plain what are the different kinds of servitude of road known to the law of Scotland. He says—"There are servitudes by the usage of Scotland analogous to these; of a foot road, an horse road, a cart or coach road, and ways or loanings by which cattle may be driven from one field to another; but an horse road is not by our practice included in a foot road as it was by the Roman law." Keeping out of view then the loaning, the three kinds of servitude roads known to the law are a foot road, a horse road, and a cart road, and the question comes to be, to which of these classes does the road in question by the verdict of the jury belong? It clearly does not belong to the first, nor does it, I think, belong to the second, because that is evidently confined to roads along which a horse may be led or ridden, but there is evidence that this road has for long been used for cars or sleds, and latterly for carts, so I think there can be no doubt that it falls to be classed in the category of cart roads.

No doubt for a considerable period the only use to which this road was put was for sleds drawn by horses. Now, a sled is just a carriage for the conveyance of peats or other produce—it is a carriage just as much as a cart is. The wheels may no doubt facilitate the cart's progress, but in point of use it is just the same as the sled. Whatever conveys farm or other produce is just a carriage. In taking the view which he has done I think the Lord Ordinary was right, and that his application of this verdict is sound. The substance of that interlocutor is just this, that the pursuer is to be allowed to use carts on a road on which sleds were used till 1854, and carts since then, and he is not to be confined to using this road for horses merely. If he were to be so limited he could not even use sleds, as in so doing he would be going beyond his rights. But it is clear that when sleds have been used the road cannot be merely a horse track.

The Lord Ordinary might have gone even further than he has gone, and granted decree in terms of the declaratory conclusions of the summons [see *ante*, vol. xxii. p. 555], but taking the interlocutor as it stands I think it is well founded, and I am for adhering to it.

Lords Mure and Shand concurred.

Lord Adam—I am of the same opinion. The use of sleds and afterwards of carts stamps the right as being of the highest kind of servitude roads known to the law of Scotland.

The Court adhered.

Counsel for Pursuer—Sol.-Gen. Robertson—Comrie Thomson—Murray. Agents—Mitchell & Baxter, W.S.

Counsel for Defender—Mackintosh—Darling. Agents—Pearson, Robertson, & Finlay, W.S.

Friday, February 5.

FIRST DIVISION.

[Lord Fraser, Ordinary.

STOBBS PATTISSON AND ANOTHER *v.* M'VICAR.

Foreign—Decree-Conform—Res judicata—*Jurisdiction—Payment by Order of English Court—Order Reversed—Implied Condition to Repay.*

In an administration suit in the Chancery Division of the High Court of Justice in England an order was on 24th January 1878 pronounced declaring that certain parties were entitled to participate in the distribution of the estate. On 9th August 1878 an order was pronounced directing that payment should be made to these parties, one of whom was "the legal personal representative of" A "when constituted." P., the agent for the plaintiffs in the suit, then intimated to M., with whom he had been in communication, that his (M.'s) wife was entitled to take out letters of administration to the estates of A. M. and his wife were domiciled in Scotland, and were not parties to the proceedings in England. P. was instructed by M. to take out letters of administration of the estate of A. in favour of M.'s wife. M. and his wife then granted a power of attorney in favour of P. to receive the sum directed to be paid by order of the Court. P. uplifted the money and remitted to Scotland the balance, after deducting costs, by cheque in favour of M. and his wife. M.'s wife, acting as A.'s executrix, distributed the money among the various beneficiaries entitled to take through A., retaining her own share. When M. and his wife received the money they knew that the order of 24th January 1878, which gave them their title to the money, was appealable for two years. The order was reversed on appeal, and it was declared that the legal personal representative of A. had been overpaid to the extent of £1523, 12s. 6d. Thereafter the plaintiffs obtained in the English Court an order under which they were at "liberty to take such proceedings as they may be advised" against certain persons who had received overpayments, and, *inter alia*, against M. The plaintiffs then raised this action in the Court of Session against M. for payment of £1523, 12s. 6d. *Held* (1) that the proceedings in England did not warrant the Court in pronouncing a decree-conform; but (2) that M.'s wife had received payment upon the implied condition that if the order which conferred upon her a title to receive the money were reversed she would make repayment; and (3) that M. having consented to his wife's acting as executrix was liable for her obligations, as she had no separate estate. The Court *granted* decree.

Husband and Wife—Husband's Liability for Wife's Obligations as Executrix.

Held that where a husband has consented to his wife acting as executrix, and she has no separate estate, he is liable for her obligations incurred in that capacity.

Andrew Carrick, doctor of medicine in the county

of Gloucester, died in 1837, leaving a trust-disposition and deed of settlement dated 10th March 1837, and codicil thereto dated 13th March 1837.

His estate was duly administered according to the law of England, and in the course of the administration an order was made by the Chancery Division of the High Court of Justice on 27th April 1871, appointing Henry Stobbs Pattisson, Frances Ann Ralph or Rattisson, and James Hugh Ralph, to be the administrators of the estate, with power to uplift, sue for, and recover all sums addebted to the deceased, and thereafter to distribute the same under the directions of the Court.

On 24th January 1878 an order was pronounced in this administration suit by Vice-Chancellor Hall, by which it was declared that according to the true construction of Dr Carrick's settlement the gift thereby made to descendants of the children of the testator's aunts did not include more remote descendants than grandchildren of such aunts. This order was subject to appeal until 24th January 1879.

While this order was still capable of being appealed, a further order was pronounced on 9th August 1878 by which Vice-Chancellor Hall directed that £34,000 3 per cent. consols should be sold and the residue divided as specified in a schedule thereto appended. This schedule specified the members of the class so entitled, and amongst others was "the legal personal representative of Alexander Allan, when constituted," —one-half of one-ninth.

In October 1878 Mr Patrick, a solicitor in London who acted on behalf of the plaintiffs in the administration suit, took out letters of administration in favour of Mrs M'Vicar, wife of Hamilton M'Vicar, Calderbank, by Airdrie, as administratrix of the estates of Alexander Allan. This was done with Mr M'Vicar's authority.

In virtue of a power of attorney granted by Mr and Mrs M'Vicar, dated 15th November 1878, Mr Patrick on 21st November 1878 received from the Paymaster-General a cheque on the Bank of England for £1523, 12s. 6d., payable to Mrs M'Vicar as the legal personal representative of Alexander Allan. This cheque Mr Patrick paid into his own account, and on the same date sent to Mr M'Vicar a cheque, payable to Hamilton M'Vicar or Janet M'Vicar, his wife, for £1442, 16s. 10d., being the said sum of £1523, 12s. 6d., less £80 deducted for costs and charges.

On 16th August 1878 notice of appeal was given by the plaintiffs against the order of Vice-Chancellor Hall of 24th January 1878, and on 26th August 1879 the Court of Appeal reversed the judgment, and declared in lieu thereof that according to the true construction of the will the gift to the descendants of the testator's said aunts, or to the descendants of the children of such aunts respectively, included all lineal descendants of every degree (*Ralph* v. *Carrick*, L.R. 11 Ch. Div. 873). In consequence of this decree an inquiry was ordered to be made as to the amounts which had been overpaid to the several beneficiaries under the former orders.

This inquiry was conducted by the Chief-Clerk of the Chancery Division, who on 25th January 1882 issued a certificate showing that the sum of £1523, 12s. 6d. was to be paid into Court to the credit of *Ralph* v. *Carrick* by Hamilton M'Vicar, for wife, as legal personal representative of Alexander Allan. This certificate was docqueted—"Approved the 21st day of February 1882. CHARLES HALL, V.C."

On 8th June 1883 an order was made by Mr Justice Kay by which it was ordered "that the plaintiffs be at liberty to take such proceedings as they may be advised against the several persons named in the schedule hereto, for the recovery of the several sums therein mentioned." The schedule contained the name of "Hamilton M'Vicar, Calderbank, by Airdrie, £1523, 12s. 6d."

This was an action in the Court of Session at the instance of Henry Stobbs Pattisson and others, plaintiffs in the administration suit of *Ralph* v. *Carrick*, against Hamilton M'Vicar, for payment of £1523, 12s. 6d. with interest at 5 per cent. from 21st November 1878.

The pursuers stated the facts above mentioned, and pleaded—"The defender being addebted to the pursuers, as plaintiffs foresaid, in the principal sum and interest sued for, decree ought to be pronounced in terms of the conclusions of the summons, with expenses."

The defender in his statement of facts stated that his wife had received the sum of £1523, 12s. 6d., less £80, 15s. 8d., and that she had immediately thereafter proceeded with the distribution of the money among the persons entitled, according to the instructions of Mr Patrick. She retained as her own share the sum of £239, 12s. 10d. The whole of these payments were made before any appeal was taken against the orders of Vice-Chancellor Hall. The defender, on behalf of his wife, stated that he was willing to make payment to the pursuer of this sum of £239, 12s. 10d. The defender further stated that he "did not receive the sum sued for, or any part thereof, His name, if appearing in the order of 8th June 1883, has been inserted *per incuriam*, and without his having an opportunity of appearing to oppose the same."

The defender pleaded—"(1) The averments of the pursuers, so far as material, being unfounded in fact, the defender is entitled to be assoilzied. (2) The sum received by the defender's wife, as administratrix foresaid, for distribution, having been paid by her to the parties then in right of the same, neither she nor the defender are liable in repetition thereof, any claim therefor being competent only against the parties who received the same. (3) The alleged over-payment not having been made to the defender, he is not liable in repetition, and ought to be assoilzied, with expenses. (4) The defender cannot in any event be held liable in repetition of more than the sum actually retained by his wife for her own behoof."

A proof was allowed, and these facts were established—That neither Hamilton M'Vicar nor his wife were parties to the administration suit in England; that no notice was given to either of them. That the Chief-Clerk was to adjudicate upon the rights of parties, and that no person represented either of them in those proceedings. Indeed, the Chief-Clerk, who was examined as a witness, deponed that no party unless a party to the action can attend on such an inquiry as that directed without having liberty to attend given him by order of the Court. That after receiving the sum of £1523, 12s. 6d. from Mr Patrick, it was distributed by Mrs M'Vicar among the various persons entitled, she retaining £239, 12s. 10d. as her share, but that though this was done Mrs

M'Vicar or her husband was aware from letters received from Mr Patrick that the order under which the money had been paid was still appealable. The letters from Mr Patrick which show that Mr and Mrs M'Vicar knew that the order of 24th January 1878 was appealable up to 24th January 1880 are quoted in the opinions of the Judges of the Inner House *infra*.

The Lord Ordinary (FRASER) on 27th May 1885 dismissed the action.

"*Opinion.*—The defender in this action is sought to be made liable for a sum of money which was distributed by his wife under letters of administration taken out by her to her father's estate. The circumstances out of which this claim arises are, that Andrew Carrick, a doctor of medicine in the county of Gloucester, who died in 1837, executed a trust-disposition and settlement by which he bequeathed one-twelfth part of the residue of his estate to the children and descendants of his aunt Mrs Mathie. The words 'children and descendants' led to litigation. An administration suit was instituted in the Court of Chancery in England by the pursuers of the present action, and in this suit Vice-Chancellor Hall on 9th of August 1878 pronounced a judgment construing the will, and finding a limited number of persons only entitled to share in the legacy. This decision of Vice-Chancellor Hall was appealed to the Court of Appeal in England, who on the 26th of April 1879 varied or altered the judgment of the Vice-Chancellor, and brought in under the word 'descendants' a great number of other persons whom the Vice-Chancellor's judgment excluded.

"One of the class of persons brought in under the Vice-Chancellor's judgment were the descendants of Alexander Allan — this Alexander Allan being the father of the defender's wife. To these descendants, according to the judgment of the Vice-Chancellor, there was appropriated, of Dr Carrick's estate, the sum of £1523, 12s. 6d. In order to distribute this money it was necessary that some person should obtain letters of administration to Alexander Allan's estate; and on the advice of Mr Patrick, the solicitor in London for the plaintiffs in the administration suit, the defender's wife obtained letters of administration to Alexander Allan and his wife. Having thus a legal title to obtain payment of the money due to the representatives of Alexander Allan, the defender's wife and the defender appointed Mr Patrick to be their attorney, with authority to receive the sum of £1523, 12s. 6d., and he as such attorney procured payment of the money. After deducting his own account, Mr Patrick on 27th November 1878 sent a cheque for £1442, 16s. 10d. to 'Hamilton M'Vicar, Esq., and Janet M'Vicar,' which cheque was duly received by these two persons, and the money therefor was got from the bank. They immediately deposited it upon deposit-receipt; and in accordance with the instructions they received from Mr Patrick, the defender's wife proceeded at once to distribute the funds among the representatives of Alexander Allan, obtaining from each of those representatives the receipts produced in process, of which the following is a specimen:—'£239, 12s. 9d.—Received from Janet M'Vicar, wife of Hamilton M'Vicar, manager of ironworks at Calderbank, Airdrie, the sum of £239, 12s. 9d. sterling, being my proportionate share of the residue of £34,000 consols, part of Dr Carrick's estate inherited by the late Alexander Allan and Mrs Janet Allan, now deceased, as detailed in statement sent and subscribed by me as correct on 12th day of December 1878.—WM. ALLAN, New York, January 21, 1879.' All these payments were made upon the authority of Vice-Chancellor Hall's judgment, and to the parties pointed out in that judgment. In consequence of the reversal of the Vice-Chancellor's decree, it turned out that some of the persons to whom the defender's wife had made payments were not entitled thereto. Of course, if the defender be bound to pay back the money that was sent to him, he will have his action against the persons who received it without any title thereto; but it turns out that some of them are in New Zealand and others in America, and are in such circumstances of impecuniosity as to render it very probable that the defender would never recover any sum from them. This, of course, is a very hard case for him if the present demand be well founded. The order of the Court of Appeal was as follows:—'If any amount so received by way of payment, or carrying over as aforesaid, shall appear to be in excess of the amount so payable to such persons respectively under this order, the amount of such excess, and the persons by whom the same is payable, are to be certified. And it is ordered that the persons who shall be certified to have received such amounts in excess, do, within such time as shall be directed in the certificate of the result of such inquiry, pay what shall be certified to be the amount of such excess due from them respectively into Court to the credit of the said cause "*Ralph* v. *Carrick*, 1870, R. 157."' The further procedure seems to have been this:—The plaintiffs in the administration suit appeared before the Chief-Clerk of Mr Justice Kay, and he then prepared a schedule as described by him, as follows:—'Particulars showing what amounts have been received by any of the persons named in the first column of the second schedule to the said order, either by payment to them or by carrying over to their accounts in the said cause, pursuant to the order of the 9th August 1878, and the said amounts so carried over to the said accounts which have since been dealt with or paid out, and the amount payable to the same persons respectively in accordance with the declarations in the said order declared pursuant to the order on further consideration, dated the 24th January 1878, as varied by the said order of the 26th of April 1879, and the names of the persons who have received by way of payment or carrying over an amount in excess of the amount so payable to such persons respectively under the said order of the 26th day of April 1879, and the amounts of such excess, are set forth in the schedule hereto. The total amount thereof is the sum of £7744, 10s. 2d., the amounts of such excess appearing in the sixth column thereof. The said several persons who have so received amounts in excess, or to whose accounts they have been carried, are respectively to pay the amounts so received by them respectively in excess as set forth in the said sixth column into Court to the credit of "*Ralph* v. *Carrick* 1870, R. 157."' In the schedule appended to this report there is this entry—'Hamilton M'Vicar, for wife, as legal personal representative of Alexander Allan, £1523, 12s. 6d.' This sum is the amount now sued for in this action.

The defender did not in point of fact receive this sum, because there were deductions made from it, such as Mr Patrick's account and Government duties; and if there could be liability enforced for any sum under this action there would be a necessity for inquiry as to the exact sum to be accounted for.

"The certificate of the Chief-Clerk is no judgment of a court of law; but it is said that such a judgment was obtained from Mr Justice Kay in the following terms:—'It is ordered that the plaintiffs be at liberty to take such proceedings as they may be advised against the several persons named in the schedule hereto for the recovery of the several sums therein mentioned.' Among the several persons named in the schedule occurs 'Hamilton M'Vicar, Calderbank, by Airdie, £1523, 12s. 6d.'

"Having obtained this permission by Mr Justice Kay to raise an action, the plaintiffs in the administration suit come to the Court of Session demanding immediate judgment against the defender Hamilton M'Vicar. A proof was allowed as to how the Chief-Clerk's certificate had been obtained, and it turns out that no notice was given to the defender M'Vicar to the effect that the Clerk was to adjudicate upon the rights of parties, and no person appeared on behalf of M'Vicar. Mr Patrick expressly says in his evidence that he did not appear for him; therefore the Chief-Clerk in putting the defender's name down as a party responsible for the £1523 which had been paid to his wife as administrator of Alexander Allan's estate, did so in absence of the person whom he made responsible. It appears from the examination of Mr Peake, the Chief-Clerk of Mr Justice Kay, that the insertion of the name of the defender upon the list is not final, but may be objected to even now before a Chancery Judge.

"Now, the law as to the enforcement of foreign judgments (not regulated and dependent upon positive statute) is this—that if a judgment be given by a court of law in a foreign country having jurisdiction over the parties, and which has fairly heard their proof and their arguments, such judgment will not be examined on the merits in another country where it is sought to put it in force. There is one decision of the Court of Session where a different rule was laid down in the following terms:—(*Southgates* v. *Montgomerie*, 9th February 1837, 15 S. 507) 'A foreign decree, founded on for execution in this country, affords only *prima facie* evidence of the truth and justice of the claim of the pursuer, and is liable to be impugned on cause shown by the defender.' This case has not been followed in the broad terms thus expressed. The judgment of a foreign court of competent jurisdiction is more than *prima facie* evidence; it is conclusive, and is given effect to. And this is the view now substantially adopted in every country except that of France, which insists upon reciprocity. If the judgment of a French court be not enforced in a foreign country, neither will the French courts enforce the judgments of the courts of that country in France. This narrow view has never been adopted in England, Scotland, or America.

"But, on the other hand, another rule is as completely established, viz., that a court of law is not bound to enforce anything but the *final* judgment of a foreign court. No interlocutory judgment, however peremptory it may be, can be laid before the foreign court and the assistance of that court invoked for its execution. All lawyers who deal with this branch of the law are agreed upon that subject, and no more need be necessary than to refer to decisions by the Courts of England. In *Patrick* v. *Shedden* (29th April 1853, 22 L.J., Q.B. 283) the Court of Queen's Bench refused to enforce a decree of the Court of Session granting interim execution for payment of the expenses in the Shedden litigation, and this upon the ground that there was no final judgment in the cause. So in the case of *Paul* v. *Roy* (21 L.J., Chan. 361), it was determined by the Master of the Rolls, Lord Romilly, that an order by the Court of Session upon a party to consign a sum of money in a process of multiplepoinding would not be enforced in England,—'Held that no final judgment had been obtained; that this Court would enforce a final judgment if final; that the order made was not final; and that this Court would not enforce an interlocutory order of a foreign court.'

"It is needless after these cases to cite further authority. The liability of Hamilton M'Vicar on account of his wife's administration of the fund is rested solely on the certificate of the Chief-Clerk. No judge has pronounced him to be responsible for his wife's proceedings as administratrix of her father's estate; and it is not clear whether liability for his wife's acts is to be determined according to the law of England or the law of Scotland, the country of his domicile. No doubt Mr Patrick, the solicitor for the plaintiffs, sent to him and to his wife a cheque in their joint names, and he endorsed this cheque in order to enable his wife to get the money, so as to distribute it. Whether this apparent intromission by him would make him responsible for his wife's acting is a question that is not raised upon this record, and upon which the Lord Ordinary is not called upon to deliver an opinion. All the ground of action in the case is that the Chief-Clerk chose to put a man's name upon the list as indebted to the estate, and that the Judge gave the plaintiffs leave to raise an action to enforce its repayment. There is here no ground of action disclosed that the Lord Ordinary can entertain, and he therefore must dismiss this action. If the pursuers have any other ground of action against the defender, they may libel it, and it will be considered, and accordingly the interlocutor is not one of absolvitor but of dismissal."

The pursuers reclaimed, and on 27th November 1885, when the case came on for hearing, the record was amended to the following effect, viz., the pursuers added the following pleas-in-law:—"(1) The sums sued for having been paid to the defender in error, he is bound to refund the same. (2) The liability of the defender to repay the said sum having been determined by the Chancery proceedings referred to, the pursuers, who are thereby duly authorised to recover the same, are entitled to decree in terms of the summons. (3) *Esto* that the sum now sued for was paid to the defender's wife as administratrix foresaid the defender as her husband, and liable in law for obligations undertaken by her, is liable in repetition thereof"—the plea quoted *supra* being made their 4th plea-in-law.

The defenders added, *inter alia*, the following to their statement of facts:—"By the decision of

the Court of Appeal, reversing that of Vice-Chancellor Hall, the defender and the descendants of Alexander Allan deceased became entitled as individuals to participate in the division of the part or share of Dr Carrick's estate bequeathed as aforesaid. According to the information supplied by the pursuers' agent Mr Patrick, the amount falling to the defender is £121, 0s. 5d., and to his wife and four other children of Alexander Allan £100, 17s. 10d. each, and to two grandchildren the sum of £50, 8s. 11d. each, amounting in all to £728, 8s. 5d. This sum the defender is entitled to retain in any action for recovery of payments in excess. A further sum from the trust-estate has now fallen to be divided between the descendants of Mrs Carrick or Mathie, of which the defender and his wife are entitled to receive £158 in addition to the £239, 12s. 10d. already received by the defender's wife, and from which the shares of the other four children and two grandchildren of Alexander Allan are increased by £400 in all; and this amount of £558 also falls to be retained by the defender, thereby reducing the amount of excess received from the estate to £239, 4s. 1d. No part of said further sums has yet, however, been received by them. The defender, on behalf of his wife, is willing to make payment to the pursuers of the sum of £239, 12s. 10d. retained by his wife as aforesaid for her own behoof."

The pursuers' answer to this was as follows:—"Admitted that by the decision of the Court of Appeal the defender and the descendants of Alexander Allan became entitled as individuals to participate in the division. Explained that the pursuers have obtained Stop Orders against payment of these shares, amounting, as stated, to £726, 8s. 5d., which will be applied in reduction *pro tanto* of the sum sued for. *Quoad ultra* denied."

The defender amended his pleas-in-law by altering the numbers as follows:—1 to 3, 2 to 4, 3 to 5, and 4 to 7, and by adding additional pleas-in-law, which were founded on the amendments added to the defender's statement of facts:—"(1) The pursuers are not entitled to have decree conform to the judgment libelled, in respect (1st) that the defender is a domiciled Scotsman, and not subject to the jurisdiction of the High Court of Justice; (2d) that he was not a party to, or represented in, the said proceedings; (3d) that he received no notice of, and was not represented at, the inquiry by the Chief-Clerk, or any other proceedings which followed thereon; and (4th) that the order founded on is a foreign decree or judgment of an interlocutory nature. (2) The pursuers are not entitled to decree, in respect that the name of the defender was inserted in the said decree or judgment erroneously, and that in that respect the order of Mr Justice Kay is not in conformity with the documents on which it bears to proceed; and further, in respect that said error was induced by the pursuers, and that it admits of being now rectified on their application. (6) In any view, the defender is entitled to deduct the amounts now payable to himself and his wife, and to the descendants of the late Alexander Allan, who participated in the previous distribution."

Argued for the pursuers and reclaimers—1. Decree-conform should be pronounced. The matter was *res judicata* in respect of (1) the judgment of the Court of Appeal, which displaced the defender's title by reversing the judgment of Vice-Chancellor Hall; and (2) the approval by Vice-Chancellor Hall on 21st February 1882 of the Chief-Clerk's certificate, by which it was found that M'Vicar was liable to repay the sum of £1523, 12s. 6d. Although there might not have been original jurisdiction of the English Court over the defender, yet he had prorogated jurisdiction by taking the money under a judgment of that Court. The liability to repay was as well ascertained by the English Court as the right to get payment. 2. If there were not grounds for asking that a decree-conform should be pronounced, then it was submitted that facts had been disclosed which would warrant the Court in pronouncing decree against the defender on the merits. This pursuers were entitled to recover either on the ground of *condictio indebiti*, or else on the ground that the defender got payment of this money on the implied condition that if the judgment under which he took the money were reversed he would make repayment. It was no defence to say that the money was paid in *bona fide*, because both M'Vicar and his wife knew that the judgment was appealable. Nor was it any defence to say that the wife alone was liable, because (1) M'Vicar interposed and intromitted with the money; and (2) M'Vicar consented to his wife, acting as executrix, and was therefore liable. The wife had no separate estate. —Fraser on Husband and Wife, i. 514, 626, and case there cited of *Moens* v. *Von Griesheim*, 12 L.T. 194; *Laird* v. *Miln*, November 16th, 1833, 12 S. 54.

The defender and respondent argued—1. There was no decree of the English Court upon which decree-conform could be pronounced. All that the pursuers had was the order of Mr Justice Kay, which ordered that they should be at liberty to take such proceedings as they may be advised. If, however, the judgment of the Court of Appeal taken together with the certificate of the Chief-Clerk, approved by Vice-Chancellor Hall, amounted, as the pursuers contended, to a simple condemnator, then it was maintained that the English Court had no jurisdiction to pronounce such a judgment. Though the English Chancery Court had jurisdiction to pronounce an order with regard to money which was in the hands of the Court, yet when the money had been paid away, that would not entitle the Court to extend its jurisdiction and follow the money. Moreover, the defender was never a party to the English suit, and had no notice of the proceedings. There were apparently further proceedings in view, so that the orders which had been made were merely *ad interim*. The cases of *Patrick* v. *Shedden* and *Paul* v. *Roy*, cited in the Lord Ordinary's note, were in this view applicable. 2. On the merits the pursuer could not demand repayment of the sum of £1523, 12s. 6d., because it now appeared from their answer to the defender's amended statement of facts that the sum of £726, 8s. 5d. fell to be deducted. The person whom the pursuers should have sued was Patrick, and then if he sued the defender the latter would have a strong defence founded on the letters by which Patrick had misled him. If decree was pronounced in the present action the defender would be deprived of that defence. There was no decision in Scotland to the effect

that a husband is liable for the obligations incurred by his wife as an executrix. The case of *Moens* v. *Von Griesheim*, cited in Fraser on H. and W., i. 626, proceeded on the view that the husband had made himself liable as agent—Fraser H. and W., i, 514, 538; *Spreul* v. *Stewart*, M. 5873, 1 Br. Sup. 709.

At advising—

LORD ADAM—The late Dr Carrick died on the 14th March 1837. By his trust-disposition and settlement he bequeathed his whole means and estate to certain trustees to be disposed of in terms thereof, and, *inter alia*, he bequeathed the twelfth part or share of the residue of his estate to the children and descendants of his late aunt Mrs Mathie.

In the course of the administration of the estate application was made to the Chancery Division of the High Court of Justice, by which Division an order was, on 27th April 1871, pronounced, appointing the pursuer along with the now deceased Mr Ralph to be administrators thereof, with power to uplift, sue for, and recover all sums due to Dr Carrick, and thereafter to distribute the same under the directions of the Court.

It would appear that by an order made in this suit by Vice-Chancellor Hall on the 24th January 1876, he found, that according to the true construction of the will, the gift to the descendants of the children of the testator's aunt named in the will did not include more remote descendants than grandchildren of such aunt respectively.

It would further appear that this order was subject to appeal until the 24th January 1879.

It would also appear that Vice-Chancellor Hall, although the foresaid order was subject to appeal, and notwithstanding the opposition of the pursuer, on the 9th August 1878 pronounced a further order by which he directed that £34,000 consols, 3 per cent., part of the trust estate, should be sold, and that the ultimate residue of the proceeds, after providing for certain payments, should be paid or carried over, as thereby directed, conform to a schedule appended to the said order. The persons to whom the money was thus directed to be paid, or to whose account it was directed to be carried, were the persons entitled to payment of the gift bequeathed to the descendants of the children of the testator's aunt, according to the construction of the will by Vice-Chancellor Hall, and given effect to by the foresaid order of 24th January 1878.

From the schedule appended to the order it appeared that one of the persons so entitled to payment was the legal personal representative of Alexander Allan when constituted, and the amount to which such legal representative was entitled was one-half of one-ninth of the money directed to be paid or carried over, and amounted to the sum of £1523, 12s. 6d., being the amount sued for.

On this order being pronounced, Mr Patrick, a solicitor in London, who had the conduct of the suit on the part of the plaintiffs, and who had been previously in communication with the defender Mr M'Vicar about the suit, intimated to him that Mrs M'Vicar being one of the children of Alexander Allan, was entitled to take out letters of administration to his estate, and proposed to send the necessary papers for the purpose. Mrs M'Vicar agreed to become such personal representative, and in October 1878 an application was made to the Probate Court in England for a grant of letters of administration to the estates of Alexander Allan and his wife, then also deceased, in favour of Mrs M'Vicar as their eldest surviving child, and probate was duly granted. Further, by power of attorney dated 15th November 1878, Mr and Mrs M'Vicar appointed Mr Patrick their attorney, to receive for them from Her Majesty's Paymaster-General the said sum of £1523, 12s. 6d. out of cash at the credit of *Ralph* v. *Carrick*, directed to be paid to the legal personal representative of Alexander Allan deceased pursuant to the before-mentioned orders, and to payment of which she was entitled as such personal representative. In virtue of this power of attorney Mr Patrick on the 21st November 1878 received from the Paymaster-General a cheque on the Bank of England for the sum of £1523, 12s. 6d., payable to Mrs M'Vicar as the legal personal representative of Alexander Allan as aforesaid; and having obtained payment of this money by endorsing the cheque, he paid the sum into his own bank, and of the same date he sent to Mr M'Vicar a cheque made payable to Hamilton M'Vicar, Esq., and Janet M'Vicar, his wife, for £1442, 16s. 10d., being the said sum of £1523, 12s. 6d., less a sum of £80, 15s. 8d. deducted on account of probate and inventory-duty and expenses.

It further appears that on the 16th of August 1878 notice of appeal was given by the plaintiffs against the order of Vice-Chancellor Hall of 24th January 1878, and that they should contend that according to the true construction of the will the gift to the descendants of the children of the testator's aunt included grandchildren, great-grandchildren, and more remote descendants—and the Court of Appeal on 26th April 1879, on considering said appeal, reversed the judgment of Vice-Chancellor Hall, and declared that the gift to the descendants of the testator's aunt, or to the descendants of such aunt respectively, included all lineal descendants in every degree, and further, *inter alia*, ordered an inquiry as to what amounts had been paid pursuant to the order of 9th August 1878, and also the amounts payable to the same persons in accordance with the declaration thereinbefore declared, and if any amount so received by way of payment should appear to be in excess of the amount so payable to such persons respectively under the said order, the amount of such excess, and the persons to whom the same was payable, were to be certified, and it was ordered that the persons who should be certified to have received such amount in excess should pay what should be certified to be the amount of such excess due from them respectively into Court to the credit of the said cause *Ralph* v. *Carrick*.

The inquiry so ordered was made by the Chief-Clerk, whose certificate, which was approved of by Vice-Chancellor Hall of date 21st February 1882, sets forth in a schedule the amounts of such excess. In this schedule occurs the following entry—"Hamilton M'Vicar for wife, as legal personal representative of Alexander Allan;" and the amount of excess paid to her is stated to be the said sum of £1523, 12s. 6d.

Thereafter on the 8th June 1883, on the appli-

cation of the plaintiffs—that is, the present pursuers—Mr Justice Kay ordered that the plaintiffs be at liberty to take such proceedings as they might be advised against the several persons named in the schedule thereto annexed for the receiving of the several sums therein mentioned. In the schedule there is the following entry—"Hamilton M'Vicar, Calderbank, by Airdrie, £1523, 12s. 6d." It is in respect of this order that the present proceedings have been taken.

The Lord Ordinary has dismissed the action. He states his opinion to be that all the ground of action in the case is that the Chief-Clerk chose to put a man's name upon the list as indebted to the estate, and that the Judge gave the plaintiffs leave to raise an action to enforce its repayment, and that there is here no ground of action disclosed that the Lord Ordinary could entertain, and therefore he dismisses the action. In the view which I take of the case I do not think it necessary to express any opinion as to whether the proceedings which I have detailed would *per se* have warranted a decree against the defenders, because I think that there is a ground of action disclosed which clearly leads to an opposite result to that at which the Lord Ordinary has arrived.

There is no doubt that Mrs M'Vicar as the legal personal representative of Mr Allan received payment of the sum of £1523, 12s. 6d. through her attorney Mr Patrick, and that is the same thing as if she had received it herself. It is also clear that when she received payment of this sum, both she and her husband knew that the order of Vice-Chancellor Hall by which she was found entitled to the money might be appealed against. This is clear from the correspondence between Mr Patrick and the defender. Thus Mr Patrick writes to the defender on 14th February 1878—"No appeal has yet been made nor any time fixed for the division of the estate. An appeal may be lodged at any time up to 24th January 1879;" and again he writes on 25th June 1878—"No notice of an appeal has been given by any party as yet, nor does it seem likely that any appeal will be made."

The money therefore was received in the full knowledge that the Vice-Chancellor's order of 24th January 1878 might be appealed against, and that it might ultimately be found that Mrs M'Vicar as the personal representative of Alexander Allan was not entitled to the money. In that suit she must have known, and be presumed to have known, that she would be called upon to repay it, for she cannot have supposed that she would be allowed to retain money to which she had no right or title. I think therefore that Mrs M'Vicar must be presumed to have received the money on the implied condition that in the event of the Vice-Chancellor's order being reversed she would have to repay it. But if Mrs M'Vicar as the personal representative of Alexander Allan was bound to repay this money, then I think her husband is bound to do so. It was with his knowledge and consent that she undertook the office of legal personal representative, and he is liable to make good the debts and obligations incurred by her in that capacity.

It further appears that Mrs M'Vicar as the legal personal representative of Alexander Allan upon receiving the money proceeded with the distribution of it among the beneficiaries who would have been entitled to it had the Vice-Chancellor's order not been reversed. She thus paid away the whole of the money which she had received, retaining only the sum of £239, 12s. 10d. as the share to which she would have been entitled as a beneficiary. She did this, she avers, under the direction of Mr Patrick, and it is now pleaded that neither she nor the defenders are liable in repetition thereof, any claim therefor being competent only against the parties who received the same. I do not think that plea is well founded. I think the plaintiffs have only to look to the person who received the money, as it has turned out, without having any right to it. I do not think that they have any concern with what she may have done with it. It is no answer to say that she distributed it according to the instructions of Mr Patrick. Mr Patrick had no power or authority over the disposal of the money. In this matter he was merely advising her as her agent. The proper course for her to have followed, with a view to her own safety, was to have retained the money until it should be finally determined who was entitled to it. That she did not follow this course, but proceeded, under what appears to have been the very bad advice of her agent Mr Patrick, immediately to distribute it, cannot free her from liability. This is not a case where an executor at the proper time and in *bona fide* has distributed the executry estate amongst those then appearing to be entitled to it. In such case an executor may be protected against claims subsequently emerging, but in this case the claim is against the executrix herself. It is said to be a hard case that she or her husband as being liable for her debts should be called upon to repay this money, as I think foolishly distributed, but it must be remembered that the alternative is that those truly entitled to it should not get it, which I think is as hard or a harder case.

It further appears that according to what must be held to be the true construction of the will Mrs M'Vicar is entitled in her own right to a sum of £100, 17s. 10d., and her husband in his own right to a further sum of £121, 0s. 5d., and that certain other descendants of Alexander Allan are entitled in their own right to further sums amounting in all to the sum of £726, 8s. 5d., and the defender claims to be at any rate entitled to retain these sums against the present claim. The pursuers explain that they have obtained stop orders against the payment of these sums, and that they will be applied *pro tanto* in reduction of the sum sued for. If this be the fact—and there appears to be no reason to doubt it—Mr and Mrs M'Vicar will ultimately be recouped to this extent. But however that may be, I do not think these sums can be set off against the present claim. The money was received by Mrs M'Vicar in the character of legal representative of Alexander Allan, necessarily as I think under the implied condition that if Vice-Chancellor Hall's judgment should be reversed the money should be at once repaid, and she cannot set off against that sums due in another character. As I have already said, I think that the defender, her husband, is liable for her debts and obligations, and therefore is now bound to repay it. I think therefore that the Lord Ordinary's interlocutor should

be recalled, and decree given for the principal sum sued for. It will be observed, however, that interest is claimed at the rate of 5 per cent. from the 21st November 1878, being the date at which Mrs M'Vicar received the money. Nothing, however, was said about interest at the bar, and I should desire to know whether the parties have anything to say on that subject.

Lord Mure—When this case was first argued upon the reclaiming-note against the Lord Ordinary's interlocutor, I was disposed to come to the conclusion that the Lord Ordinary was right in holding that the action ought to be dismissed, and that substantially upon the grounds explained by his Lordship in the note to his opinion. The case as then argued, and as it appeared to have been argued before the Lord Ordinary, was rested mainly, if not exclusively, upon certain orders or proceedings in the Court of Chancery, under which it was said that the defenders were ordained to make repetition of the sum concluded for in this action, and which order it was contended ought at once to be given effect to here. It however appeared to me, as it had done to the Lord Ordinary, that the Chancery proceedings founded on were not of a description which would entitle this Court to enforce the order said to be contained in them, without inquiry, as a judgment of a foreign Court.

Even in the most favourable view of these orders for the pursuers, they were merely interlocutory orders, pronounced in an administration suit in absence of the defender, and in which neither the defender nor his wife had even been called as a party. And the last of them, viz., that pronounced by Mr Justice Kay in June 1883, upon which the pursuers are now proceeding, was in no sense a decree against the defender, but simply a permission given to the pursuers "to take such proceedings as they may be advised against the several persons named" (including the defender) for the sums therein mentioned. It humbly appeared to me that such an order never could be made the foundation of a decree-conform, and that the opinion and judgment of the Master of the Rolls in the case of *Paul* v. *Roy*, 21 L.J., Chan. 361, referred to by the Lord Ordinary, has a very distinct application to the circumstances of the present case. If, then, the Court had now been called on to dispose of this case upon the same grounds as those which were at first submitted to us, I should have taken the same view of it as that taken by the Lord Ordinary.

But the parties have since then been allowed to amend their pleadings, and the pursuers' case is now rested, not merely upon the terms and import of the Chancery proceedings, but upon this broader ground, that under an erroneous view of the relative rights of the beneficiaries in an administration suit a sum of money had been paid over to the defender in excess of what was due under the distribution which was ultimately appointed to be made in that suit. It is for repetition of the money alleged to have been so paid in excess that the present action has been brought, and the main question now to be disposed of—apart from that to which I have already alluded as dealt with by the Lord Ordinary—is, whether the pursuers have been able to instruct that the sum here concluded for is justly due by the defender, and is one which he must now be called upon to repay?

I am of opinion that the pursuers have not as yet laid before the Court evidence which can be held to be sufficient to lead to this result.

This new ground of action, as stated in the first plea-in-law in the amended pleadings, is an alleged payment in error of money which it is said the defender is bound to return. It is substantially therefore a claim which seems to come under the category of a *condictio indebiti*, which is an equitable remedy as explained in all the leading authorities, and appears to me to impose upon the Court, when called on to apply it, the duty of ascertaining that the whole sums claimed are still truly due, and that there are very clear and conclusive grounds for ordering repayment. More especially is that so in a case like the present, where the defender has taken no personal benefit whatever from the money remitted, except indirectly to the extent of the share belonging to his wife, which it is important to keep in view he has all along intimated his readiness at once to repay. The rest of the money remitted was paid away in December 1878, under the direction of Mr Patrick, who acted for the pursuers in the administration suit, to the beneficiaries standing in the same degree of relationship to the deceased as the defender's wife. All this was done in the manner fully explained in the correspondence, receipts, and other evidence adduced, to which Lord Adam has referred, six years before the date of the present action, and several of the parties to whom the money was so paid are and have for some time been resident abroad.

It is plain therefore that by now ordering repayment of the whole of the sum claimed, and leaving the defender to recover it from the beneficiaries, the defender may be exposed to very serious hardship and loss, and this will in my opinion be neither equitable or just if the sum concluded for in this action is not now due. I cannot therefore accede, without further inquiry, to what Lord Adam has proposed, even assuming the view he has expressed as to the ultimate legal liability of the defender to be well founded, as to which I at present give no opinion. Because as at present advised I see no sufficient evidence to instruct that the whole sum concluded for is due.

In the first place, the whole sum sued for was not remitted to the defender. The sum remitted amounted only to £1442, 16s. 10d., the difference —£80, 15s. 8d.—having been retained by Mr Patrick, the agent for the present pursuers, and who has all along been their agent in the administration suit, to meet probate and residue duties to the extent of about £60, which, in consequence of Vice-Chancellor Hall's order having been altered on appeal, do not, as I understand the correspondence, and in particular the letter of 26th June 1879, now fall to be paid. The remainder of the £80 was retained to meet Mr Patrick's charges for taking out letters of administration, which he rashly and improperly, as it appears to me, advised the defender and his wife to do, and to act upon, and which has been the cause of the whole of this unfortunate litigation. That sum of £80 therefore is in the hands of Mr Patrick, the pursuers' agent, and ought immediately to be paid into Court by him, as would in all probability have been ordered if Mr Justice

Kay had been made aware how that matter stood. But, as explained by the Lord Ordinary in his opinion, the fixing of £1523, 12s. 6d. as the sum for which proceedings might be taken against the defender was not, strictly speaking, the act of Mr Justice Kay, but of his Chief-Clerk in the absence of the defender. That sum therefore is in my opinion not due by the defender, but by the London agent for the pursuers.

In the next place, it is plain from the correspondence that by the reversal of Vice-Chancellor Hall's order on appeal Mrs M'Vicar and her relatives were not deprived of the whole sums they were found entitled to under that order. The letter of Mr Patrick to the defender of the 8th of March 1882 and relatives makes this very clear.

In the earlier letter of 26th June 1879, to which I have already referred, Mr Patrick writes to the defender—"You need not worry yourself, as all has been done under the order of the Court, and you are by no means answerable for the mistake. Those who have received more than their share will, as I before have told you, have to refund the difference. . . I will send you in a few days a statement shewing the division of the 1-9th of the £34,000 consols according to the new order of the Court of Appeal;" and he adds, "I am now writing to assure you that you have incurred no risk beyond refunding what overplus has been received by yourself. The others must be called on to refund any overplus also." Some statement of the nature referred to in this letter appears to have been sent on the 28th of June, but it has not been printed. After some further correspondence, however, a similar statement is sent in March 1882, when Mr Patrick writes—"On the other side I send a statement showing what each of your party have received and how much they should return, and I hope you will get as much of it back as you can."

Now, this statement is most distinct as to the division made between Mrs M'Vicar and the rest of the Allan family. It is prepared under three heads, and gives (first) the division of the £1523, 12s. 6d. among the several beneficiaries under the order of the 9th August 1878, (second) the sums payable to each by the order as varied on appeal, and which is stated to amount to £879, 1s., and (third) the excess payments, or, in other words, the sum which each will require to pay back, and which amounts in all to £644, 11s. 6d., of which only £107, 8s. 7d. is an over-payment to the defender's wife. According to this statement, then, prepared by the pursuer's agent, the sum overpaid is not £1523, 12s. 6d., but only £644, 11s. 6d.

It is in the third place, however, not clear from the evidence before the Court that even that sum now falls to be repaid. For it is distinctly averred by the defender in his statement of facts that under the distribution, as varied on appeal, a further sum from the trust estate has fallen to be divided between the descendants of Mrs Carrick, of which the defender and his wife are entitled to receive £158, in addition to what she is entitled to of the £1523, 12s. 6d. under the order as varied on appeal. And it is also averred that the members of the Allan family, other than Mrs M'Vicar, who were overpaid to a certain extent under the order of Vice-Chancellor Hall, are now entitled each to £100 out of this further sum, which ought, the defender says, to be set off against the sums overpaid by him to those beneficiaries, so that in this way the sum now claimed would be still further reduced, if not entirely wiped off. This part of the defender's fifth statement is no doubt denied by the pursuers. But it is in the circumstances a matter which ought, I think, to be inquired into, because there is in evidence another letter of Mr Patrick, of the 8th of September 1882, with a relative state, which goes far to support this view.

It is clear to me, therefore, that as matters stand at present it would not be just to the defender to pronounce decree against him for the full amount of the sum now sued for. No part of that sum has been received or retained by him as an individual, and he is ready to repay the share received by his wife. More than one-half, moreover, of the sum sued for, viz., £879, has, according to the statement to which I have referred of the 8th of March 1882, been paid over to parties who under the Vice-Chancellor's order, even as varied on appeal, are entitled to retain it.

In these circumstances I am quite unable to concur in a judgment which will oblige the defender to make immediate payment of the large sum sued for. And the conclusion I have come to is, that before any decree is pronounced the Court should appoint the pursuers to put in a state or account showing (first) what sum was paid by the defender to each of the beneficiaries mentioned in the state contained in the letter of the 8th of March 1882 in excess of what each of them was entitled to under the Vice-Chancellor's order as varied on appeal, and (second) what sum, if any, is now payable to those beneficiaries out of the trust estate in addition to what they are entitled to under the above order as varied on appeal, as alleged in the 5th article of the statement of facts for the defender, and upon that being done to appoint parties to be further heard.

Lord Shand—I agree with Lord Adam in thinking that the interlocutor of the Lord Ordinary should be recalled, and that the pursuers of this action are entitled to decree against the defender for the sum for which they sue, and I take that view of the case on the same grounds as his Lordship has expressed. The pursuers in this case, acting as administrators of the suit in Chancery for the administration of the estate of the late Dr Carrick as explained on record, have rested their claim to decree against the defender Mr M'Vicar on two separate and distinct grounds. One of these is, that they have got a decree from the Court of Chancery for repayment of this specific sum, and they ask that this Court should take that decree as final against the defender and simply pronounce decree-conform. The alternative groundis, that if they are not entitled to decree-conform, they are at least, in the circumstances disclosed in the case, entitled to decree for repayment of the money, because they are able to say that Mrs M'Vicar, for whose actings her husband is responsible, received payment of a sum of £1523, 12s. 6d., to a large portion of which she had no right whatever, and therefore that she and her husband, as responsible for her obligations, are bound to repay that money.

If this had been a case in which it appeared that Mrs M'Vicar had a separate estate, and that the action had been directed against her for recovery of part of that estate, I think there would have been a good deal of room for the argument that the pursuers were entitled to decree-conform against Mrs M'Vicar, because it appears that this administration suit was attended by persons who represented a number of different interests in such a way that it was unnecessary for Mrs M'Vicar to appear directly in the process to make a motion which was substantially made for her as one of Allan's representatives. But then, if after the judgment of Vice-Chancellor Hall was pronounced she took out of the Court of Chancery the fund which is the subject of this action, in the capacity of executor or administrator of Allan, and received that money which she afterwards distributed, appropriating a part of it to herself, I think in that case there would have been room for saying that the Court of Chancery were entitled to grant decree against a person who had so appeared and taken benefit to repay that money, and there would be good grounds for saying that that would be a decree which this Court would enforce. But this case is not quite of that class. Mrs M'Vicar as representative of Alexander Allan alone drew from the Court of Chancery, through her attorney and law-agent, the the money which is now here sued for, and the money being so drawn out was no doubt remitted to Scotland in the joint names of her and her husband, but so far as her husband was concerned he was personally no party to the uplifting of that money from the Court. It appears to me, therefore, that as he was no party to the Chancery proceedings, he not having been the person who took the money from the Court of Chancery, and as that Court has no jurisdiction over him, he being resident in Scotland, we cannot regard the decree which the Court of Chancery have pronounced against him as entitled to any legal effect in this country. He was no party to the suit, and the Court of Chancery had no jurisdiction over him. On these grounds, therefore, it appears to me that the pursuers must fail when they ask for decree-conform.

But I think quite otherwise in regard to the second or alternative ground of action to which Lord Adam proposes to give effect. The case in that aspect is very simple upon the statement of it. In this administration suit a construction was put upon the will by Vice-Chancellor Hall which entitled the representatives of Alexander Allan to £1523. Mrs M'Vicar gave instructions to the agent who acted in the carriage of the administration suit, but who also acted for her in that matter, and for her alone, to make up a title in her favour as administrator of Alexander Allan, and to uplift that money. The money was so uplifted by power of attorney by her and her husband, and was remitted to this country, received by her, and, as has been noticed, distributed by her.

Now, what was the state of knowledge of all parties in regard to the money? It was this, that the fund was payable on what may be called an interim judgment. It was payable upon, and paid under a judgment which was not final, and which was liable to appeal, and of course if a reversal of that judgment took place the parties must have known that it might turn out that these representatives of Alexander Allan who had got this sum of £1523 had no right to it, and that other parties had right to it, and in that case it appears to me to be clear beyond question that money taken in that way, and indeed upon that footing, must be repaid in the event of the reversal of the judgment, finding that the persons who got it had no right to it, and that the money belongs to some-one else. That there was complete knowledge that that decree was liable to be reversed is beyond all question. I find that when Mr M'Vicar was examined he says—"I had no interest under Vice-Chancellor Hall's judgment. I thought that judgment was wrong, and would probably be appealed against. I hoped it would. I think I inquired up to what time the appealing days lasted." And then he refers to a letter which gave him information upon that subject, and when I turn to that letter I find that on the 14th of February 1878 Mr Patrick, the agent to whom I have referred as the agent in the administration suit, and agent for Mrs M'Vicar in receiving this money, wrote—"No appeal has yet been made, nor any time fixed for division of the estate. An appeal may be lodged at any time up to the 24th January 1879." Now, it was a few weeks before 24th January 1879 that this money was applied for and taken out of Chancery and received in this country, and therefore it was applied for, taken out, and received by Mrs M'Vicar and her husband in the knowledge that the decree which gave right to it might be reversed, and if reversed, that the right to that money might be found to be in some-one else. The decree was reversed, and the Court of Chancery have ordered that the money shall be paid back, and we are asked to give decree upon the simple ground that it has been proved to the satisfaction of the Court that this lady as Alexander Allan's representative had no right to the money, and that it must go to other persons altogether.

It appears to me to be quite clear that in these circumstances the pursuers are entitled to the decree which they ask. The sum has been liquidated, and indeed liquidated by the circumstance that the amount was fixed and drawn, and it is quite clear that the representatives of Alexander Allan under the decree of reversal have no right whatever to this fund. I agree entirely with Lord Adam in thinking that this payment must in the circumstances be taken as one that was made under the implied condition that in the event of that decree being reversed the money must be repaid.

In that state of matters the only question that remains is, whether there is anything whatever in the plea, which I may call one of personal bar, that has been suggested? As to anything like personal bar against the pursuers, I have only to say that I have been unable to adopt the argument of the defender in support of that view, or to see that it has any foundation, and I do not think it is entitled at anyrate to the weight which my brother Lord Mure seems to give it—

[Lord Mure—I did not say I give that any weight].

I must have misunderstood his Lordship. It appears to me to come under the category of personal bar, because the argument comes to this, as I understood his Lordship to say, because the pursuers were persons who had

been parties to the payment of this money through their agent Mr Patrick, who had been the party who got the payment of this money, that that should preclude them from asking it back again. Upon that subject I have only to say, that from the time Mr Patrick was employed to obtain payment of this money, as he was in the Court of Chancery, he was acting not as joint-agent for the pursuers and Mrs M'Vicar at all, but was acting entirely as Mrs M'Vicar's agent. Surely it was in that character alone that he could have taken out letters of administration, and thus enabled Mrs M'Vicar to act as administrator and to get the money. The pursuers have nothing earthly to do with that. And so Mrs M'Vicar having got the money, Mr Patrick gives her suggestions as to the mode of dividing it. Again the pursuers have nothing to do with that. In that Mr Patrick was acting as Mrs M'Vicar's agent, and in that character alone. He unfortunately did give her bad advice, whereby the money was distributed among the persons interested in Alexander Allan's estate without waiting for the result of the appeal against Vice-Chancellor Hall's order, but he did so in no other character than that of agent for Mrs M'Vicar, and the pursuers have nothing to do with that. And so I see no ground for holding that the pursuers by their own actings have precluded themselves from asking back this money.

Again, it has been suggested that if decree is to be given against the defender it should not be for the sum of £1523 concluded for, but that deduction should be given therefrom of such sums as the Court should be satisfied that Mr M'Vicar and his wife are entitled under the new order to obtain, not in the capacity of representatives of Alexander Allan, for they get nothing in that capacity, but to obtain as individuals, and also deduction I suppose of such sums as may be due to Allan's representatives, who will take benefit under the new order or reversal of the Court of Chancery. In the first place, there is a complete answer to that suggestion in this circumstance, that the Court of Chancery have ordered the representatives of Alexander Allan to repay this money, and as the representatives of Alexander Allan take nothing under the new order, the proposal to deduct from the sum which is to be repaid anything whatever appears to me to be wrong in principle. But there is a second answer, and it is this, that the Court of Chancery have settled that matter by fixing the sum for which decree is to be given, and the sum for which decree is to be given against Alexander Allan's executor is duly entered, and the Court not only considered that, but they also thereby resolved that Allan's executor was not entitled to anything whatever by way of deduction, and therefore that this money must be repaid in full, and I cannot say for my part that I see anything that would appear to be wrong in that.

It was further suggested that the £1523 was subject to deduction because of the expenses of taking out letters of administration, but surely the pursuers of this action and those who are interested in the fund in Chancery have nothing to do with that expense. The money which Alexander Allan's executor got was £1523, and those who are interested in the process have nothing whatever to do with the mode in which that money has either been spent or divided. The title so made up may have been quite a proper proceeding, but I can see no possible reason for saying that the expense of it is to be deducted from money which Mrs M'Vicar had no title to receive.

Then, again, as to the payments she has made, unfortunately they have been made to beneficiaries who are not able to repay them. But that was a step which Mrs M'Vicar ought not to have taken, and I see no reason for saying that any deduction should be made on account of these payments. It is worthy of observation that Mr Patrick failed in the Court of Chancery to get this decree reduced to a sum less than £1523, by getting credit given for such sums as might be due to Mrs M'Vicar and the other persons who got part of that money. The only decrees for the purpose which the Court of Chancery have granted are what are called stop orders, by which money which Mrs M'Vicar and the other persons who have taken benefit from Alexander Allan's executry are entitled to is stopped and held in the Court of Chancery. These sums being so stopped, we cannot, as proposed by the defender, allow him credit for the amounts of them and give decree for the balance in this action, for there is no doubt that the pursuers are entitled to decree for the principal sums here asked. But it will be for Mr M'Vicar and his wife in their separate character, not as Allan's executors at all, but as individuals, to take the benefit of these sums in the Court of Chancery, the benefit of which I cannot doubt they will get, and so I agree with Lord Adam in the view which his Lordship has expressed.

Lord President—If the only ground of action maintained by the pursuers here was that a decree had been pronounced by the Court of Chancery against the defender which it was the proper office of this Court to enforce as by decree-conform, I should have had no hesitation at all in refusing the pursuers' demand, upon the simple ground that as I read the proceedings in Chancery no decree whatever has been pronounced against the defender, and there appear very obvious reasons why such a decree should not and could not have been pronounced by the Court of Chancery, because that Court had no jurisdiction over this defender. The defender was no party to the suit, and he had no notice whatever of any demand having been made against him in that suit, and I cannot suppose that in such circumstances the Court of Chancery would ever have dreamt of pronouncing such a decree.

But there is another ground I think, and one certainly involving very serious and difficult considerations both in fact and law. It is said this money which is now sought to be recovered from M'Vicar was paid to his wife as executrix of Alexander Allan, while in point of truth there was no sum due to Alexander Allan's executrix at all. No doubt an order had been pronounced by Vice-Chancellor Hall finding that the executrix of Alexander Allan was entitled to a certain sum of money out of the estate in the administration suit, and if that order had stood undisturbed there cannot be any doubt that Mrs M'Vicar was entitled to the sum of £1523. It does seem very strange that the money was ever paid out of Chancery in the circumstances in

which it was paid, but of course I speak with great diffidence about the proceedings in that Court, because I cannot very well judge whether they have been regular or according to the rules of practice of that Court, but speaking as a Scottish lawyer it does strike me as very remarkable that a Judge in the Court of Chancery could order money to be paid in terms of a judgment pronounced by himself when that judgment is still subject to appeal. And yet that is what actually took place, Vice-Chancellor Hall having pronounced a judgment the effect of which was to order a certain amount of consols to be sold out and the proceeds distributed amongst the parties who were entitled to it under his order. The order of Vice-Chancellor Hall was taken to appeal and was reversed, and the consequence has been that that money has been erroneously paid when it never ought to have been paid to them. It was in point of fact paid without any judicial authority. But I confess I do not see in what respect the pursuers of this action can be made at all answerable for what took place under the direction of Vice-Chancellor Hall. We have it in evidence that so far from their consenting to this being done they remonstrated against it, and therefore I think they stand quite clear of being in any sense the cause of this money having been paid when it ought not to have been. On the other hand, that the money has been erroneously spent is now established by the judgment of the Court of Appeal; and the present action is brought for the purpose of obtaining repayment of that which ought not to have been paid. That, as I take it, is the simple ground of action here. I do not think this is *condictio indebiti*, as was suggested by my brother Lord Mure. I think, on the contrary, the ground of action is correctly described by Lord Adam when he says that the parties receiving this money being in the knowledge that the order of Vice-Chancellor Hall might be reversed upon appeal, and that in that case the money might require to be repaid, must have taken payment under an implied condition, and that condition was that in the event of a reversal the money should be repaid, and it is to enforce that condition, as I understand it, that this action is now brought against the defender. It would have been brought against the representative of Alexander Allan who received the money, if there had been a person *sui juris*, or even a married woman who had a separate estate of her own. But as neither of these facts occur in this case, the law is, I am afraid, beyond dispute, that the husband having consented to her assuming the office of administratrix of Alexander Allan's estate is answerable for her obligations undertaken in that capacity.

Now, that is the reason why it appears to me that it is impossible to resist the conclusion of this action upon any of the grounds maintained by the defender. The proposal to have an accounting here, and to see whether Mrs M'Vicar and her husband may not ultimately obtain payment of the money out of this administration suit in Chancery which may be sufficient to wipe off to a great extent the liability they are now under, is one that I do not think we can possibly entertain, because this money was paid to the executrix of Alexander Allan, and it is in that capacity that she and her husband are asked to restore it. That they may be able to recover certain amounts from some of those to whom they have paid away the money in a different capacity in the Chancery suit, I think has nothing to do with the question as it now depends between the pursuers of this action as plaintiffs in the administration suit and Mrs M'Vicar and her husband.

I cannot help thinking with Lord Mure that there is a great deal of hardship in enforcing this present demand against Mr M'Vicar, but it is a hardship which has arisen out of the circumstances for which the pursuers are not responsible. There is, in the first place, the proceeding of Vice-Chancellor Hall which was the cause of this money having been paid; and there is, in the second place, what I cannot help characterising as the extremely bad advice which Mr Patrick gave Mrs M'Vicar, encouraging or directing her to pay away this money to the other parties interested in the executry estate of Alexander Allan. It was his duty to warn her and her husband that they could only do so at their own risk, and if that money was ultimately found not to be due to those parties they would be answerable to repay it. The professional advice therefore which the defender received was certainly very misleading, and it is very much to be regretted that that advice was given, and also that it was acted upon, but in a question between the pursuers and the defender here, however, I am afraid the circumstance of Mr Patrick being also the agent of the pursuers in the Chancery suit cannot make the pursuers of the Chancery suit liable for the advice that he gave in another capacity as agent of Mr and Mrs M'Vicar.

The case might have been different if Mr and Mrs M'Vicar had been entirely unaware that the order of the Vice-Chancellor was not subject to appeal, and that the effect of the appeal might be to require that the money should be repaid. But we have evidence before us that they were aware of that, and there can be no doubt of it from the letters that passed between Mr M'Vicar and Mr Patrick, which abundantly prove that Mr M'Vicar was fully aware that such an event was possible, although no doubt they got and acted on very bad professional advice. But still they were in the full knowledge that the order might be reversed, and in that knowledge Mr M'Vicar allowed his wife to pay away the money to the next-of-kin of Alexander Allan.

I must say I cannot bring myself to doubt that the grounds of judgment proposed by Lord Adam are in the circumstances perfectly sound, that this money has been paid when it ought not to have been, and that it was not by the fault of the pursuer of this action that this has been done, but by the fault of the defender acting upon bad professional advice. I therefore concur with the majority of your Lordships in holding that the pursuers are entitled to recover this money. But upon the question of interest I think a very different question may arise, and probably we had better hear what the parties have to say upon that now.

On the question of interest the defender submitted that interest should not be allowed except from the date of citation, as the English Court only gave the pursuer a limited warrant to sue for the principal.

The Court recalled the interlocutor of the Lord Ordinary, and gave decree for the sum concluded for (£1523, 12s. 6d.) with interest from the date of citation, and expenses, modified to the extent of one-half.

Counsel for Pursuers (Reclaimers)—Mackintosh—Lang. Agents—J. B. Douglas & Mitchell, W.S.

Counsel for Defender (Respondent)—Pearson—Paterson. Agents—Paterson, Cameron, & Co., S.S.C.

LANDS VALUATION COURT.

Friday, February 5.

DRUMMOND AND OTHERS *v.* ASSESSOR FOR LEITH.

Valuation Cases—Consideration other than Rent—Valuation Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 6—*Goodwill of a Public-House.*

The tenant of a public-house purchased it and let it on lease to a tenant, receiving besides a fixed rent a sum for goodwill. *Held* that this sum formed a "consideration other than rent," and that the assessor was justified in taking half of it, spreading that sum over the years of the lease, and thus bringing out as the annual value a sum greater than the fixed rent.

At a meeting of the Magistrates and Council of the burgh of Leith, for the purpose of hearing and disposing of appeals against valuations made by the Assessor for the year 1885–86, George Clark Drummond, proprietor of shop and cellar situated at No. 156 Bonnington Road, Leith, and Page & Whitecross, wine and spirit merchants, the tenants and occupiers of these premises, appealed against a valuation of £145 which the Assessor had placed upon these subjects.

The subjects were occupied by Page & Whitecross as a retail wine and spirit shop, under lease granted by Drummond dated 1st December 1884.

The lease provided (1) that the date of the lessees' entry should be 2d December 1884; (2) that the possession under the lease should come to an end at the term of Whitsunday 1892; and (3) that the rent should be £70 yearly.

Prior to this lease Drummond, the landlord, had himself been in possession of the premises as tenant at a rent of £70. He acquired the premises, and let them to Page & Whitecross, receiving from them the sum of £1200 for the goodwill, fixtures, fittings, and utensils. The Assessor stated that in estimating the yearly value of the premises at £145 instead of at £70, his former valuation, he had made a fair allowance for the actual value of the fittings, &c., and that, after deducting that sum from the £1200, he had taken one-half of the balance, which he had added to the rent, divided by the total number of the years of the lease.

The Magistrates confirmed the valuation.

Drummond and Page & Whitecross took a Case.

Argued for the appellants—The sale here was by a tenant to a tenant. Goodwill arose from personal and not from local considerations. There ought therefore to be no addition to the fixed rent at which the subjects were actually let.

Authorities for appellants—*Labouchere* v. *Dawson*, January 15, 1872, L.R., 13 Eq. 322; *Ginesi* v. *Cooper & Company*, March 5, 1880, L.R., 14 Ch. Div. 596, *per* Jessel, M.R., 599; *ex parte Punnett*, November 18, 1880, L.R., 16 Ch. Div. 226.

Authorities for the Assessor—*Glasgow Iron Company and S. H. Campbell*, March 24, 1873, 11 Macph. 989; *Alexander Mitchell Innes*, May 26, 1875, 3 R., 1147; *The King* v. *Bradford*, June 10, 1815, 4 Maule & Selwyn, 316.

At advising—

Lord Fraser—The number of cases at these sittings raising the same question indicates that the practice of letting public-houses at small rentals, but with a heavy sum paid down in name of "goodwill, fixtures, fittings, and utensils," is common. The question now is, whether the Assessor must take the sum stipulated in name of rent in the lease (in this case £70), and throw out of view altogether the £1200 (in this case) paid for "goodwill, fixtures, fittings, and working utensils?"

It has been argued to us that "goodwill" cannot be taken into consideration in ascertaining what is annual value, and various reasons have been argued in support of this contention. The goodwill of a business arises from various and often accidental circumstances, such as the situation of a house, the changes in the neighbourhood, and even the prejudices of customers. It is the advantage which is acquired by an establishment beyond the value of the capital and fixtures employed therein, in consequence of the general public patronage which it receives from habitual customers on account of its local position, or reputation of celebrity and comfort, or even from ancient partialities. In regard to a public-house, local position is the thing which gives it its chief value. If it be planted down in a populous neighbourhood, and especially if beside large manufacturing and public works, or at any other place where crowds of people repair, that public-house, from its situation, has advantages over other public-houses situated at a distance, and will let for a far higher rent than one of the same capacity planted in the midst of a more scattered population. Very little depends, in such a matter as a public-house, on the personal qualifications of the landlord. The house is there, and the liquors that are distributed are at hand, and it matters not who is the distributor. There are cases, on the other hand, of what is called personal goodwill, where the profits of the business result almost entirely from confidence placed in the personal skill of the party employed, as in the case of surgeons and solicitors, in regard to whom the goodwill is really worth nothing.

In the present case the landlord, Mr Drummond, let to the appellants a retail wine and spirit shop from 1st December 1884 to Whitsunday 1892 at a rent of £70 yearly, but Mr Drummond having himself been in possession of the premises as tenant obtained for the goodwill, fixtures, fittings, and working utensils from the present tenants £1200. The assessor makes what he calls a fair allowance for the fixtures, fittings, and utensils (he does not say how much), and