with the operations on the ground that they consider—and perhaps justly—that they are for the benefit of the burgh. That accordingly raises the further question whether the operations were such as the Magistrates were entitled to authorise or to carry out for themselves—and that depends upon this question, whether the title of the Magistrates to the ground in question is qualified by its having been appropriated from time immemorial to the use and enjoyment of the burgesses and inhabitants for the purposes of recreation, walking and exercise, bleaching of clothes, and such like uses—so as to render any alienation or other appropriation of it inconsistent therewith illegal.

I agree with the Lord Ordinary in thinking that this is the difficult question in the case.

My opinion on the question may be shortly stated. It appears to me that this case resembles in its chief characteristics the cases of Musselburgh (*Sanderson* v. *Lees*, 22 D. 24) and Kirkcaldy (*Grahame* v. *The Magistrates of Kirkcaldy*, 6 R. 1066), and must be disposed of on the same principles as were applied in these cases.

I think that the burgh of Haddington, like these and other ancient burghs of Scotland, had attached to it links or common ground which was open to the common use and enjoyment of all the burgesses and inhabitants of the burgh, and whose right to such use and enjoyment was coeval with the right and title of the Magistrates. I think it is clearly proved that the burgh had such common ground attached to it, and that it was called the commonty of Sands, and that the ground in question was part of it. It is clear from the charter of 1624 that the burgh had at that date some common lands, because there is conveyed to it lands "as well proper as common."

It is also clear that the burgh had such common lands prior to that date, because there is produced a sasine in favour of Alexander Symsoun dated 20th March 1578 of certain property in the burgh, which is described as bounded by the lands of Friar's Croft "ex australi, ac communiam dicti burgi appelatam 'the Sandis' ex orientali partibus."

There is also produced an excerpt from a minute of meeting of the Town Council of the burgh, held on 26th July 1622, in which the deputy treasurer is instructed to repair and build up a dyke or wall pertaining to the town on the west side of "ye commoun callit the Sandis."

I need not particularise them, but there will be found in the appendix excerpts from titles of the adjoining lands in which frequent reference is made to the commonty of the burgh called the Sands. There is also produced a minute of meeting of the Council of date 14th December 1774, in which they deal with an application by the Hon. Mr Charteris, who desired to build an assembly hall on the "commonty called the Little Sands."

Turning now to the parole proof, it appears to me that the complainer has proved that the inhabitants of the burgh have had, from time immemorial, such use and enjoyment of the ground in question as its size and nature admitted.

It is necessary to keep in view, in considering cases of this kind, that it is not necessary to prove that the ground has been used for any particular purpose—such as the bleaching of clothes, or for any particular form of recreation—such as golf or cricket or football. All acts of the inhabitants showing that they had the free use and enjoyment of the ground are relevant to support the complainer's case. I think it is proved that it has been used for walking over and exercise by the inhabitants from time immemorial; that it was, so far as suitable, used for the bleaching of clothes; and as regards recreation, it was certainly used by the younger part of the community for their games and amusements to the fullest extent.

Such uses appear to me to be sufficient to show that the burgesses and inhabitants have had the use and enjoyment of this ground as common ground from the earliest date, and I think that neither the Magistrates, nor anyone deriving right from them, had a right to interfere with them in such use or enjoyment.

That this commonty of Sands has suffered encroachment at the hands of its administrators—as we know similar commons have done—is sufficiently clear, but it is well settled that such encroachments give them no right to encroach further on what of the commonty remains intact.

I therefore think that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Complainer and Respondent—J. Wilson, K.C.—Guy. Agents—Patrick & James, S.S.C.

Counsel for the Respondents and Reclaimers—The Lord Advocate, K.C.—Dundas, K.C.—W. Trotter. Agent—T. S. Paterson, W.S.

Counsel for the Town Council of Haddington—Blair. Agents—Strathern & Blair, W.S.

Thursday, March 20.

SECOND DIVISION.

DE LA CHAUMETTE'S TRUSTEES *v.* DE LA CHAUMETTE.

Trust—Husband and Wife—Antenuptial Marriage-Contract—Presumption against Child-Bearing—Fee Destined to Issue—Trustees Authorised to Invest Trust Estate in Annuities for Spouses when Both were Seventy Years of Age without Issue.

A wife by antenuptial marriage-contract conveyed certain funds to

trustees, *inter alia*, for payment to herself of the income, which was declared to be exclusive of her husband's *jus mariti* and right of administration, and unassignable by her, and in the event of the husband surviving, for payment of the income to him during his life. The trustees were directed to hold the capital in trust for the children of the marriage, in such shares and proportions and under such conditions and burdens as their mother should appoint, and failing such appointment, equally among them. In the event of the dissolution of the marriage without issue, the trustees were directed to pay the capital of the trust estate to the heirs, executors, and assignees of the wife subject to the husband's liferent. No children were born of the marriage.

In a special case presented to the Court when both spouses were nearly seventy years of age, *held* (*diss.* Lord Moncreiff) that, as in the circumstances of the case the wife might be presumed to be past the age of child-bearing, the trustees were entitled at the request of the spouses to apply the trust funds in the purchase in their own names, as trustees under the marriage-contract, of annuities on the joint lives of the spouses and the survivor, to be held and applied by the trustees as unassignable income for the alimentary use of the spouses.

Opinion per Lord Young that in the circumstances the spouses were entitled to have the trust brought to an end and to receive payment of the capital of the trust estate.

Opinion per Lord Trayner *contra*.

By antenuptial contract of marriage entered into between Thomas Amédée de la Chaumette and Miss Margaret Gunn, dated 8th December 1876, the said Mrs Margaret Gunn or de la Chaumette conveyed to the trustees thereby appointed certain investments then belonging to her, together with *acquirenda* during the subsistence of the marriage, in trust for the purposes therein set forth.

The trust purposes were, *inter alia*, as follows:—"(*Second*) For payment during her life to the said Margaret Gunn of the whole free income, interest, and profits which shall be derived from the estate conveyed by her as aforesaid, and that exclusive of the *jus mariti*, right of administration, and every other right of the said Thomas Amédée de la Chaumette, which income, interest, and profits shall not be assignable by her but shall be payable to her on her own receipt alone; and it is hereby declared that the rights and interests of the said Margaret Gunn under this deed shall noway be subject or affectable by the debts or deeds, legal or voluntary, of her said intended husband, nor subject to the diligence of his creditors; and the said Thomas Amédée de la Chaumette hereby renounces and discharges his *jus mariti*, right of administration, and all rights competent to him in, to, or over any part of the estate and effects of the said Margaret Gunn hereby settled in trust as aforesaid. . . . (*Third*) In the event of the said Thomas Amédée de la Chaumette being the survivor of the spouses, for payment to him during all the days of his life of the said whole free income of the estate hereby conveyed by the said Margaret Gunn, under the burden of educating and alimenting suitably to their station in life the child or children of the marriage, which provision the said Thomas Amédée de la Chaumette hereby accepts in full of his legal claims: (*Fourth*) After the death of the longest liver of the spouses, leaving a child or children of the marriage, the trustees shall . . . hold the capital of the trust estate in trust for the child of the present intended marriage if there be only one who shall attain majority, or being a daughter shall be married, or if there shall be more than one such child who shall attain the said age, or being daughters shall be married, then in trust for such children, in such shares and proportions and under such conditions and burdens as shall be appointed (with or without power of revocation and new appointment) by any writing to be executed by the said Margaret Gunn; And in case the power of appointment hereby reserved shall not have been exercised, and also so far as such appointment, if incomplete, shall not extend, the said capital of the trust estate shall be divisible equally among the children of the marriage and their lawful issue *per stirpes* and not *per capita* . . . . (*Sixth*) In the event of the marriage being dissolved by the predecease of the said Margaret Gunn without any child or children of the marriage, or should such child or children die without leaving lawful issue before the estate hereby conveyed by the said Margaret Gunn shall have become payable, then the trustees shall pay, convey, and make over the same to the heirs, executors, or assignees of the said Margaret Gunn, subject always to the liferent of the said Thomas Amédée de la Chaumette as above provided: . . . With power also to the trustees to invest the estate committed to their charge in the purchase of lands or houses, or on real or heritable or personal security in Great Britain, or in any of the public stocks or debts of Great Britain or its colonies or of any foreign country, or in the bonds or mortgages, shares, or stocks of any public or joint-stock companies at home or abroad, or of any private undertaking, of the propriety of which investments they shall be sole judges, and from time to time to vary and alter the same."

After the marriage of Mr and Mrs de la Chaumette, the trustees nominated in the marriage-contract accepted office, and entered into possession of the trust funds. The capital of the trust funds amounted to £4700, and the income thereof, amounting to £150, was regularly paid over to Mrs de la Chaumette in terms of the marriage-contract. No children were born of the marriage.

In 1901 Mr and Mrs de la Chaumette, being

both nearly seventy years of age, and being anxious to obtain as large a return as possible from the trust funds, requested the trustees either to pay over to them the whole of the trust funds in exchange for a discharge by them, or to realise the trust funds and invest the proceeds in the purchase of annuities payable to the spouses and the survivor, such annuities to be declared unassignable. The trustees having declined to do so without judicial authority, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the marriage-contract trustees, and (2) Mr and Mrs de la Chaumette.

The first parties contended that they were not entitled to denude themselves of the trust in favour of the spouses for whose protection it was specially constituted, and that their duty was to conserve the trust funds and administer the same in conformity with the provisions of the marriage-contract, and that the purchase of an annuity or of annuities was outwith the scope of the investment clause of the marriage-contract, and beyond their powers.

The second parties in the contentions as set forth in the special case contended that as there could not now be any children of the the marriage, and that the spouses were the only parties who had any interest in the trust funds, and were therefore entitled (1) To revoke the trust, and to have the trust estate paid or made over to them, or as they might direct; or (2) To have the capital of the trust estate applied in the purchase of annuities on the joint lives of the spouses and the survivor, or of separate annuities on the lives of each, such annuities to be declared unassignable by the annuitants, and the bond or bonds of annuity to be taken in favour of the spouses and the survivor of them, as trustees or trustee for the alimentary use of the respective annuitants; or (3) In the event of its being held that the trust could not be terminated during the subsistence of the marriage, that they were entitled to have the capital of the trust funds realised and applied by the trustees in the purchase of annuities on the joint lives of the spouses and the survivor, or of separate annuities on the lives of each, the bond or bonds of annuity being taken in favour of the trustees so as to preserve the unassignable nature of the income at present payable to the wife under the marriage-contract.

The questions of law were—"(1) Are the parties of the first part entitled now to denude themselves of the trust and pay over the capital of the trust funds to the parties of the second part in exchange for a discharge by them in their favour? or (2) In the circumstances above set forth, are the parties of the first part entitled, at the request of the second parties, to realise the whole of the present trust investments and apply the trust funds in the purchase of annuities from Government or from insurance offices established in the United Kingdom, on the joint lives of the parties of the second part and the survivor, or of separate annuities on the lives of each, such annuities to be declared unassignable by the annuitants, and the bond or bonds of annuity to be taken in the names of the second parties and the survivor of them, as trustees and trustee for the alimentary use of the respective annuitants? or (3) In the event of the Court answering both of the foregoing questions in the negative, are the parties of the first part entitled at the request of the second parties, to apply the trust funds in the purchase in their own names, as trustees under the marriage-contract, of such annuities on the joint lives of the spouses and the survivor, or of separate annuities on the lives of each, such annuities to be held and applied by the trustees as unassignable income for the alimentary use of the spouses."

In an amendment to the special case the parties agreed in stating that there was "now no likelihood of there being any children of the marriage."

Argued for the second parties—It could not be maintained in face of previous decisions that the spouses were entitled to have the trust brought to an end. But the third alternative, viz., that the trustees should be authorised to realise the trust estate and purchase an annuity to be held by them would not be contrary to authority, and would not diminish the protection afforded to the wife by the marriage-contract. No doubt the Court had refused to fix any period at which a woman must be presumed to be past child-bearing — *Anderson* v. *Ainslie*, January 24, 1890, 17 R. 337, 27 S.L.R. 276; *Beattie's Trustees* v. *Meffan*, March 11, 1898, 25 R. 765, 35 S.L.R. 580; *Gollan's Trustees* v. *Booth*, July 5, 1901, 38 S.L.R. 762. But there was the strongest presumption, *hominis et facti*, that a woman of seventy could not have issue. And the Court had given effect to that presumption in two cases where the woman was younger than in the present case—*Louson's Trustees* v. *Dicksons*, June 19, 1886, 13 R. 1003, 23 S.L.R. 722; *Urquhart's Trustees* v. *Urquhart*, November 23, 1886, 14 R. 112, 24 S.L.R. 98. So, too, in England—*Croxton* v. *May* (1878), 9 Ch. D. 385; *In re Widdow's Trusts* (1871), L.R., 11 Eq. 408.

Argued for the first parties—The trustees conceded the reasonableness of the proposal to purchase an annuity, but the Court could not authorise this to be done without affirming as a legal proposition that a woman of seventy was past child-bearing. And that was precisely what the Court had refused to do in the cases of *Anderson* and *Beattie, supra.* The object of the antenuptial contract was to protect the wife against herself, and she could not, *stante matrimonio*, renounce that protection—*Menzies* v. *Murray*, March 5, 1875, 2 R. 507, *per* Lord Deas, at p. 513, 12 S.L.R. 373. The scheme here proposed afforded no more protection to the wife than in *Ker's Trustees* v. *Ker*, December 13, 1895, 23 R. 317, 33 S.L.R. 212, where the wife was held not entitled to alienate the provisions in her marriage-contract.

At advising—

LORD JUSTICE-CLERK—The parties of the

second part in this special case are now upwards of seventy years of age, having been married for twenty-five years, and having no child. They desire now, upon the footing that it must be held that there can be no issue of the marriage, to receive a greater benefit from certain funds held in trust by the first parties under a trust established antenuptially, by which the fee was to go to the issue of the marriage, the liferent being paid to the wife during her life and to the husband in the event of her predeceasing him.

There are three questions put in the special case, but in the view I take of the case there is no occasion to answer any but the third. Had it been necessary to answer either of these other questions I should have had great difficulty in answering either of them in a sense favourable to the view of the second parties. To do so would be directly in the teeth of decisions which to me seem to be of authoritative weight, and which were referred to in the debate. But the proposal contained in the third question is different. It is that the funds shall still be kept under trust, so as to be protected, while the benefit to the second parties will be increased. As this is agreed upon between the parties to the case, if the Court will sanction it, the only question is, whether this can be done. I confess I have had great difficulty in holding that it can. But after much consideration I have come to be of opinion that the Court may in this case act upon the presumption that the class of beneficiaries contemplated in the provisions of the contract as fiars cannot arise. I think that although it has never been declared that an absolute legal presumption arises at any age that no issue is possible, nevertheless in considering the particular case the Court may, where no other interest can be involved except that of prospective issue, act on a presumption, *hominis et facti*, based upon what is known as possible or impossible according to the experience of mankind. Now, except in an old case referred to in works on medical jurisprudence no such thing has been heard of as issue between spouses of the age of the second parties in this case. I have therefore come to be of opinion that the Court can, without infringing upon any principle of law, answer the third question in the affirmative.

LORD YOUNG—I understand that the opinions of the other three Judges are to the effect that the first question must be answered in the negative. I am of a different opinion, and I am going perhaps superfluously to state very briefly my reasons for being of a different opinion. I may say also that the opinion which your Lordship in the chair has expressed, and in which Lord Trayner concurs, agrees with mine, that no account whatever can be taken of the suggested possibility of these old people having a family now, and therefore the case must be determined on the footing that the Court regards issue of this marriage as impossible—not as impossible because it would be contrary to the law of Scotland, but impossible because it would be contrary to the law of nature. But the case is to be decided on the footing that the Court must consider there is no possibility of issue of the marriage, because if there was a possibility of which the Court could take any account of issue of the marriage, this third question could not be answered in the affirmative. Now, I am going to indicate very briefly my opinion against the answer which your Lordship and Lords Trayner and Moncreiff think should be made if it were necessary to answer the first question. I had, before I knew we were agreed three to one, to the effect of allowing the money to be invested as proposed under article three—that being according to the will of the parties who alone are interested—I had commenced an opinion upon the general question presented by the first query.

The questions in the case regard the future disposal or investment of the property held by the first parties as trustees under the antenuptial marriage-contract of the second parties. The property at the date of the contract was the wife's (the husband had none), and was conveyed by her to the trustees with directions to pay the income thereof to her during her life, and on her death to her husband should he survive her, and to pay the capital to the issue of the marriage, or failing such issue then to her (the wife's) "heirs, executors, and assignees."

The property consists of shares and stocks (I assume good trust-investments) of the present value of £4700, and yielding an income of about £150 a-year. The second parties are childless, and having been so during twenty-five years of married life they think it impossible that they can now begin to have a family, not by reason of any rule or principle of the municipal or common law of Scotland, but of the law of nature regarding the propagation of the human species as manifested by its operation in the past history of mankind. In this view they suggest that the present investments which were properly made in order to preserve the capital for the issue of the marriage, and continued so long as the existence of such issue was possible, ought not to be longer continued, and that the property ought now to be dealt with and applied by the trustees, and lawfully may be, in such manner as will be most profitable and reasonable in their (the second parties') interest, they alone having any beneficial or legal interest in it.

The primary question is whether the second parties and no others have a beneficial interest in the property held by the first parties. It is certain that no others in existence have such interest, so that the question really is whether account ought to be taken of the possibility of a child being hereafter born of the marriage of the second parties. Should it be held that the direction to pay to the issue of the marriage is now to be disregarded, the case would stand thus — that the first parties (the trustees) hold the fee or capital

for the wife absolutely, subject only to her own liferent, and that of her husband should he survive her. The husband being *sui juris* is of course free to renounce his prospective liferent, and should he do so his wife would necessarily be liferentrix and absolute fiar, and so at liberty to terminate the trust and dispose of the funds as she pleased.

I am of opinion, in law, on the facts of the case, that there is no other interest in existence except that of the second parties, and that the property may be disposed of as if vested in their interest. We determined the law to be to that effect in two cases that occurred in the year 1886, in the case of *Louson's Trustees*, June 19, 13 Rettie 1003, and in the case of *Urquhart's Trustees*, November 23, 14 Rettie 112, where on account of the age of the spouses, which was considerably less than it is here, the Court found no possibility of taking judicial account of issue of the marriage, and that the spouses were entitled to have the money put into their own hands to do with as they pleased. That was decided in both these cases. In pronouncing that decision reference was made to the case of *Menzies*, decided in 1875, where it was held that the wife ought to be protected by having the money held for her annuity so long as the marriage subsisted. The Court did so hold. It is true that in the case of *Menzies* there was a marriage-contract, and it was maintained, although I never knew on what ground, that there was a distinction between a provision being in a marriage-contract, as in the case of *Menzies* and also here, and in the testamentary disposition of a relation, which in one of the cases before us was made by that relation becoming a party to the marriage-contract. But with regard to the contracting parties a marriage-contract is no stronger contract than any other deed, and if this old lady, or any other lady who has money, gives a bond to her husband before her marriage, it is impossible to say he could not discharge it. It is well established as a principle of the law of this country that a creditor in any onerous contract or obligation, if *sui juris*, may discharge it, and to say that her husband could not discharge an onerous contract in his favour by his wife in respect of her money or an obligation by her would be a most untenable proposition and contrary to well-established law. I am therefore of opinion, and clearly of opinion, that setting aside the possibility, as being of such a nature as this Court cannot take judicial account of, of the old couple, who have been married for more than a quarter of a century and are now septuagenarians, coming to have a family—laying aside the possibility of an intelligent court of justice taking account of that as a possibility, I have no doubt whatever that the spouses here are entitled to discharge the contract between them in so far as in favour of the husband, he being *sui juris*, and to receive the money into their own hands and to dispose of it as they please.

LORD TRAYNER (who was absent at advising, and whose opinion was read by the LORD JUSTICE-CLERK)—The counsel for the second parties to this case admitted that they could not maintain the affirmative of the first and second questions here put. I think they were right in doing so, because the first question could not be affirmed, having regard to the decision in *Menzies* v. *Murray*, nor could the second because of the decision in *Ker's Trustees*.

The third question presents for consideration a view not presented, so far as I know, in any previous case. The proposal that the trustees should purchase an annuity in their own names, if adopted, might be sufficient to overcome the difficulty presented in each of the cases I have referred to, for so long as the annuity was in the names of the trustees the wife would be protected "against marital influence on the one hand and self-sacrifice on the other" (*Menzies*' case), and would be unable to sell or assign the annuity (*Ker's* case).

It is obviously very desirable in the interests of the second parties that what is proposed in the third question should be authorised if we can competently do so. The income derivable from the trust funds invested in such securities as trustees may by law invest them is only (we were informed) about £150 a-year, whereas under the annuity which it is proposed to purchase more than double that sum would be obtained. The difficulty we have to deal with arises from the fact that the trustees hold the funds not merely for behoof of the second parties, but also in trust for the children of the marriage. In dealing with this question the material facts are these—The second parties were married in 1876, when they were each apparently over 40 years of age, being now, according to the statement in the case, seventy years of age. There has been no issue of this marriage, and the parties are agreed that "there is now no likelihood of there being any children of the marriage." But the first parties contend that even in these circumstances they are not entitled to apply the trust funds in the manner proposed, because according to the latest decisions on the subject there is no presumption in law that a woman is past child-bearing at any particular age, and that their duty obliges them to hold the trust funds for behoof of possible issue of this marriage. The recent cases of *Anderson* and *Beattie's Trustees* undoubtedly lay it down that there is no presumption of law that a woman is past child-bearing at any particular age. But there are decisions which proceed upon a different view, which will be found referred to in Lord Kyllachy's opinion in *Anderson's* case, and Lord Adam's opinion in *Beattie's* case. Accepting, however, for the moment the view adopted in these two recent cases, all that is settled is that there is no presumption of law that at any particular age a woman is past child-bearing. But neither is there any presumption of law that a woman may or will have children after a certain age. There is, however, a very strong presumption *hominis et facti* that a woman who

is seventy years of age is past child-bearing. So far as I can see there is only one recorded case where a woman of seventy gave birth to a child. That case is referred to by Taylor (Med. Jur., 7th ed. 675), and also by more recent writers. There is, however, only one such case, and that very exceptional case appears to me rather to prove than to disprove the rule. I am prepared in this case, without laying down any general rule, to hold that the lady here is past child-bearing, and that it is consistent with the right and duty of the first parties to purchase the annuity as proposed in the third question. That question I would accordingly answer in the affirmative.

LORD MONCREIFF (who was absent at advising, and whose opinion was read by the LORD JUSTICE-CLERK)—I regret that I cannot concur in the judgment. I recognise as clearly as your Lordships do that there is now no possibility of issue of the marriage of the second parties looking to the advanced age (70 years) of Mrs Chaumette. I also recognise the desirability of giving the spouses the fullest benefit which the law will permit of the marriage contract funds.

But in my opinion the possibility of issue is not a question of law for the Court. It is a question of fact—a physiological question if you please—on which parties to this case are not agreed, or at least will not say that they are agreed, I am therefore of opinion that it is not the province of the Court to answer such a question, or queries depending upon it. I fear that this decision will hamper us in subsequent cases in which the age of the lady may not be so advanced.

Apart from this I doubt the power of the first parties to sink the capital in purchasing an annuity for Mr Chaumette. According to *Menzies* v. *Murray*, 2 R. 507, and other authorities, the consent of Mrs Chaumette *stante matrimonio* is quite insufficient in law to validate such a use of the trust funds.

LORD KINCAIRNEY, who was present at the advising to make a quorum but who was not present at the debate, gave no opinion.

The Court pronounced this interlocutor:—

"Answer the questions of law therein stated by declaring that the parties of the first part are entitled at the request of the second parties to apply the trust funds in the purchase in their own names as trustees of such annuities on the joint lives of the spouses and the survivor, such annuities to be held and applied by the trustees as unassignable income for the alimentary use of the spouses: Find and declare accordingly, and decern."

Counsel for the First Parties—Guthrie, K.C.—Macphail. Agents—H. & H. Tod. W.S.

Counsel for the Second Parties—Dundas, K.C.—Craigie. Agents—Mackenzie&Black, W.S.

Wednesday, November 20, 1901.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MELROSE-DROVER LIMITED *v.* HEDDLE.

Bankruptcy — Trade-Marks—Sale of Business with Goodwill and Right to Use Trade-Marks Containing the Firm's Name—Bankrupt Not Allowed after Discharge to Use Similar Trade-Marks Containing His Own Name.

A B carried on business under the firm name of A B & Co. The estates of the firm were sequestrated. The trustee sold the business with the stock and goodwill and the right to use certain trade-marks and labels previously used by the firm. After his discharge A B proposed to resume the business formerly carried on by him, and to use certain labels and trade-marks which had been used by him before the sequestration. *Held* (1) that he was not entitled to represent himself as carrying on the old business which had been sold; and (2) (*altering* judgment of Lord Stormonth Darling, who had granted interdict against A B Limited as regards the labels and trade-marks in question to their use in so far as they contained the firm name of A B & Co.) that A B was not entitled to use any of the labels or trade-marks in question whether they bore the firm name of A B & Co. or only his own name of A B; and interdict *granted* at the instance of a limited company, the successors of the firm which had purchased the business, against his doing so.

The firm of James Heddle & Company, of which James Heddle was the sole partner, and which carried on business as wholesale wine and spirit merchants in Leith, was sequestrated in March 1892, and Mr Charles John Munro, C.A., was appointed trustee on their estates. For some time prior to 1892 the firm had carried on a considerable business, and in connection therewith had distinctive trade-marks and labels which were known in the trade as distinctive of the articles manufactured and sold by it. The trustee in the sequestration, with concurrence of the commissioners, sold the goodwill of the said business, with the right to use the firm's name, to Melrose-Drover & Company, now represented by the complainers Melrose-Drover, Limited. The said trade-marks and labels, with the right to use them, were made over by the trustee to the purchasers of the business and the goodwill. The fact of the sale having taken place was at once made public by the trustee and the purchasers by an advertisement in the *Scotsman* on 18th March 1892, which set forth the sale by the trustee, and contained on the part of the purchasers the following intimation:—"We have pleasure in intimating that we