right of liferent as might be given to the husband. Now, that question was precisely the same as was raised in the case of *Ramsay's Trustees*, 10 Macph. 120, and we came to the conclusion that the point that was brought before us under that first appeal with regard to the trustee on the sequestrated estate was precisely the same point as was decided in the case of *Ramsay*. Now, that being so, I see no reason for holding, under the present reclaiming-note, that any other decision should be pronounced. I think the plain construction of this antenuptial contract is the one that was given to it by your Lordships in the case of *Newlands* v. *Miller* in 1882, and that it must follow that the decision under the conclusions of this action must be, that Mrs Laidlaw, with the consent of her husband, is entitled to have it declared that the estate that she claims belongs to her exclusive of the *jus mariti* of her husband, as in the case of *Ramsay* it was held that Mrs Ramsay was entitled to get the estate there. Upon these grounds I think the Lord Ordinary's interlocutor does not proceed upon a sound construction of the marriage-contract in this case.

LORD DEAS—The late William Stewart, who died on 3d November 1869, by trust-disposition and settlement, dated the 8th October 1868, conveyed his whole means and estate to trustees, and directed them to pay and make over to Catherine Stewart (a near relative of his own), and whom failing to her child or children, one-fourth share of the whole residue of his estate, exclusive of the *jus mariti* and right of administration, and all other rights competent to her husband, and there is an exclusion of the rights of any other husband to whom she might be married. The estate which thus fell to Mrs Laidlaw was of large amount. It has been greatly dilapidated by paying debts incurred by Mr Laidlaw, who has at present, it is explained, no funds whatever to meet any future debts he may incur unless he shall prevail, as formerly, upon his wife to allow him to use her funds for his purposes, in which case there is no reason to doubt, unless the Lord Ordinary's interlocutor be adhered to, that the whole remaining funds which are still in question will soon melt away. The Lord Ordinary has assoilzied the defender, as trustee, from the conclusions of the action, holding, I understand, that the principle of the very authoritative case of *Menzies* v. *Murray*, March 1875, decided by the unanimous judgment of Seven Judges, applies to this case. I entirely agree with the Lord Ordinary that the principle of that case is applicable, and I have no hesitation whatever in thinking that we ought to adhere to the Lord Ordinary's interlocutor. In the lifetime of her near relative Mr Stewart, Mrs Catherine Stewart had intermarried with Mr Laidlaw, then carrying on business as a hotel-keeper. On that occasion an antenuptial marriage-contract was entered into by the parties, whereby the husband disponed and conveyed and made over to the three persons therein named as trustees, and others to be assumed, *primo*, a policy of insurance on his own life for £100, *secundo* another policy on his own life for £200, and then the husband assigns to the three trustees his whole household furniture, and renounces his *jus mariti* and right of courtesy and administration. The three trustees accepted the trust, the purposes of which were—(first) if the marriage was dissolved by the husband's dying, the trustees should obtain payment of the sums in the policies, and invest the proceeds in such securities as they thought proper, "for the liferent use and behoof of the said Mrs Catherine Stewart during all the days of her life, so long as she shall survive the said Thomas Laidlaw," and the trustees were during the life of the said Thomas Laidlaw to pay over to the said Thomas Laidlaw and Catherine Stewart the income so derived. The antenuptial contract was dated on the 6th and 7th of June 1867, and registered in the Books of Council and Session, and it assigns to the three persons therein named, as trustees, and others to be assumed by them, these two policies

I have mentioned, and also his whole household furniture and effects, and renounces all his rights which might accrue to him in consequence of the marriage. These three trustees all accepted, and the purposes were those I have already mentioned.

After the renunciation of the husband's rights in the property conveyed by the wife the contract says:—"And the said Catherine Stewart, with the special advice and consent of her said husband, binds and obliges herself, and the said Thomas Laidlaw binds and obliges himself and his foresaids, to make, execute, and deliver all deeds and writings necessary for fully implementing the conveyance last above written, declaring that the trustees shall have power to invest the proceeds of the estate and effects of the said Catherine Stewart, when the same shall be received by them, in such securities real or personal as they may consider expedient, and shall pay over the produce thereof to the said Thomas Laidlaw during the subsistence of the marriage, and upon the dissolution of the marriage the said trustees shall pay or make over to the said Catherine Stewart or her heirs the fee or capital of the said estate and effects hereby conveyed by her to them." And the marriage-contract also says:—"Declaring hereby that as the said liferent provisions hereby made in favour of the said Catherine Stewart are intended for her aliment and maintenance, the same shall not be assignable or transferable by her in any manner of way during her liferent, nor be liable for her debts or deeds, nor subject to be attached by the diligence of her creditors by arrestment or otherwise, but shall be applied solely for her aliment and maintenance; and declaring that the trusts hereby created by the said Thomas Laidlaw and the said Catherine Stewart respectively shall subsist until all the ends and purposes above written are come to an end." The trustees assumed others to act along with them in the execution of this trust. Now, both the spouses are still alive, and if the husband dies first one thing is very plain—that the wife has a most material interest in the estate if she is the survivor. There is nothing about children in the contract except that, if I recollect rightly, Mr Laidlaw binds himself to maintain and educate the children according to their rank in life, and there are several children who are still alive, and there can be no doubt these will be very important burdens on Mrs Laidlaw if she survive. The children have a most material interest in the trust as well as Mrs Laidlaw. Now, what is proposed now is virtually to revoke that marriage-contract, and I do not see that in this Court they gave any reason or ground for that at all. In these circumstances I do not wonder at the Lord Ordinary being of opinion that the principle of the case of *Menzies* v. *Murray* is applicable here. I see nothing stated against that except some inferences drawn from some previous decisions which I mentioned as having done away with a great part of this lady's estate already. The Court seem to think that something is implied in these cases to the effect that notwithstanding this contract of marriage the spouses may do with this estate what they please. I do not think the previous decisions of your Lordships have anything whatever to do with this case. This estate is very considerable; it consists of a number of heritable securities of large amount, upon which Mr Newlands, the defender, as trustee, is infeft. I think that to give effect to what is sued for in this action would be nothing else than revoking that marriage-contract. I do not see any ground whatever stated for that in this record. It seems to me to be assumed in the pleas. There is no reduction mentioned or referred to as intended to be brought. So far as the spouses are concerned, I should say it is without rhyme or reason. The spouses have assigned no reason whatever for reducing it. In short, I am clearly of opinion that the principle in the case of *Menzies* v. *Murray* applies, and if it does, I think there can be no doubt that this contract must remain effectual.

Lord Shand—I agree with my brother Lord Mure in the opinion he has expressed in this case, and it appears to me that really the question has been already decided by the judgment of the Court in the case of *Newlands* v. *Miller*, July 14, 1882, 9 R. 1104. It is of course essential to keep in view in construing this marriage-contract that there are two separate trusts created, or rather, the trustees who are appointed hold the husband's estate under one set of provisions, and the wife's under another. In regard to the property conveyed by the husband there can be no doubt that the trust must continue to subsist. The property thereby conveyed was given over for a matrimonial purpose expressed in the marriage-contract; particularly, it was given to secure the wife a liferent which could not be attached by creditors or assigned by her in any way, consequently that trust must continue to subsist, and the pursuers do not dispute that. The sole question arises in regard to the property which the wife conveyed to the marriage-contract trustees. Now, in the former case, to which I have alluded, the question arose between Mr Newlands on the one hand, and the trustee in the sequestration upon the other, relating to a sum which unquestionably fell under the trust—I mean fell under the conveyance which the wife Mrs Laidlaw granted to the trustees—but the husband had disposed of that fund without allowing it to come into the hands of the trustee, and the question which arose was whether the husband and wife were entitled so to deal with the funds, or whether Mr Newlands, representing the trustees, was entitled to vindicate it. The judgment of the Court in the former case was that Mr Newlands could not vindicate that fund, and the reason—and the only reason—given for coming to that conclusion was that even if the fund had been conveyed to the marriage-contract trustees and was in their possession, the husband and wife were entitled, looking to the provisions of that marriage-contract, to take the fund out of the trust just as they had thus prevented the money from going into the trust, and the Court held that the trustee under the marriage-contract had no claim. It appears to me that the ground of judgment there is conclusive in the present case. The Court there considered whether the earlier case of *Ramsay* or the later case of *Menzies* v. *Murray* was applicable, and the majority expressed the opinion that the case of *Ramsay*, and not the case of *Menzies* v. *Murray*, applied. In that state of matters it appears to me that the question now discussed has really been decided. It is true that the fund

in that case had not been paid to the marriage-contract trustees, but although the money now in question is in the hands of the judicial factor Mr Newlands, it is in substantially the same position as the former. In regard to the case of *Menzies* v. *Murray* I shall only say this, that I think there are two points in which the present case differs. In the first place, there was there a provision for children, and in the next place there was a liferent in favour of the wife (which is entirely wanting here) during the marriage, which liferent would have been her sole liferent in the event of her husband predeceasing. There was therefore there a very clear matrimonial purpose, and in the present case the liferent has been given entirely in favour of the husband, and has been partly discharged by the transaction with the trustee under the sequestration, and the husband concurring in this action discharges the liferent *quoad ultra*, and the wife now claims her estate, which is in the hands of the trustee, free from the *jus mariti* and right of administration of her husband. In that state of matters I think she is entitled to succeed.

Lord President—I think the interlocutor of the Lord Ordinary cannot consistently stand with the judgment of this Court in the case of *Ramsay*, still less consistently with the previous judgment of the Court in the case between the present defender Mr Newlands and the trustee in the sequestration of Mr Laidlaw. We had occasion in that case to consider the whole provisions of this marriage-contract, and to determine its construction and effect with reference to the property of Mrs Laidlaw as conveyed in the marriage-contract. It is enough to say that the case of *Newlands* v. *Miller* decides the very point now in dispute, but the case has been so anxiously argued on behalf of the defender, and his arguments have received so much countenance from one member of the Court, that I propose to record the grounds upon which I have decided the present case. First, there are two trusts, as my brother Lord Shand has pointed out—one in which provisions are made in favour of the wife by the husband, and the other in which the wife conveys her fortune to the marriage-contract trustees. In regard to the first part of the trust, there can be no doubt at all that that must subsist so long as the marriage endures, and that the parties cannot put an end to the trusts created by that part, for this very reason, that the money which is there dealt with is the money of the husband as settled upon the wife so as to secure her a liferent interest in the money after the husband's death. Nobody proposes or would venture to say that a trust of that kind can be set aside, and funds adapted to such a purpose taken out of the hands of the marriage-contract trustee, especially considering that the liferent of the wife is declared to be alimentary and not affectable by her deeds or those of her husband. But the other part stands in a totally different position. There is a conveyance by the wife to the trustee of her entire property, and, as we know, she succeeded to a good deal of money from her uncle, and also by her claim for legitim against her father's estate. We are quite well aware of what became of Mr Stewart's succession, and it is the balance of that and the legitim which is now being disputed. Now, what does she do with this money? because surely it is decided and very well fixed by precedent that the mere circumstance of a lady in a marriage-contract conveying her fortune to the marriage-contract trustee does not deprive her of her absolute right to that property; something must be done with it. It must be not only conveyed to the trustees but it must be settled, and they must be directed to apply it to purposes of the marriage-contract, and if they have to do so they must keep it until these purposes are fulfilled; but if it is not directed to be so applied, or, in other words, is not settled, then I apprehend the mere circumstance of the lady having given what then becomes a gratuitous conveyance to the marriage-contract trustees, will not prevent her from demanding from these trustees a reconveyance of that estate when she thinks fit. Now, how does this case stand in that respect. The only purpose of the marriage-contract to which this money or any part of it is to be applied, is that the income is to be paid to the husband during his life, and if that right is given up, then there is no other right, and the money is there for no purpose at all. Now, the husband and wife together come here and demand that the property conveyed by Mrs Laidlaw to the trustees shall be reconveyed to her. That is a plain renunciation on the part of the husband of any liferent interest he may have in that money, and indeed we know, as regards the greater portion of it—the whole of the money derived from Mr Stewart—that his interest in the marriage-contract, under the provision that the income of his wife's estate is to be paid to him, was valued and the value paid over to the creditors in his sequestration; so that as far as that is concerned, his right is at an end, and the only fund which is now subject to the provision in his favour is the money derived in name of legitim from Mrs Laidlaw's father's estate, and as regards that I have only to repeat what I said, that when he comes here along with his wife asking that that money should be paid with his distinct consent—that it shall be so done notwithstanding his liferent—that is, in other words, a distinct renunciation of his rights under the marriage-contract. The husband's right, therefore, to have the income of this property paid to him during the subsistence of the marriage, being out of the way, the case is plainly ruled by the judgment in *Ramsay's* case. Some observations, however, were made upon the particular clauses of this marriage-contract. One clause observed upon by the defender is in these terms:—"Declaring also that the trusts hereby created by the said Thomas Laidlaw and the said Catherine Stewart respectively shall subsist until all the ends, uses, and purposes above written are come to an end." Now, it was contended that the meaning of that clause is, that until every purpose of the marriage-contract is fulfilled, no part of the money conveyed to the trustees can possibly be set free. But on a moment's reflection we will see that it is quite impossible to adopt that construction. Supposing the wife survives the husband, there is one provision in the contract that still remains to be fulfilled—that is, her liferent of the money settled by the husband—and so long as she survives that purpose has certainly not come to an end; but can it be maintained for one moment that because that purpose has not come to an end, therefore Mrs Laidlaw would not be entitled, being a single woman, to order the trustees to convey to her her property? On the other

hand, supposing the wife predeceased, then there are provisions still that will require to be fulfilled, but the wife's heirs or assignees would certainly be entitled to come in and demand payment of this money. In short, it is impossible to read this clause except *applicando singula singulis.* The trust shall not come to an end, so far as concerns any portion of the funds invested in the trust, until the purposes for which that portion is conveyed have been fulfilled and come to an end. That is the only consistent and reasonable meaning of the words. I think my brother Lord Deas was a little mistaken in his reading of the clause immediately preceding the one of which I have been speaking, where the liferent provision in favour of Mrs Stewart or Laidlaw is declared to be for her liferent aliment and maintenance. She has no liferent provision of any kind in the second part of the marriage-contract. The liferent provision there mentioned is a liferent of the proceeds of the policies of insurance in the event of her surviving her husband, and therefore these two clauses do not seem to me to affect the general principles in the slightest degree. I think this lady and her husband quite entitled to take this money—the proceeds of the claim for legitim and the balance of Mr Stewart's succession—and that the trustee is bound on demand to pay over that money. We shall therefore alter the Lord Ordinary's interlocutor and give judgment for the pursuers after the accounting has been made.

The Court recalled the interlocutor reclaimed against, decerned in terms of the declaratory conclusions of the summons, and remitted to the Lord Ordinary.

The Court was then moved to find the trustee (defender) personally liable in expenses on the ground that the point in question had already been decided.

LORD PRESIDENT—I think Mr Newlands has been doing nothing but his duty. I should like it to be distinctly understood that Mr Newlands is to go out of Court *indemnis*, and clear of all personal expense, and we will find him entitled to his expenses out of the fund up to this date.

Counsel for Pursuers—Lord Adv. Balfour, Q.C.—Rhind. Agents—Ferguson & Junner, W.S.

Counsel for Defender—J. P. B. Robertson—Gillespie. Agents—Davidson & Syme, W.S.

Friday, February 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MONTGOMERIE *v.* DONALD & COMPANY.

Trade-Mark — Trade Name — Infringement—Name of Natural Product used in a Manufacture.

A person who, together with his predecessors for a long period, had manufactured hones from a quarry on his estate, which was bounded by the river Ayr, sought to interdict the lessees of a quarry on a neighbouring estate, also bounded by the river Ayr, from applying to hones manufactured by them there the trade name "Water of Ayr Stone," by which he averred his hones were widely known for their excellence in the commercial world, and to which he had acquired the exclusive right by long and continued use. The Court being satisfied on a proof that the name was the ordinary trade name of an article known in commerce as a natural product of the valley of the Water of Ayr, and not identified with the particular output of the complainer's quarry, *refused* interdict.

John Cunninghame Montgomerie carried on a business of over ninety years' standing as a manufacturer, producer, and finisher of stones and hones for sharpening edged tools and for polishing purposes, at Dalmore, which is in the parish of Stair, and is bounded by the river Ayr. James A. Donald & Company carried on at the date of this action a similar business for the sale of stones and hones produced from the estate of Barskimming, which is also bounded by the river Ayr, and only separated from Dalmore by the glebe lands of the parish church. Montgomerie presented this petition in the Sheriff Court of Lanarkshire praying the Court to interdict James A. Donald & Company, and their agents and servants, "from selling, or advertising, or offering for sale, any stones or hones as of the pursuer's manufacture, production, or finish, or as bearing his trade name or trade-mark, having thereon as the most prominent and distinctive feature the words 'Water of Ayr Stone,' . . . which have not been manufactured, produced, or finished by the pursuer, and from representing as the manufacture, production, or finish of the pursuer, or as bearing his trade name or trade-mark, any stones or hones which are not of the pursuer's manufacture, production, or finish, and from selling, or advertising, or offering for sale any such stones or hones not manufactured, produced, or finished by the pursuer, to which the pursuer's said trade name or trade-mark, or any trade name or trade-mark similar thereto, or only colourably different therefrom, shall be affixed, and from affixing to any such goods any label or other mark having the words 'Water of Ayr Stone' thereon."

The complainer averred that the Dalmore stones had been always known in the trade, and generally to the public, as "Water of Ayr Stone"—a name which was purely arbitrary and distinctive, and not descriptive, and was first and had hitherto been exclusively used and applied to Dalmore quarry stones by him and his predecessors. He had by himself for five years and upwards continuously manufactured, advertised, and sold whetstones and hones under the title of "Water of Ayr Stone"—a designation which had been for that period his trade name or trade-mark. In addition, he had for the last three years used in connection with them a distinctive label or trade-mark consisting of a group composed of a hand grasping a hone, in the centre of which group was a wheelstone with four blocks bearing conjointly the words "Water of Ayr Stone," and disposed on each side of the group. This he had registered on 7th February 1883 by virtue of the Trade-Marks Registration Act 1875, "but independently of such registration he had by the long and continued use of the name acquired the sole and exclusive right to use the same as a