The Court adhered.

Counsel for the Pursuer—W. Brown. Agents—Henry & Scott, W.S.

Counsel for the Defender—H. Johnston—Cullen. Agents—Auld & Macdonald, W.S.

Friday, December 13.

SECOND DIVISION.

KER'S TRUSTEES *v.* KER.

Trust — Marriage - Contract Provisions — Wife's Power (1) *to Discharge Provisions stante matrimonio,* (2) *to Accept Purchased Annuity in Lieu of Provisions.*

In an antenuptial contract of marriage entered into in 1866 the husband's father bound himself to pay to trustees £40,000, and the husband assigned to them certain estate and effects. These trust funds were to be held, *inter alia*, for payment to the wife in the event of her surviving her husband, and there being children of the marriage, or their issue, of a free yearly annuity of £800 during her lifetime.

The only issue of the marriage were two sons, born in 1867 and 1870. In 1887 the husband became bankrupt, and in 1894, his sons having paid his debts, his bankruptcy was annulled, and his whole estate was vested in his sons.

In 1895 the wife and her sons called on the trustees to denude of the trust-estate in their favour as being the only parties interested in the trust estate.

Held that the annuity being a marriage-contract provision, the wife could neither alienate nor discharge it *stante matrimonio.*

Menzies v. *Murray*, March 5, 1875, 2 R, 507, *followed.*

Held further, that the trustees were not entitled to purchase with the trust-funds an annuity of £800 payable to the wife contingently on her surviving her husband, and thereafter to denude of the rest of the trust-estate, because (1) the security of the trust funds was greater than that afforded by a purchased annuity, and (2) a purchased annuity would not be protected by the trust and could be alienated by the wife.

Lord Charles John Innes Ker, born in 1842, and Miss Blanche Mary Williams, born in 1844, were married on 15th January 1866. Under their marriage-contract, dated 12th and 13th January 1866, the late Duke of Roxburghe bound himself during his life to pay to Lord Charles during the latter's life, and after his death to the trustees appointed under the marriage-contract, an annual sum of £1200. The Duke further bound himself to pay to the marriage trustees a sum of £40,000 out of provision for his Grace's younger children, payable out of the rents of his entailed estates. Lord Charles assigned to the marriage trustees, *inter alia*, (1) the capital of the residue of the estate of the deceased Lieutenant-General Sir James Charles Dalbiac, and (2) his right and interests in and to a sum of £9600 held by the trustees under an indenture dated 24th December 1836.

The purposes of the trust constituted by the marriage-contract so far as relevant to the present case were as follows—(1) the trustees were to pay the free interests and annual proceeds of the trust-estate to Lord Charles during the subsistence of the marriage; (2) to pay to Lady Charles Ker, in the event of her surviving her husband, and there being a child or children of the marriage or the issue of such, an annuity of £800, restricted in the event of her marrying again to £400; "and it is hereby further provided and declared that the said trustees or trustee shall hold and apply the balance of the free income or produce of the property hereby conveyed, after payment of the said annuity or restricted annuity, as herein provided, for behoof of the child or children of the marriage, or for behoof of the issue of any child who may have died, according to the proportions in which they shall be entitled to shares of the funds and property of this trust;" (3) After the death of Lady Charles Ker, if she should have survived Lord Charles Ker, the trustees were directed to hold the whole funds and property for behoof of the children of the marriage, and to pay over the same to them in such proportions, at such times, and under such conditions as Lord Charles might direct and appoint, and failing direction by Lord Charles, the trustees were directed, after the death of the survivor of the spouses, to make over the trust-estate to and among the children equally, the shares of sons being payable when they attained 21 years of age, the shares of daughters being payable when they attained that age or were married, whichever event first happened, it being declared that the shares of the children should become vested in them on Lord Charles' death, unless it should be otherwise declared or directed by him. The marriage-contract contained no provision that the liferents and annuities to Lord and Lady Charles Ker were to be alimentary. Special directions were made as to the disposal of the portion of the trust-estate derived from (1) the estate of Sir James Charles Dalbiac, and (2) the funds subject to the indenture dated 24th December 1836.

The only issue of the marriage were two sons, Charles James Innes Ker, born 19th January 1867, and Bertram Harry Innes Ker, born 5th April 1870.

By two deeds of appointment dated 24th February and 2nd March 1892 respectively, in favour of Charles James Innes Ker and Bertram Harry Innes Ker respectively, Lord Charles irrevocably appointed that one-half of the property subject to the trusts of the marriage-contract should after the death of Lady Charles, if she should survive him, be held in trust for each of his said sons absolutely, and likewise that after his death the moiety of the balance of the free income of the trust property, after payment of the annuity, or restricted an-

nuity, to Lady Charles should be held in trust for and belong to each of his said sons absolutely, and declared the whole of the property and interest thereby appointed to his said sons to be indefeasibly vested in them as from the dates of the said deeds.

Lord Charles was adjudicated a bankrupt on 19th February 1887, and by an order of the High Court of Justice in bankruptcy, dated 1st February 1894, it was ordered that his bankruptcy should be annulled, and that his estate should vest in his two sons, Charles James Innes Ker and Bertram Harry Innes Ker, as joint tenants.

In these circumstances Lady Charles Innes Ker and her sons were desirous that the said marriage trust should be wound up, except as regards the portions of the trust-estate derived from (1) the estate of the said Sir James Charles Dalbiac, and (2) the funds subject to the said indenture, dated 24th December 1836. They called upon the marriage-contract trustees to denude in their favour, and to place at their disposal the entire trust-estate, with the exception of the portions thereof above mentioned. They maintained that, in virtue of the two deeds of appointment, and of the order in bankruptcy, Lord Charles was now divested of all interest in the trust-estate, and that one-half thereof, subject to the rights of Lady Charles, was vested in each son. Lady Charles agreed to discharge the trustees and the trust-estate under their charge of her annuity and contingent liferent right.

Lady Charles and her sons were willing that the sum required to purchase from a well-established assurance company or from Government the annuity of £800 yearly (restrictable as aforesaid), to which Lady Charles would be entitled in the event of her surviving Lord Charles, should be retained by the trustees and applied in purchasing said annuity in name of the trustees for the benefit of Lady Charles.

The trustees did not feel in safety to consent to the demand by Lady Charles and her sons without the sanction of the Court.

For the settlement of the question a special case was presented by (1) the trustees, (2) Lady Charles Ker with consent of her husband, and (3) the two sons of the marriage.

The questions of law were—"1. Are the first parties bound or entitled, upon receiving discharges from Lady Charles and the third parties, to make over to Lady Charles and the third parties the whole trust-estate with the exception of the portions thereof derived from (1) the residue of the estate of Sir James Charles Dalbiac, and (2) the funds under the indenture of 24th December 1836? 2. Are the first parties bound or entitled, after purchasing an annuity of £800 yearly (restrictable as aforesaid) payable to Lady Charles contingently upon her surviving Lord Charles, and upon receiving discharges from Lady Charles and the third parties, to make over to the third parties the whole trust-estate, with the exception of the said annuity purchased as aforesaid, and also with the exception of the portions of the trust-estate excepted in the preceding query?"

Argued for second and third parties—All parties interested in the marriage-contract funds now came forward and demanded that the trust should be wound up. All were *sui juris*. It would be argued on the other side that the wife was not *sui juris*. This argument was founded on *Menzies* v. *Murray*, March 5, 1875, 2 R. 507, following upon *Anderson* v. *Buchanan*, June 2, 1837, 15 S. 1073; and *Pringle* v. *Anderson*, July 3, 1868, 6 Macph. 982. The principle in these cases was, that where under a marriage-contract an annuity was put in trust in such a way as to protect the wife against the husband, the wife during the lifetime of her husband was not a free agent for the purpose of revoking the trust. In all these cases the money came from the wife or her family, and was tied up before the marriage so as to protect the wife from her husband's influence. Such a trust was irrevocable *stante matrimonio*. But in the present case the money came from the husband's family, and the principle of the husband's adverse influence could not apply, as he had no interest in the marriage-contract trust-estate. The annuity was not declared in the deed to be alimentary, and the question came to be—Could not a wife, in order to benefit herself and her family, her husband having no adverse interest to her own, set free a provision made in her favour out of her husband's estate?—*Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120; *Laidlaws* v. *Newlands*, February 1, 1884, 11 R. 481. In any event, the second question should be answered in the affirmative. There was no practical difference between the security of an annuity by a well-established insurance company and the security of the trust-estate. The purposes of the trust would be kept intact by the trustees purchasing an annuity, and they could then pay over to the sons the residue of the trust funds.

Argued for the first parties—Both questions should be answered in the negative. The case was ruled by *Menzies* v. *Murray*. The wife was not *sui juris*, and had no power to renounce her right, and it was not material from whose means or estate the income or annuity flowed, provided it was a marriage-contract provision—*per* Lord Deas in *Menzies*, *supra*, 2 R. 512. If the station of the parties was considered, the fund must be considered alimentary. The cases of *Laidlaws* and *Ramsay* differed materially from the present, as in both of these cases there were two separate funds, and there was no matrimonial purpose for which the funds required to be retained in trust. The trust must be kept up, at least so far as was required to provide the annuity to the wife after her husband's death. If an annuity was bought from an insurance company, there was a risk, however small, of the insurance company becoming insolvent. Such a risk the trustees were not entitled to incur.

At advising—

LORD TRAYNER—The condition on which the first question in this case could alone be answered in the affirmative is that Lady

Charles Ker and her two sons should discharge their respective rights under the marriage-contract. It is perhaps open to argument whether the sons could do so on the ground that no right under the marriage-contract has yet vested in them. But assuming that such rights have vested, and could now be validly discharged, I am of opinion that no such discharge can validly be granted by Lady Charles Ker. Her right of liferent is a marriage-contract provision, which, *stante matrimonio*, she can neither alienate nor discharge. I think that was conclusively settled in the case of *Menzies* v. *Murray*, a decision which, in my opinion, rules the determination of the first question now put to us. The second question presents a distinction between the present case and the case I have just referred to. There is practically here an offer to purchase for Lady Charles an annuity equal in amount to that provided to her under the marriage-contract. In *Menzies*' case there was no such offer. This, however, does not affect my opinion that the second question also should be negatived. Such an annuity as is offered to be purchased for Lady Charles would not secure her provision to her as the marriage-contract does. In the first place, the value or security of a purchased annuity depends on the stability of the office or insurance company which grants it; its insolvency would render the annuity valueless. This, I admit, is a very remote contingency to provide against, but so long as the trustees hold the marriage-contract fund no such contingency could arise. The security of the trust funds held by the trustees is therefore greater than that afforded by a purchased annuity. But granting them to be equal as regards the security for the full and regular payment of the annuity, they are very unequal in security in another and more important respect. A purchased annuity could be disposed of by Lady Charles, which would just be another way of alienating her marriage-contract provision. I think she has by the marriage-contract placed herself in a position which protects her, as Lord Deas said in *Menzies*' case, "against marital influence on the one hand, and self-sacrifice on the other," and that that protection cannot now be surrendered or impaired by her.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered both questions in the negative.

Counsel for the First Parties—Rankine—Don Wauchope. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second and Third Parties—D.-F. Asher, Q.C.—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Friday, December 13.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.

TAYPORT LAND COMPANY, LIMITED *v.* DOUGALL AND OTHERS.

Superior and Vassal—Feu-Charter—Reduction—Singular Successor—Implied Entry—Trust—Trustees—Ultra Vires—Prescription.

A body of trustees, "as authorised by" a private Act of Parliament, granted a feu-charter of a plot of ground, declaring that the charter was granted only in so far as consistent with the said Act, and that the piece of ground was feued in terms of, and subject to all the conditions of, the said Act. They further granted warrandice only in so far as consistent with the said Act.

The vassal, after possessing the feu and paying the feu-duty for more than twenty years, disponed the feu to a third party, who raised an action of reduction of the feu-charter against the trustees on the ground that it exceeded the powers conferred on them by the Act of Parliament, in respect that it feued a larger piece of ground than the Act permitted.

Held (*aff.* judgment of Lord Moncreiff, though for different reasons) that the defenders must be assoilzied, on the grounds (1) that even if the feu-charter were reduced, the pursuer would still continue to be a vassal of the superior by virtue of the disposition to him and his implied entry under the Conveyancing Act 1874; (2) that inasmuch as the feu-charter contained an express reference to the statute, neither the first vassal, nor the pursuer in his right, could challenge its validity on the grounds set forth in the action; (3) that for the same reason the pursuer could not challenge the disposition to him by the first vassal.

Opinion that the plea of positive prescription could not in the circumstances be maintained by the trustees as excluding inquiry at the vassal's instance into the validity of his title.

In 1857 Mrs Elizabeth Kinnear Heriot Maitland Dougall and others, the Scotscraig trustees, obtained a private Act of Parliament, styled "The Scotscraig Estate Act 1857," empowering them to feu certain detached portions of the estate of Scotscraig. The Act provided that the lands feued under its authority "shall only be feued for houses, buildings, erections, yards, enclosures, and gardens, in parcels to an extent not greater than one imperial acre and a half or thereby for each feu."

In 1867 the trustees, with consent of Mrs Maitland Dougall, the liferentrix of Scotscraig, feued to David Stewart Littlejohn and James Henderson, Dundee, two pieces of ground, each of the extent of one acre, three roods, six poles, and seven yards or