Special Case—We cannot say that the trustees are "bound" to make an allowance, and I should be inclined, in answering that query, merely to say they are "entitled" to do so. I observe that this lady (though I do not think her entitled to the liferent of the residue) appears to have enjoyed the full confidence of her husband, and a proof of that is her being appointed a trustee and one of his executors.

On the whole, therefore, I admit that we should answer the *first* question in the negative, and the *second* question also in the negative, with the exception of holding that the trustees are "entitled" to make such advance—that they are "entitled" but not "bound."

LORD COWAN—I concur, and especially in the last observations of Lord Benholme. We are now construing a particular special deed of a remarkable character, not laying down any general principle.

LORD NEAVES—I concur *in omnibus*. The only thing I could suggest is that in finding the trustees "entitled" to make advances for the maintenance and education of the children, it must be borne in mind that this, while not consistent with the letter of the deed, is done by the authority of the Court granting the permission.

LORD JUSTICE-CLERK—I entirely concur. I may call attention to the fact that the second question does not cover the whole clause of the deed. I read the clause as indicating that the time at which the right of the trustees arose was the death of the father. At the same time, we do not decide the question of vesting—that the Court is not called upon to do.

The Court pronounced the following interlocutor:—

"Are of opinion and find, in answer to the first query, that Mrs Spears is not entitled to the liferent of the free residue of the estate of her deceased husband: And in answer to the second query, that the parties of the first part are entitled, but not bound, to make an allowance from the annual proceeds of the trust-estate for the maintenance and support of the children while their mother Mrs Spears survives, and decern: Allow the expenses in connection with the Special Case to be paid to the parties out of the trust-estate, and remit to the Auditor to tax the same and report."

Counsel for First Parties—Balfour. Agent—John Robertson, S.S.C.

Counsel for Second Party—Omond. Agents—Jardine, Stodart & Frasers, W.S.

Counsel for Third Parties—Watson and Mackintosh. Agents—Jardine, Stodart & Frasers, W.S.

S., Clerk.

Tuesday, June 24.

SECOND DIVISION.

[Lord Shand, Ordinary.

DAVIDSON *v.* REID AND OTHERS.

Marriage-Contract—Construction—Power of Father to affect the rights of the Children of the Marriage.

Terms of clause in an antenuptial contract of marriage between A and B, under which *held ultra vires* of A by gratuitous *mortis causa* deed to diminish, limit, or affect the rights of the children of the marriage to two-third parts of his estate provided to them by said contract.

In the conjoined actions of reduction, multiplepoinding, and exoneration, raised in connection with the succession of William Davidson, sometime doctor of medicine, Glasgow, the question came to be whether it was *ultra vires* of the said William Davidson, by gratuitous *mortis cuusa* deed, to affect the rights of the only child of his marriage, who survived him. to two-third parts of his estate provided by his antenuptial contract of marriage to the child or children of his marriage and their issue? This question the Lord Ordinary determined in the following interlocutor, which fully narrates the facts of the case:—

"*Edinburgh, 27th January* 1873.—The Lord Ordinary having considered the conjoined actions, Finds that the deceased William Davidson, doctor of medicine, Glasgow, by antenuptial contract of marriage entered into between him and the pursuer and claimant, Mrs Elizabeth Williamson or Davidson, dated 19th October 1835, bound and obliged himself to provide two-third parts of the whole estate, funds, and effects, heritable and moveable, which should belong to him at the time of his death, after deduction of the debts due by him, to the child or children of the marriage between him and the said Mrs Elizabeth Williamson or Davidson, and to their issue, as therein mentioned: Finds that it was *ultra vires* of the said William Davidson, by gratuitous *mortis causa* deed, to diminish, limit, or affect the rights of the children of the marriage, and, in particular, of his daughter Isabella Stevenson Davidson, who was the only child of the marriage who survived him, to the said two-third parts of his estate, and that the provisions of the trust-disposition and settlement and codicils of the late Dr Davidson, in so far as they diminish, limit, or affect said right, were *ultra vires*, and are ineffectual: Therefore finds that the said Mrs Elizabeth Williamson or Davidson, as disponee and executrix of her daughter, the said deceased Isabella Stevenson Davidson, has right, by virtue of the provisions of the said antenuptial contract of marriage, to two-third parts of the said estate which belonged to her husband at his death, after deduction of the debts due by him: And with these findings, appoints the cause to be enrolled, that they may be given effect to, and the cause finally disposed of.

"*Note.*—By antenuptial contract, dated 19th October 1835, between the deceased William Davidson and the claimant Mrs Elizabeth Williamson or Davidson, now his widow, *inter alia*, Mr Davidson undertook an obligation on the following terms:—'And further, the said William Davidson binds and obliges himself and his foresaids to provide two-third parts of the whole estate, funds, and effects, heritable and moveable, real and per-

sonal, wherever situated, which may be belonging and pertaining to him at the time of his death, after deduction of the debts due by him, to the child or children of the said intended marriage, and to the issue of the bodies of such child or children as representing their parent as after mentioned, whom failing, to his own heirs and assignees; but it is expressly declared that if there shall be more than one child of the said intended marriage, it shall be in the power of the said William Davidson, at any time of his life, and even on deathbed, to apportion and divide, at such times of payment, in such manner, and under such conditions and restrictions as he shall think proper, among the said children, the above provisions in their favour; and failing of such division, the said provision shall be divided among the said children, share and share alike; declaring always, that if any child or children of the said intended marriage shall die before the said provision shall be paid, and the exercise of the said power of division, leaving lawful issue of his, her, or their bodies, the said issue shall have right to the share of such deceasing child or children, in the same manner as if such parent had received payment, or the same had become payable during the parent's life; and it shall be in the power of the said William Davidson to divide and apportion among the issue of the body of any child the share to which the parents of such issue, if surviving, would have been entitled.' It was declared by the deed that these provisions in favour of the child or children of the marriage should be in full satisfaction to them of all legitim and rights of succession, or other legal rights competent to them through the death of their father, or the dissolution of the marriage. Mr Davidson died in 1859, survived by his wife and a daughter, Isabella Stevenson Davidson, his other children having predeceased him without leaving issue. Since the records in the present action were closed, Miss Isabella Stevenson Davidson has died, unmarried, and leaving a settlement, by which she assigned and disponed to her mother, who now claims in her place, her whole right under the antenuptial marriage-contract, and nominated her mother to be her executrix.

"Mr Davidson left a trust-disposition and deed of settlement, dated 12th March 1845, with codicils, dated 24th September 1850 and 15th December 1859 respectively. These codicils deal with the residue of his estate; and, professing to proceed in exercising the powers of restriction contained in his marriage-contract, Dr Davidson thereby restricts the right of his daughter, Isabella Stevenson Davidson, and any other children he might have, to a liferent of the residue of his estate, and directs the fee to be divided among the issue of his daughter and of any other child he might have, *per stirpes*; and failing such issue, to be paid and given over to his sister Margaret Davidson or Neilson to the extent of one-half, and to the children of his sister Marion Davidson or Stalker to the extent of the remaining half. By the latter codicil a power is given to his daughter Isabella Stevenson Davidson, on her attaining the age of 30, and provided she had no issue then in life, to dispose of the residue of the estate by any *mortis causa* deed as she might think fit.

"Miss Isabella Stevenson Davidson during her lifetime maintained, and her mother as representing her in the conjoined actions now maintains, that in virtue of the obligation contained in the marriage-contract, Miss Davidson, on surviving her father, became absolutely entitled, in virtue of the provision above quoted in the marriage-contract, to two-thirds of her father's estate, real and personal, after deduction of debts; and that, in the circumstances which occurred, her father had no power to deal gratuitously with this part of his estate. The claimant Isabella Neilson and others, on the other hand, who are amongst the parties favoured by the destination of the residue under Dr Davidson's deed of settlement and codicils, maintained that the testator was entitled to deal with his estate as he has done, and that they have no right to a half of the residue of this estate, the other half of which, in this view, belongs to the family of the late Mrs Stalker, who are said to be in America.

"The Lord Ordinary is of opinion that the contention by Mrs Davidson, as her daughter's representative, is well founded. By the contract of marriage, Dr Davidson, for onerous causes, bound himself to provide two-thirds of his estate to the children of the marriage and the issue, and he was not entitled to defeat that provision to any extent gratuitously.

"It is said that the power of division, under conditions and restrictions, amongst children and their issue, entitled him to restrict the children to a liferent, to give the fee to their issue, if any, and failing such issue, that he must be held to have a power of disposal of the fee. The power of division or apportionment of the estate which the deed contains, in so far as regards grandchildren (or issue of the issue of the marriage), could, however, only be exercised or become effectual in the event of a child of the marriage dying and leaving issue, and this event did not occur. There was no room, therefore, for the provisions in Dr Davidson's deed of settlement in favour of grandchildren.

"But, farther, there having been children of the marriage, and at least a surviving child of the marriage, Dr Davidson's power in regard to the two thirds of his estate in question was limited to that of apportionment. He had no power of disposal of that part of his property. He could apportion it only amongst his children if more than one, 'in such manner and under such conditions and restrictions' as he should think proper. It is unnecessary to consider what powers, by way of limitation, of a particular child's interest, in favour of other children, these words might be held to confer on him in a question amongst different children themselves. It is sufficient for the disposal of the present case that they do not reserve or confer any right to restrict a child or children to a liferent, and to dispose gratuitously of the fee to strangers. The Lord Ordinary has no doubt that, having regard to the terms of the marriage-contract, the provisions of Dr Davidson's trust-disposition and settlement, by which it is attempted to dispose of the fee of two-thirds of the estate, were *ultra vires*, and are consequently ineffectual.

"*7th February* 1873—The Lord Ordinary, in respect of the findings in the preceding interlocutor, reduces, decerns, and declares in terms of the reductive conclusions of the summons of reduction raised at the instance of Miss Davidson, and now insisted in by Mrs Elizabeth Williamson or Davidson as her general disponee and executrix, and ranks and prefers the said Mrs Elizabeth Williamson or Davidson as general disponee and executrix foresaid on the fund *in medio*, in terms of the first branch of her

claim, No. 7 of Process; and decerns and finds the claimants Miss Isabella Neilson and others, claiming in terms of the claim No. 6 of process, liable to the pursuer and claimant, the said Mrs Elizabeth Williamson or Davidson, in the expenses of the action of reduction, from the date of the compearance of the said Miss Neilson and others, and also in the expenses of the competition; allows an account of the said expenses to be given in; and remits the same when lodged to the Auditor to tax and to report; Further, on the motion of the claimants Miss Neilson and others, grants leave to them to reclaim against this interlocutor."

The claimants Isabella Neilson and others reclaimed, but the Court unanimously adhered.

Counsel for Reclaimers—Fraser and Marshall. Agents—J. & J. Gardiner, W.S.

Counsel for Mrs Williamson—W. A. Brown. Agents—Morton, Neilson, & Smart, W.S.

Friday, June 13.

SECOND DIVISION.

DUKE OF BUCCLEUCH AND OTHERS *v.* COWAN AND OTHERS.

(*Ante*, p. 494.)

In this case, after the Lord Justice-Clerk had prepared a draft-interlocutor granting interdict in terms of the issue against the defender, Counsel for the pursuers appeared at the Bar and insisted that they were entitled to have interdict, not in the words of the issue, but in terms of the conclusion of the summons—(see p. 499, *ante*).

After argument, the Court granted interdict in the following terms:—

"Prohibit and interdict the defenders from discharging into the said water of the North Esk from their respective paperworks any impure stuff or matter of any kind, whereby the said water in its progress through or along the property of the pursuers or any of them may be polluted or rendered unfit for domestic use, or for the use of cattle."

Counsel for Pursuer—Watson and Johnstone. Agents—Gibson & Strathearn, W.S.

Counsel for Defender—Solicitor-General (Clark), Q.C. and Asher. Agents—White, Allardice & Dobson, W.S.

Friday, June 20.

FIRST DIVISION.

[Lord Gifford, Ordinary.

ASHLEY AND OTHERS *v.* THE MAGISTRATES OF ROTHESAY.

Licensing Magistrates — Statutory Powers—Limitation—9 *Geo. IV, cap.* 58 (*Home Drummond Act*)—16 *and* 17 *Vict. cap.* 67 (*Forbes Mackenzie Act*) § 11—25 *and* 26 *Vict. cap.* 35 (*Public Houses Amendment Act* § 2.

Held—(1) that, under section 2 of 25 and 26 Vict. cap. 35, the licensing Magistrates are not entitled to alter the hours of opening and closing licensed hotels and public houses throughout an entire county or burgh; (2) that, under the licensing acts, the time during which hotels and public houses are to be kept open is, as a general rule, fifteen hours each day.

Question—Whether the Magistrates have any power, under the exception introduced by the above section, to diminish the number of hours during which public houses and hotels are to be kept open?

Process—Review—25 *and* 26 *Vict. cap.* 35, § 34.

Held that a proceeding in the Supreme Court for the purpose of setting aside as incompetent and illegal the proceedings of an inferior court, is not a process of review, and therefore is not incompetent under the above section.

Process—Exclusion of Action through lapse of time—25 *and* 26 *Vict. cap.* 35, § 35.

Held that the limitation contained in the above section does not apply to a proceeding for the purpose of setting aside an incompetent and illegal proceeding of the licensing Magistrates.

The pursuers in this action were the four principal licensed hotel keepers in Rothesay. The defenders were the Magistrates and Town-Clerk of the burgh of Rothesay. At an adjourned statutory meeting for the purpose of granting and renewing certificates for the sale of exciseable liquors, the defenders, on 15th April 1872, passed a resolution in the following terms, viz.—"The Magistrates considering that in the particular locality within the burgh situated within the following limits, viz., Mackinlay Street, from the south end thereof to the sea, thence the sea and harbours of Rothesay, from Mackinlay Street to Bishop Terrace Brae, thence along Bishop Terrace Brae, Bishop Terrace, Mountpleasant Road, to Ministers' Brae, thence in a straight line from the west end thereof at High Street to the south end of Columshill Street, and thence in a straight line to the south end of Mackinlay Street aforesaid—other hours are required for closing inns and hotels and public-houses than those specified in the forms of certificates in schedule A, annexed to the Act 25 and 26 Vict. cap. 35, applicable thereto,—resolve to insert eight of the clock in the morning as the hour for opening, and ten of the clock at night as the hour for closing the same, in such certificates."

The Public Houses Acts Amendment (Scotland) Act 1862 contains in the 2d section the following provision, viz.—"The forms of certificates contained in schedule A to this Act annexed shall come in place of the forms of certificates provided by the recited Acts, or either of them; and it shall be lawful for the Justices of the Peace for any county or district, or the Magistrates of any burgh, where they shall deem it inexpedient to grant to any person a certificate in the form applied for, to grant him a certificate in any other of the forms contained in the said schedule; provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such Justices or Magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later