not by a child of four, but, it is allowed, by a child of eight, and the defenders ought, I think, to have been instructed, if not by their own sagacity or experience, at anyrate by the custom of those who used such a machine, as to what in the circumstances was a reasonable precaution. Had they been so instructed, and used a chain, the accident and the consequent claim for damages would both have been prevented.

For these reasons I think the appeal ought to be sustained.

Lord Rutherfurd Clark—I think this is a case not unattended with difficulty, but on the whole matter I have come to be of the same opinion as Lord Young.

Lord Justice-Clerk—I concur in the opinion of Lord Young, and have only one observation to make on the bearing of the case of *Ord and Maddison* on the present one. I do not think this case belongs to the same category. I think it is not only different in circumstances, but entirely different in principle. There the machine was left in the market place unwatched and unsecured, and the child strayed up to it, and got hurt, and it was held, first, that there had been no contributory negligence, and secondly, that the machine was not secured. The injury to the boy there arose from the machine being improperly secured. But here this is not an accident in any sense. It was the result of the malicious act of some-one else; and the question is, Is the owner answerable for deliberate and malicious interference with the machine which overcame measures of security which were sufficient to protect against accident if it were left alone. Now, as the machine here was left secure in a certain way, though perhaps not in the most efficient way, the case of *Ord and Maddison* is clearly distinguished from this one. It is possible that the machine might have been better secured, but in the fact that it was secured at all lies the distinction of the present from that case.

Lord Young—I omitted to say that I do not think this is a case in which contributory negligence comes in at all, for I do not think it would have altered the legal aspect of the facts here if this machine had been fastened as it is said it ought to have been fastened—with a chain and padlock—and that had been broken by a man or a bigger boy. That would not have been a case of contributory negligence. There can be no contributory negligence by a child of four years old. In such a case the contributory negligence can only be on the part of the parent in allowing the child to go out unattended. That is not the case here. It entirely turns on the question of the fastening being such as to be secure against accident. I am of opinion that it was secure, and that the owner is not responsible for its being deliberately and of purpose undone.

The Court pronounced this interlocutor:—

"Find in fact—First, that the fly-wheel of the machine referred to on record was tied by a strong rope to the other wheels, and to the stand of the machine, so firmly that the wheels could not be set in motion without deliberately and of set purpose cutting or unfastening the rope; second, that the rope was so cut or unfastened by some person unknown: Find in law, that in these circumstances the defenders are not liable to the pursuer in damages for the injury sustained by his son Duncan M'Gregor: Therefore dismiss the appeal: Affirm the judgment of the Sheriff appealed against: Find the defenders entitled to expenses in this Court; remit," &c.

Counsel for Pursuer (Appellant)—J. Burnet—Ure. Agent—Robert Emslie, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh—M'Kechnie. Agent—W. B. Glen, S.S.C.

Thursday, March 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

IRVINE *v.* SCOTT AND OTHERS (CONNON'S TRUSTEES).

Succession—Husband and Wife—Exclusion of Jus mariti.

A testator by his trust-disposition and settlement directed that in the event of either of his daughters marrying with the consent of his trustees before the trust should be wound up, "to pay over to her on her marriage-day £100, . . . taking care always by a contract of marriage to exclude the *jus mariti* or right of administration of her or their husbands in regard to their property." After a number of other provisions he directed that the residue of his whole estate, which was very large, should be paid and made over to his two daughters or the survivor, or their heirs. There were in the residuary clause no words referring to exclusion of the *jus mariti* or right of administration. One of the testator's daughters (who by decease of the other before the testator became the sole residuary legatee) was married in his lifetime without a marriage-contract. *Held* that by the settlement the *jus mariti* of her husband was validly excluded from the whole estate to which she succeeded at her father's death.

Observations upon the cases of *Cuthbertson* v. *Pollock*, Hume 206; *M'Alister* v. *M'Donald*, M. 6600.

Thomas Connon was married to Christina Mackay, daughter of Benjamin Mackay, on 19th April 1859. There was no antenuptial contract of marriage.

Benjamin Mackay died on 29th July 1859 leaving a settlement under which Mrs Connon was, through the death of a sister who predeceased her father, sole residuary legatee.

After his death Mr and Mrs Connon executed the postnuptial contract hereinafter fully referred to.

Mrs Connon died in 1877, predeceasing her husband.

In an action in the Court of Session at the instance of Maggie Irvine, Crown Street, Aberdeen, against Thomas Connon, the pursuer on 12th March 1878 obtained decree against the defender for

the following sums:—(First) The sum of £2 of inlying expenses attending the birth of an illegitimate child of which the pursuer was the mother and the defender the father; (Second) The sum of £10 per annum as aliment for the said child until the age of ten; and (Third) The sum of £12, 16s. 11d., being the amount of the expenses and dues of extract.

On the dependence of that action Maggie Irvine arrested in the hands of Henry Scott, house-agent, Portobello, and Dr Duncan Mackenzie, Kilcreggan, as trustees under a postnuptial contract of marriage between Thomas Connon and the deceased Christina Mackay or Connon, his wife, dated 3d and 9th November 1863, and also in the hands of Messrs Skene, Webster, & Peacock, W.S., Edinburgh, agents for the trustees, the sum of £150 alleged to be due by them to Thomas Connon. The pursuer then, by virtue of the warrant in the decree, arrested in the hands of Henry Scott, Alexander Scott, blacksmith, Portobello, Dr Duncan Mackenzie, and Thomas Connon, as trustees under the postnuptial contract, the sums of £150, £50, and £150 respectively, alleged to be due by them to Thomas Connon.

This was an action of furthcoming at the instance of Maggie Irvine against Henry Scott, Alexander Scott, and Thomas Connon as trustees under the postnuptial contract of marriage, arrestees, and Thomas Connon, principal debtor, concluding for payment of the sum of £150, or of such part thereof as would satisfy the amount of the inlying expenses, expenses of process, and two years and a quarter's aliment for the child.

The arrestees denied that at the date of the arrestments they held any funds belonging to Thomas Connon, and averred that Thomas Connon's beneficial interest under the postnuptial contract was a liferent of one-half of the trust funds, which funds consisted entirely of heritable estate derived from Mrs Connon; that the interests of the spouses under the contract were specially declared to be not arrestable for the debts of either, but to be in all respects alimentary only. They further averred that Thomas Connon on 2d March 1869 assigned to the marriage trustees his liferent interest in payment of a balance of £1500 due by him to them on his account as factor for the trust.

They pleaded—"(2) The interest of the principal debtor under the marriage-contract being specially declared to be not arrestable for debt, but in all respects alimentary only, the arrestments used in the hands of the trustees are inept. (3) In virtue of the assignation and conveyance granted by the principal debtor to the defenders, they are entitled to retain the income of the marriage trust thereby assigned until the amount due to them by the principal debtor is paid. (4) *Separatim*, The trustees being entitled at common law to retain till the balance due to them is paid off, are entitled to be assoilzied from the conclusions of the action."

On 22d March 1882 the Lord Ordinary (Fraser) repelled these pleas.

"*Opinion*—No man can by any deed so settle his property for his own use as to withdraw it from his creditors. Various attempts of this kind have been made like the present, whereby a man conveys to trustees, at a time when he is solvent, funds to be retained by them, the income to be paid to him during his life as an alimentary allowance for himself, his wife, and children, and declared not to be assignable or attachable by creditors. Such an assignation is ineffectual as against creditors, and the income may be attached by them (*Learmonth* v. *Miller*, 10 Macph. 107, *aff.* 2 R. (H. of L.) 62; *Ker* v. *Justice*, 5 Macph. 4; *Dunlop* v. *Johnston*, 3 Macph. 758, *aff.* 5 Macph. (H. of L.) 22).

"The estate which came to Mrs Connon from her father Benjamin Mackay was not excluded from the *jus mariti*. The father's will is not in process; but the Lord Ordinary gave to the arrestees an opportunity of amending the record, if they could aver that Mrs Connon's estate coming to her from her father was exclusive of the *jus mariti*. The Lord Ordinary was informed that they could not make this averment, and therefore the case must be dealt with on the same footing as if Thomas Connon was the owner of the property, the revenues of which he wished to enjoy, and at the same time preclude his creditors from attaching them.

"The assignation and conveyance were plainly ineffectual against an arresting creditor of Connon. He appropriated to himself £1500 of the revenues of the trust-estate, which it is said he ought not to have done; that is to say, he appropriated his own funds. There was no proper debt incurred by him to sustain the assignation as against his creditors."

The defenders reclaimed, and in the Inner House obtained leave to put in a minute of amendment to the effect that Mrs Connon by the postnuptial marriage-contract had conveyed to them the residue of her father Dr Benjamin Mackay's estate to which she was entitled under his settlement dated 30th September 1845, and that by his settlement the trustees under it were directed "to take care always by a contract of marriage to exclude the *jus mariti* or right of administration of the husbands of his two daughters in regard to their property." These trustees had subsequently in 1865, in terms of an interlocutor of the Lord Ordinary in an action of declarator and denuding at the instance of the marriage-contract trustees, denuded of and conveyed the estate to the marriage-contract trustees. The defenders also added the following plea-in-law—"(2) The estate sought to be attached having vested in Mrs Connon under her father's will, exclusive of the *jus mariti* of the common debtor, the arrestments used in the hands of the trustees are inept."

On 24th October 1882 the Court recalled, *in hoc statu*, the interlocutor of the Lord Ordinary, and remitted the cause. The terms of the settlement of Mr Mackay and of the postnuptial contract are fully recited and referred to by the Lord Ordinary.

On 8th November 1882 the Lord Ordinary (Fraser) pronounced this interlocutor:—"Finds that the now deceased Benjamin Mackay, one of the classical masters of the High School of Edinburgh, executed on 13th October 1845 a holograph trust-deed and settlement, whereby he conveyed to the trustees therein named, All and Sundry lands, heritages, debts, heritable and moveable, which should belong to him at the time of his death, and particularly his heritages and personal estate therein specially mentioned: Finds that by the said deed the said Benjamin Mackay directed his trustees to make payment of certain legacies, and among others an annuity

of £30 to each of his two daughters Christina and Catherine Mackay, and also to pay to each of said daughters £100 on her marriage-day in addition to said annuity: Finds that he directed his trustees to assign and dispone the residue of his estate, after payment of debts and legacies, to his said two daughters, or to the survivor of them, or their heirs lawfully begotten: Finds that the daughter Catherine predeceased her father without issue, and that thereby the daughter Christina became the sole residuary legatee: Finds that Christina married Thomas Connon on 19th April 1859, and that her father Benjamin Mackay died on 29th July 1859: Finds that no antenuptial contract of marriage was entered into between Thomas Connon and Christina Mackay; but finds that the *jus mariti* and right of administration of Thomas Connon, in so far as regards the estate coming to Christina Mackay under her father's settlement, were by said settlement excluded: Finds that Thomas Connon and Christina, his wife, executed on 3d and 9th November 1863 a postnuptial contract of marriage, whereby they conveyed to certain trustees therein named—*First*, the estates heritable and moveable which belonged to the said Benjamin Mackay, and to which Mrs Connon succeeded under her father's settlement; and, *secondly*, the said Thomas Connon conveyed over to the said trustees the heritable and moveable estate which he might possess at the time of his death: Finds that by said deed the trustees were directed to pay (in the event which has occurred, the predecease of the wife) one-half of the free yearly rents, interests, and profits arising from the said estates to the said Thomas Connon, and to retain the other half thereof for the purposes of educating and maintaining the children of the marriage: Finds that it was declared by said deed that it should not be in the power of Thomas Connon or his wife to assign, restrict, or discharge the liferent provisions in their favour without the special consent of the trustees; and it was further declared that the liferent provisions should not be arrestable for the debts of Thomas Connon and Christina Connon, nor by the diligence of their creditors, but should be in all respects alimentary only: Finds that on 8th January 1866, the trustees, acting under the trust-deed and settlement of Benjamin Mackay, denuded themselves of their said trust, and conveyed over the whole trust property then remaining in their hands, after payment of debts and legacies, to the marriage-contract trustees under said postnuptial contract: Finds that the defenders in this action are now the trustees acting under the said postnuptial contract, and hold the estate conveyed over to them for the purposes of that contract, said estate consisting wholly of property to which Christina Mackay or Connon acquired right as residuary legatee of her father, and no part thereof being estate that belonged to Thomas Connon: Finds that Mrs Christina Mackay or Connon died in the year 1877, and that Thomas Connon is still alive, and that there are surviving issue of the marriage: Finds that Thomas Connon became indebted to the marriage-contract trustees in a sum of upwards of £1500, and that in order to the payment of that debt, he, by assignation and conveyance, dated 2d March 1869, assigned his liferent interest under the contract to the trustees, to be retained by them until the debt due to them should be paid: Finds it not admitted by the pursuer that said debt has not been paid by the retention by the defenders of his half of the income of the estate: Finds that the pursuer is a creditor of Thomas Connon, in virtue of a decree of the Court of Session dated 12th March 1878, for the sums contained in said decree, and in virtue of said decree used arrestments in the defenders' hands in the month of December 1877, and in the month of November 1879: Finds in law, that the arrestments used by the pursuer in the defenders' hands could not competently attach any of the funds payable under the postnuptial contract to Thomas Connon, in respect that said funds were declared by the said postnuptial contract not to be attachable by creditors except for alimentary debts, and that pursuer's claim is not an alimentary debt within the meaning of the contract: Therefore assoilzies the defenders from the conclusions of the action: Finds no expenses due to either party; and decerns."

"*Opinion.*—The amendment upon the record allowed by the Inner House has totally changed the aspect of this case. When the Lord Ordinary pronounced his judgment on 22d March 1882, he was informed that the *jus mariti* of the husband of Benjamin Mackay's daughter had not been excluded by his deed of settlement, in reference to the estate bequeathed by him to her, and it was upon this footing that that interlocutor was pronounced.

"The amendment on the record makes a totally different case, and is followed by a new plea, to the effect that 'The estate sought to be attached having vested in Mrs Connon under her father's will, exclusive of the *jus mariti* of the common debtor, the arrestments used in the hands of the trustees are inept.' In support of this plea the defenders have produced the trust-deed and settlement of Benjamin Mackay. This deed is holograph of the testator, and contains a strange mixture of technical clauses of conveyancing with garrulous reminiscences of his past life, and recommendations as to the mode of teaching in the High School of Edinburgh. Apparently the testator had a style-book before him, and so far as the technical clauses are concerned he seems to have copied them correctly. The question however is, whether he has effectually excluded the *jus mariti* of his daughter's husband from the very large estate (said to be £30,000) which she took under his will. There are two specific legacies left to his two daughters—first, an annuity to each of £30, and secondly, a sum of £100 to be paid to each of them on their marriage-day. This latter bequest is contained under the sixth direction to the trustees, and is in the following terms: "And in the event of either of my daughters getting married, with the consent of my said trustees, before the trust is wound up, I hereby direct my said trustees to pay over to her on her marriage-day one hundred pounds in addition to her regular annuity, taking care always by a contract of marriage to exclude the *jus mariti* or right of administration of her or their husbands in regard to their property." This clause occurs in the middle of the deed, and is followed by a number of other bequests,—the disposal of the residue to the daughters coming in at a subsequent part, and not having attached thereto any specific exclusion of the *jus mariti*.

Is it then excluded with regard to residue by the clause above quoted?

"Keeping in mind that this is a deed not drawn by a conveyancer, but by the testator himself, some indulgence must be granted in construing the language he has employed, in endeavouring to ascertain his intention. The clause certainly does not apply literally to the events as they occurred. He did not contemplate, when he wrote his settlement in 1845, that he would live to see either of his daughters married, and therefore the instruction is given to his trustees. He did, however, live to see one of them married, the other having predeceased him; and he survived the marriage by three months. There was no contract of marriage executed by Thomas Connon and Mackay's daughter. Why this was overlooked can now only be a matter of conjecture. Perhaps he had thought the exclusion of the *jus mariti* in his holograph will to be sufficient for the purpose; perhaps, on the other hand, he had confidence in his intended son-in-law, and did not mean to exclude his marital rights. The latter conjecture can hardly be accepted, looking to the above clause standing in his will; and it is for the Court now to determine whether, if he held the first view—that he had effectually excluded the *jus mariti*—it was sound.

"Now it has been repeatedly determined that it is not necessary to use the very words 'exclusive of the *jus mariti*,' though such words are used here; and the difficulty of the case does not arise from their absence. Language of equivalent import, if sufficient to declare intention, has been held effectual. In the case of *Wilson's Trustees* v. *Wilson's Factor* (20th November 1868, 7 Macph. 136) Lord Deas said that 'there is no doubt that all questions of this kind are questions of intention,' and so dealing with that case the Court held the *jus mariti* excluded, although there was no special exclusion applicable to the fund. In *Black* v. *Pearson* (9th February 1841, 3 D. 511) Lord Mackenzie said, in disposing of another case where it was alleged that the *jus mariti* was not excluded because of the non-use of express words to that effect,—In absence of authority I cannot think that we are warranted in rejecting the true and certain meaning of a marriage-contract in favour of the wife, and enabling the husband, or his creditors in his place, palpably to cheat her because there is a want of the technical words "excluding the *jus mariti*."' (See also *Stables* v. *Murray or Stables*, not reported, but referred to in Fraser, 1 Husband and Wife, 787).

"Dealing with the present case, therefore, as a question of intention, the Lord Ordinary holds it to be clear that the whole estate bequeathed to the testator's daughter was intended by him to be held exclusive of the *jus mariti*. But the question always remains, did he effectually carry out his intention? Although the clause is mixed up with the direction to the trustees to hand over £100 to his daughter on her marriage-day, yet the language as to exclusion of the *jus mariti* is quite general. The trustees are to 'exclude the *jus mariti* or right of administration of her or their husbands in regard to their property,'—words which are wide enough to exclude the subsequent bequest of residue. The exclusion is not to apply merely to the £100, but to all the property coming to the daughters under the will. If intention is to be given effect to, then these words ought to be read into the subsequent clause disposing of the residue.

"If, then, the *jus mariti* was excluded, the whole estate dealt with by the postnuptial contract being the separate estate of the wife, she had full power to say in what way it was to be disposed of. The conveyance of one-half of the liferent of the estate to her husband was a voluntary gift by her, and must be taken by him and his creditors under the condition annexed to it. Now one of the conditions is that the fund should not be arrestable by Thomas Connon's creditors, nor assignable by him without the consent of the trustees. Whether the assignation granted by him to the trustees for the debt which he owed them is valid against this prohibition, is a question that need not at present be answered. The validity of that assignation cannot be challenged by the pursuer, who is a creditor using arrestment, which is equally prohibited. If there had been no prohibition against assignment or arrestment in the contract, the pursuer in competition with the defenders must fail (if the debt of £1500 be not paid off), because the assignation was completed years before the arrestment was used. It is needless, however, to consider whether the assignation excludes the claim of the pursuer, because the other ground of judgment, that arrestments are prohibited, is quite sufficient for that purpose. If it had been necessary for the defenders to found upon the assignation in order to exclude the pursuer's claim, then a remit to an accountant would be necessary in order to ascertain whether any part of the debt of £1500 is still due.

"It is said, however, that the pursuer's claim is an alimentary debt, seeing that it is for inlying charges and aliment of an illegitimate child of which Connon is the father. This is an erroneous view to take of the pursuer's claim, which is not of the character of an alimentary debt, having the character of privilege and preference over other creditors. Her claim is one for rateable contribution or relief. She is not an alimentary creditor of Thomas Connon, as having made furnishings of food and clothing to him. 'An action of filiation,' said Lord Neaves, 'is not an action of aliment; it is an action of debt between the parents, concluding that the defender shall relieve the pursuer in part of that support which she is bound to give to her child' (*Buie* v. *Steven*, 5th December 1863, 2 Macph. 225)."

The pursuer reclaimed, and argued that Connon's *jus mariti* had not been excluded by Mr Mackay's settlement — *Cuthbertson* v. *Pollock*, Hume, 206; *M'Alister* v. *M'Donald*, M. 6600.

At advising—

Lord President—This is an action of furthcoming at the instance of a young woman who is the mother of an illegitimate child, of which Thomas Connon, the principal debtor, is the father, against him, and also against the trustees under a postnuptial contract of marriage between Connon and his wife, as arrestees.

The defence of the arrestees is that there is no money of the principal debtor in their hands which is subject to arrestment, and the first question to be considered—and it is the most important—is whether from the bulk of the funds belonging to Mrs Connon, the principal debtor's

wife, the *jus mariti* of her husband is excluded. That depends, not on the construction of the postnuptial contract alone, but also of the settlement of Mr Mackay, Mrs Connon's father. The postnuptial contract can hardly exclude the creditors of the husband by itself, and therefore the validity of the defence depends primarily on Mr Mackay's settlement, which contains an exclusion of the *jus mariti* of any husband his daughter might marry. Mr Mackay had two daughters, one of whom predeceased him, and therefore Mrs Connon had the sole beneficial interest in the residue of her father's estate.

The words employed by Mr Mackay are sufficient to exclude the *jus mariti* of her husband, provided they apply to the circumstances that have occurred, and to the entire property left to Mrs Connon.

This deed is evidently the work of Mr Mackay himself; it certainly contains several clauses of style, borrowed either from a book of styles or from some deed in his possession; but there is no doubt that it is his own composition, and one must therefore make allowances for inaccuracies, and endeavour to arrive at the intention of the testator.

The first clause bearing on this case is in these terms—"In the event of either of my daughters getting married with the consent of my said trustees before the trust is wound up, I hereby direct my said trustees to pay over to her on her marriage-day £100, in addition to her regular annuity;" and then follow the words of the greatest practical importance, "taking care always by a contract of marriage to exclude the *jus mariti* or right of administration of her or their husbands in regard to their property." The other clause—and I think it is almost the only other clause of importance—is that by which he disposes of the residue of his property after giving a number of legacies, and is in these terms—"Then after all these purposes are answered, my said trustees or their foresaids shall denude themselves of, assign, convey, dispone, and make over my whole heritable and personal estate, or the residue and remainder thereof, to my two daughters above named, or to the survivor of them, or their heirs lawfully begotten, excepting always the above legacies and annuities, and permitting my said trustees to give each of my two sons a sum not exceeding £100, if their conduct and behaviour should appear to them to justify such liberality. Failing my two daughters or their representatives, it is my desire that my trustees should convey in due form all my property to my two sons in liferent, and to their children in fee." Failing them he leaves it to certain cousins. In this residuary clause nothing is said about the exclusion of marital rights, and the question is, whether the words in the previous clause which I have already quoted can be held to apply to this bequest of residue.

Now, it is to be observed that the words are in direct juxtaposition to, and follow immediately on, the provision that "in the event of either of my daughters getting married"—[*quotes as above*]. The contention of the reclaimer is that the words which follow apply only to the event there contemplated, and to the sum there given, or directed to be given. I think the argument was alternative, and that it was contended that the exclusion applied to the sum of £100, or else that it operated only in the event of the marriage of either daughter before the trust was wound up.

I do not think that the words are susceptible of so narrow an interpretation. The expression is, "taking care always"—we have no punctuation, and must construe the words with reference to what is their natural punctuation—"taking care always by a contract of marriage to exclude the *jus mariti* or right of administration of her or their husbands in regard to their property." Now, in the first place, I think it is very hard to construe "their property" as being confined to the sum of £100 which was to be paid on the daughter's wedding day, a very small sum in comparison with the value of the property generally which is given by the same deed. In the second place, I think the words "taking care always" mean, in the language of the testator—who was not a lawyer—in any event, not only in event specified, viz., the daughter's marriage with consent of the trustees before the trust was wound up. I cannot help coming to the conclusion that the testator's intention was to exclude the *jus mariti* in regard to everything he left to his daughters, and if the words are sufficient to exclude property of every kind, then it follows that the property could only descend subject to that condition.

What followed was this—Mrs Connon married during her father's lifetime without an antenuptial contract of marriage, so that there was no opportunity then of giving effect to the declaration in the way contemplated by Mr Mackay, because there was no marriage-contract—why we do not know. When he died the only security for the preservation of the succession was contained in the deed of settlement, and the testamentary trustees seem to have acted very prudently in postponing payment to Mrs Connon until they saw how the property was to be administered. The spouses therefore entered into a postnuptial contract of marriage, which is dated in 1863, after Mr Mackay's death, and in it there is specially conveyed to trustees, who are named, the whole heritable and moveable estate to which Mrs Connon succeeded under her father's settlement, but subject to the conditions contained in the settlement, and the conveyance was declared to be in trust for the following purposes—"(1) That the said trustees and their foresaids shall, during the joint lives of the said Thomas Connon and Christina Mackay or Connon, pay to the said Christina Mackay or Connon the one-half of the free rents and interests arising from the said Benjamin Mackay's estates aforesaid, and that on her own receipt, and freed and disburdened of the *jus mariti* and right of administration of the said Thomas Connon, which *jus mariti* and right of administration are hereby excluded, and the other half of the said free rents and interests the said trustees shall pay to the said Thomas Connon on his own receipt; (2) that in the event of the said Thomas Connon predeceasing the said Christina Mackay or Connon the said trustees and their foresaids shall pay over to her the whole of the said free rents, interests, and profits arising from the said estates during her lifetime, and so long as she does not enter into a second marriage, but in the event of her contracting and entering into a second marriage, then, and in that case, the said trustees shall pay to her only one-half of the said free

rent, interests, and profit arising from the said estates, and the other half of the said free rents, interests, and profits shall be applied by the said trustees in the education and maintainance of the children of the marriage between her and the said Thomas Connon; (3) in the event of the said Christina Mackay or Connon predeceasing her husband, then, and in that case, the said Thomas Connon shall be entitled to enjoy, and the said trustees and their foresaids shall pay to him, the aforesaid one-half of the said free yearly rents and interests and profits arising from the said estates, and the remaining half thereof shall be applied by the said trustees and their foresaids in the education and maintainance of the children of the marriage." And this allowance to Connon of half the income is declared in the marriage-contract to be alimentary only, and not assignable or arrestable. I think this deed is well calculated to give effect to Mr Mackay's intention as disclosed in his settlement, for by it the estate is settled on the spouses in liferent and the children in fee, so that Connon could not touch one shilling of the capital, and was only entitled to one-half of the income under certain conditions. Mr Mackay's trustees just postponed payment until these other trustees were in a position to receive payment and give effect to the condition; therefore I consider that by the operation of these two deeds the *jus mariti* of Connon has been excluded.

An argument was addressed to us which rested on certain decided cases, and particularly on the two cases of *M'Alister*, which were decided in the year 1763, and another case reported in Hume's Decisions, to which I shall presently refer. The object of that argument was to show that when it is not clear that words excluding the *jus mariti* apply to a certain fund, it is the law not to apply them unless they are clearly applicable. I do not know any authority for holding that when we get words excluding the *jus mariti* we are not entitled to gather the intention of the maker from a construction of the whole terms of the deed, and to apply the exclusion accordingly either to a part or the whole of the fund.

The case of *M'Alister* was a peculiar one, for there was involved in it an action of declarator of marriage at the instance of Jean M'Donald against M'Alister. The provision was a bond for £100, which Mrs Drummond assigned to Jean M'Donald, "secluding her husband's *jus mariti*, and all manner of right of administration, or other interest he could pretend thereto." While the suit was pending Mrs Drummond executed a general settlement of all her estate in favour of Mr Maxwell, and assigned to him all her bonds, and particularly the one previously assigned to Jean M'Donald, but then she directed Mr Maxwell to pay to Jean M'Donald £100, the same amount as that contained in the bond; in her settlement, however, she said nothing about the exclusion of the *jus mariti*. The Court there held that it was impossible to import into the settlement the exclusion contained in another deed, but that has no application here, for the words excluding the *jus mariti* are contained in the deed which we are called on to construe.

The only other question is, whether the exclusion applies to a part or the whole of the fund? and that brings me to the second case, which is the case of *Cuthbertson*. There the contract of marriage between the two spouses began with the declaration that "whatever fortune, means, or estate, whether heritable or moveable, either of them presently has, or may conquest and acquire, during the standing of this present marriage, shall each their own be respectively subject wholly and entirely to their own settling and disposal without control of each other." Now, no doubt these words are ambiguous, and it is possible to construe them as rendering the spouses absolutely independent of each other, and therefore excluding the *jus mariti*, and also to construe them as applying only to the estate of the spouses after death. The latter was held to be the true meaning, for there followed a clause which could only apply to the period of decease, and not to any period during the subsistence of the marriage, and the Court therefore held that the *jus mariti* was not excluded. There are some words used by the reporter as to the view taken by the Court which were much relied on by the reclaimer, but I do not think that they much aid her case; the words are—"At advising a reclaiming petition and answers, the Lords adhered. They thought that the clause was at best equivocal, and that the *jus mariti*, as an interest strongly founded in the law, can only be excluded by direct and explicit words." That is perhaps a little too strong, but accept it as law, what is its application here? Can there be more explicit words than those we have in Mr Mackay's settlement? There is no want of sufficient words; the question is only what do they apply to? I think that these authorities, which were the pursuer's mainstay, do not apply, and I therefore agree with the Lord Ordinary in holding that the *jus mariti* of Thomas Connon was effectually excluded from this fund. But it is contended by the pursuer that she is entitled to prevail in so far as the provision to Connon exceeds what is necessary for his aliment, and that whatever is beyond a reasonable allowance for his maintenance may be attached. She is met, however, by the very conclusive answer that the principal debtor Connon has assigned his whole interest in the fund, in so far as he could, and that this assignation being prior in time is preferable in law to the creditor's arrestment, and being in favour of the parties holding the fund, the marriage-contract trustees, required no intimation. The arresting creditor cannot say that such an assignation is prohibited, because if that is so her arrestment is prohibited also. The fund, if it can be assigned to any extent, is already assigned, and for an onerous cause, for the object of the assignation is to replace the sums lost through the defalcations of Connon as factor for the trustees.

I am therefore of opinion with the Lord Ordinary that the defenders must be assoilzied from the conclusions of the summons.

Lord Mure—I concur. The main question to be decided is, whether the *jus mariti* of Mrs Connon's husband was effectually excluded by her father's settlement? The settlement is certainly not artistically drawn, but I think that the clause by which the matter is dealt with is sufficient to show the intention of the testator that the *jus mariti* of his daughter's husband should be excluded from this fund. The terms in which the clause is expressed are curious—"Taking care always," and so on—but I think that it was evi-

dently intended to apply to the whole residue, and the *jus mariti* being so excluded by the terms of the conveyance to the trustees under the post-nuptial contract of marriage, I have no doubt that the conclusion the Lord Ordinary has come to is the sound one. The intention of Mr Mackay having been sufficiently carried out, it is not necessary to inquire whether the allowance to which Connon became entitled under the post-nuptial contract is not subject to arrestment.

I am afraid, therefore, the defenders must be assoilzied, and that the pursuer cannot recover the money which she ought to get.

LORD SHAND—I am of the same opinion. I think that the funds which this lady received from the trustees under her father's settlement were her own property, and that the *jus mariti* was excluded. The pursuer attempted to show that the *jus mariti* was not excluded, and that resolves itself into a question as to the meaning and construction of the clause beginning "taking care always." The exclusion contained in that clause must apply to the whole estate which the daughter would take. I do not think the opposite contention admits of argument. It evidently does not refer only to the sum of £100.

The only possible argument founded on these words is that they refer only to the introductory part of the clause, and that they were only to take effect in the event of the daughter's marriage with the consent of the trustees before the trust was wound up—that is to say, that they were not to apply in the event which actually happened, the daughter's marriage before the truster's death. I think that interpretation altogether too narrow. The truster left the clause notwithstanding his daughter's marriage. As your Lordship has observed, the deed is not artistically drawn, and we must not read it in too literal a way. If so, it might be remarked that he says the *jus mariti* is to be excluded if the daughter marries with the consent of the trustees, and supposing she married without the trustees' consent or against it, could it be maintained in such a case that the right of the husband would not be excluded? The purpose of Mr Mackay was that when the trustees came to part with the estate they should ensure its settlement on his daughter exclusive of the *jus mariti* of her husband; that has been done, and I therefore agree with your Lordships.

LORD DEAS was absent on Circuit.

The Court adhered.

Counsel for Pursuer—Scott—Rhind. Agent—William Officer, S.S.C.

Counsel for Defenders — Graham Murray—Forbes. Agents—Skene, Edwards, & Bilton, W.S.

Thursday, March 8

OUTER HOUSE.

[Lord Kinnear.

CAMPBELL, PETITIONER

Entail—Authority to Charge with Debt—Consent—11 *and* 12 *Vict. c.* 36 (*Entail Amendment Act* 1848), *secs.* 2, 3—45 *and* 46 *Vict. c.* 53 (*Entail (Scotland) Act*) 1882, *secs.* 3, 4.

The Entail (Scotland) Act 1882, sec. 4, allows the heir in possession of an entailed estate held under an entail dated after 1st August 1848 to charge the estate with debt "with the like consents" as if the entail were dated prior to that date.

In a petition to charge an entailed estate with debt where the entail was dated after 1st August 1848, and the next heir was born after that date but before the date of the entail—*held* that the words "with the like consents" implied the consents mentioned in the 3d section of the Rutherfurd Act.

This was a petition for authority to charge an entailed estate with debt.

The Act 45 and 46 Vict. c. 53 (Entail (Scotland) Act 1882), enacts, section 3—"It shall be lawful for an heir of entail in possession of an entailed estate held under an entail dated on or after the 1st day of August 1848, to disentail the estate and acquire it in fee-simple, by applying to the Court in the manner provided by the Entail Acts if he shall be the only heir of entail in existence, or if he shall obtain the like consents as are required by the third section of the Entail Amendment Act 1848 in the case of entails dated prior to the said date." Section 4—"It shall be lawful for an heir in possession of an entailed estate held under an entail dated on or after the first day of August 1848, to sell the estate, and to grant feus and long leases, and to charge the estate with debts or incumbrances, and for improvement expenditure, and to convey, bequeath, or assign the amount of such expenditure, all in like manner and with the like consents as if the entail were dated prior to the said date."

The petitioner was heir of entail in possession of the lands and estate of Southhall, situated in the district of Cowall and county of Argyll, under a deed of entail (dated 20th May 1858, and recorded in 1859) granted by John Campbell, Esquire of Southhall, in favour of himself and the heirs whomsoever of his body, whom failing to the petitioner, therein designed Major in the army, and then on half-pay, his brother, and the heirs whomsoever of his body, whom failing the other substitutes therein specified.

The petitioner succeeded to the estate upon the death of his brother on September 22, 1864, and he now presented this petition to enable him to borrow £4000, and to make the same with interest a real burden on the estate. The heir-apparent Lieutenant Alexander Parker Campbell was born on 16th July 1851, and the next two heirs of entail were his two children, Duncan Campbell and Alicia Isabel Campbell, both of whom were in pupillarity. The petitioner set forth that the only heir whose consent was required was Edward Parker Campbell, he being heir-apparent under the entail and born after 1st August 1848, and being thus the