wards, but it could be swung round so as to act as a lever having as its fulcrum the corner of the gate-post. Thus when it was swung outwards with the weight of several boys upon it, it had a strong tendency to wrench the bolt out of its fastening. That indeed was what happened. It was said that the fastening of the gate was defective owing to the screws which held it to the gate-post not being sufficiently tightly screwed up, and that may have been so, but the really important fact is that the bolts could be taken off by being wrenched out when the gate swung round, and that was what was done here.

In my opinion the defenders are responsible for this deficiency. If the gate had been kept reasonably safe then the accident would not have happened. It is no answer to say that if the children had not swung upon it the gate was safe. It is so natural for children to swing on a gate that I think the School Board should have anticipated it. I think that we must reverse the Sheriff's judgment, and revert to that of the Sheriff-Substitute.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court pronounced this judgment:—

"Find in fact (1) that the pursuer's son, while a pupil at the Pulteneytown Academy, a school belonging to the defenders, was injured by the falling of part of the gate at the entrance to the school; (2) find that the gate was insufficiently hung, was not provided with a stop, and consequently on the occasion libelled swung outwards against a pillar, thereby breaking the hinge and causing part of the gate to fall on the boy; (3) find he did not by negligence on his part contribute to the accident: Find in law that it was the duty of the defenders to keep the gate in a safe condition, and that they are liable in damages to the pursuer as guardian of his son for the injury done to him: Therefore sustain the appeal: Recal the judgment of the Sheriff appealed against: Affirm the judgment of the Sheriff-Substitute: Of new assess the damages at forty pounds sterling," &c.

Counsel for the Appellant—Low—M'Lennan. Agent—Thomas Liddle, S.S.C.

Counsel for the Respondents—Comrie Thomson—Watt. Agent—William Gunn, S.S.C.

Wednesday, June 26.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

ROSS v. MACKENZIE.

Process—Jury Trial—Abandonment of Action—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 10—*Act of Sederunt*, 16*th Feb.* 1841, *sec.* 46.

The Judicature Act 1825, sec. 10, provides, *inter alia*—" . . . The pursuer has it in his power to abandon the cause on paying full expenses or costs to the defender, and to bring a new action if otherwise competent." . . .

The Act of Sederunt, 16th February 1841, sec. 46, provides—"If it shall be made to appear to the Court that a party has abandoned his suit, . . . the Court shall proceed therein as in cases in which parties are held as confessed." . . .

The pursuer of an action lodged a minute in process abandoning "the cause in terms of the statute," but he failed from poverty to pay the taxed amount of the defender's account of expenses. On the motion of the defender, and on the pursuer's consent, the Court *assoilzied* the defender from the conclusions of the action.

In an action of damages by Hugh Ross, Balchaggan, Ross-shire, against John Mackenzie, innkeeper, Milltown, Ross-shire, an issue was settled by Lord Wellwood on 25th January 1889, and the case was set down for trial at the jury sittings in March 1889. Shortly before the date of the trial the pursuer lodged a minute in the following terms:—"FORSYTH, for the pursuer, hereby abandons the cause in terms of the statute." Thereafter the Court, on the motion of the defender, allowed the defender to lodge an account of his expenses, and remitted the account to the Auditor for taxation. It was not stated that the pursuer had failed to pay the defender's expenses as taxed, and that his agent had advised the defender's agent by letter that the pursuer was unable to pay the expenses, and did not object to decree passing therefor, and to the defender being assoilzied. The defender moved for the amount of the expenses, and for absolvitor.

Reference was made to the Judicature Act (6 Geo. IV. cap. 120), sec. 10; the Court of Session Act 1868, sec. 39; the Act of Sederunt, 16th February 1841; and to *Lawson* v. *Low*, July 1, 1845, 7 D. 960.

The Court assoilzied the defender from the conclusions of the action.

Counsel for the Pursuer—Forsyth. Agent—David Barclay, Solicitor.

Counsel for the Defender—Wilson. Agent—Robert Cunningham, S.S.C.

Friday, June 28.

FIRST DIVISION.

[Lord Fraser, Ordinary.

TENNENT v. WELCH.

Husband and Wife—Foreign—Wife's Heritable Estate—Effect of Sale—Surrogatum—Donation.

The wife of a domiciled Scotsman after her marriage, with concurrence of her husband, sold a heritable estate belonging to her in England. She duly acknowledged the conveyance thereof before two of the commissioners appointed under the Act for the Abolition of Fines and Recoveries (3 and 4 Will. c. 74), and "declared that she did intend to give up her interest in the said estate without having any provision made for her in lieu thereof." Part of the price

was received and retained by the husband, and part was vested in certain trustees to indemnify the purchasers against an annuity charged on the estate.

The result of this conveyance by the law of England was that the husband "became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by the said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti.*" The husband and wife having subsequently separated by mutual consent, the latter executed a deed of revocation by which she revoked and cancelled all donations and provisions made by her in favour of her husband.

In an action by the wife against the executor of her husband—*held* that the pursuer was entitled to repayment of the sum received by her husband, and to payment of the rest of the price on the annuity ceasing to be chargeable, in respect that (1) the rights of the spouses in the price of the estate were to be decided by Scots law, and (2) that by Scots law the price was *surrogatum* for the estate.

Husband and Wife—Donation.

Opinion that if there had been a presumption that the wife intended to give her husband the price of the estate it would have been a revocable donation.

Husband and Wife—Separate Estate of Wife—Liferent of Husband—Actuarial Value.

A married woman having, with the concurrence of her husband, sold a heritable estate belonging to her in England, in which by the law of England her husband had a freehold or liferent interest, subsequently brought an action against the executor of her husband to recover the purchase money which her husband had received and retained in his own hands, but without claiming interest thereon. The Court *decerned* against the defender for the sum sued for, and refused to have the life interest of the husband calculated as at the date of the sale, and deducted from the said sum, in respect that it had been fully satisfied by his having had possession of the purchase money till his death, and having appropriated the interest to his own uses.

Charles Welch Tennent and Mrs Hamilton Dunbar Tennent were married at St Mark, St Marylebone, in the county of Middlesex, on 24th March 1877. At the date of the marriage Mr Tennent was a domiciled Scotsman, and continued to be so till his death. No contract of marriage was entered into between the spouses.

At the date of the marriage Mrs Tennent was possessed of a large amount of property, both heritable and moveable, and, *inter alia*, of the estate of Overton in the county of Salop. By deed of conveyance, dated 24th July 1877, Mrs Tennent, with concurrence of her husband, conveyed the estate of Overton to the marriage-contract trustees of Lord Boyne at the price of £23,500, and on the same day she acknowledged the said conveyance before two of the commissioners in terms of the Act 3 and 4 Will. IV. c. 74, for the abolition of fines and recoveries.

The certificate of the commissioners was to this effect—"And we do hereby certify that the said Hamilton Dunbar was at the time of her acknowledging the said deed of full age and competent understanding, and that she was examined by us apart from her husband touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same."

The affidavit required to be made by one of the commissioners bore—"That previous to the said Hamilton Dunbar Tennent making the said acknowledgment, I inquired of her the said Hamilton Dunbar Tennent whether she intended to give up her interest in the estate in respect of which such acknowledgment was taken without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate, and that in answer to such inquiry the said Hamilton Dunbar Tennent declared that she did intend to give up her interest in the said estate without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said Hamilton Dunbar Tennent I have no reason to doubt the truth, and I verily believe the same to be true."

Of the price of the estate the sum of £18,000, after deduction of the charges connected with the sale, was paid over, and passed into the hands of Mr Tennent. By deed of declaration of trust dated 24th July 1877 the remainder of the purchase money—£5500—was vested in Lord Boyne and Mr E. G. Marshall, on the part of the purchasers, and Mr Ralph Dalzell Welch, on the part of the vendors, as trustees, for the purpose of indemnifying the purchasers against a charge of £200 per annum charged on the estate of Overton; and further trusts were declared by the said indenture of the said sum of £5500, after the determination of the annuity mentioned, for the benefit of Mr and Mrs Tennent.

Mr and Mrs Tennent lived together as husband and wife till June 1881, when they separated by mutual consent. There was no issue of the marriage.

By deed of revocation dated 20th December 1882 Mrs Tennent revoked and cancelled all donations, provisions, deeds, writings, and things whatsoever made or executed by her in favour of her husband Charles Welch Tennent.

The present action was raised by Mrs Tennent against her husband on 1st June 1883. The conclusions of the summons were that it should be found and declared "that the defender is in possession of and holds the sum of £18,000 sterling as *surrogatum* for the heritable estate of the pursuer, free from and unaffected by the *jus mariti* of the defender, or otherwise that the said sum possessed and held by the defender constituted a donation from the pursuer to the defender which has been validly recalled by the pursuer; and the defender ought and should be decerned and ordained by decree foresaid to make payment of the said sum to the pursuer: And further, it ought and should be found and declared by decree foresaid that a sum of £5500 sterling, which was part of the price of the heritable estate of Overton, formerly belonging to the pursuer, and which is presently consigned or invested in the names of the defender, or some person on his behalf, and certain other persons, to meet a liferent annuity chargeable

on the said heritable estate is *surrogatum pro tanto* of the said estate under burden of the liferent annuity aforesaid, and that the said sum of £5500 and interest thereon, subject to the burden of the said liferent annuity, is the property of the pursuer, or otherwise it ought and should be found and declared by decree foresaid that the right to the said sum of £5500 is vested in the pursuer, or that the same constituted a donation by her in favour of the defender which has been validly recalled by the pursuer, and that on the foresaid liferent annuity ceasing to be chargeable the pursuer is entitled to payment of the said sum and all interest accruing thereon, or income derivable therefrom, after payment of the said annuity."

The defender died on 8th October 1884, leaving a trust-disposition and settlement whereby he appointed his brother Ralph Dalzell Welch his executor and general disponee, and in terms of a joint minute for the parties the cause was transferred against the latter as executor and general disponee of the original defender.

It was averred in a statement of facts for the defender as follows:—"(Stat. 1) Prior to the marriage of the pursuer and the original defender, the pursuer by her agents, W. K. J. Langridge, solicitor, Lewes, Sussex, and Charles J. Skitt, land agent, Charlton, Wellington, Salop, lawfully authorised on that behalf, or by one or other of them, had entered into a contract of sale in writing duly signed by the said agents, or one or other of them, of her manor of Overton and other hereditaments in the parish of Stottesden and county of Salop, to Viscount Boyne, but the said sale had not been carried into effect by actual conveyance. After their marriage the said defender concurred, as he was bound to do, with the pursuer in fulfilling her contract of sale by granting the necessary conveyance. The price of the said estate contracted to be paid to the pursuer by Viscount Boyne was by the law of England personalty at the date of their marriage, and passed to the said defender *jure mariti* as his own absolute property upon the marriage taking place. (Stat. 2) At least if the said contract of sale was not complete and binding on the pursuer prior to her marriage, or if the original defender was not bound to fulfil or to join with her in fulfilling it after their marriage, then the pursuer being at the date of her marriage with the said defender seized of the said manor of Overton and other hereditaments for an estate of inheritance in fee-simple in possession, and no settlement of the pursuer's estate having been executed prior to the pursuer's marriage to the said defender, by the law of England the said defender on his marriage with the pursuer *ipso facto* acquired a freehold interest in the said manor of Overton and hereditaments foresaid, which entitled him to the rents and profits thereof during the joint lives of himself and wife, and which, in the event of there being issue of the marriage who could inherit, entitled him to such rents and profits during the remainder of his life. This freehold interest it was competent for him to alienate at pleasure. The pursuer retained the property or fee-simple subject to her husband's right therein, but without power to dispose of the same by will or (except as hereinafter mentioned) by deed. (Stat. 3) The pursuer was entitled to dispose of her said fee-simple estate by deed, provided only her husband concurred therein, and such deed was duly executed and acknowledged by the pursuer before two commissioners, in terms of law according to the Act for the Abolition of Fines and Recoveries, 3 and 4 Will. IV., c. 74. In the event of her duly acknowledging the deed of conveyance in terms of law, the whole purchase price of the fee-simple, and not merely of his own freehold interest therein, passed by the law of England to her husband, the original defender, as his own absolute property *jure mariti*. (Stat. 8) *Separatim*, the deed of revocation founded on by the pursuer is ineffectual so far as the sale of the said property of Overton, and leasehold property at Grove End, London, and the prices thereof (other than the £5500 placed in trust as aforesaid) are concerned, in respect that the said prices (other than as above mentioned) received by the said defender were not invested by him or otherwise applied to his own purposes. They were lodged in bank and afterwards entirely spent by the pursuer and the said defender, or by the said defender with the knowledge and consent of the pursuer, upon their joint establishment, and for their joint uses and purposes. The said prices form no part of the said defender's executry estate."

The pursuer pleaded—"(1) The said sum of £18,000 being *surrogatum* for the heritable property of the pursuer, did not fall under the *jus mariti* of the said Charles Welch Tennent, and the defender is bound to make payment thereof to the pursuer. (2) The said sum of £5500 being *surrogatum* for the heritable property of the pursuer, did not fall within the *jus mariti* of the said Charles Welch Tennent. (3) The pursuer is not barred from claiming right to the said sums of £18,000 and £5500 by the acknowledgment of the deed of conveyance executed by her in respect, 1st, that the said acknowledgment did not affect the rights of the pursuer and the said Charles Welch Tennent *inter se*; and 2nd, that their rights in the premises fell to be determined by the law of Scotland. (4) At all events the said sum of £5500 not having been reduced into the possession of the said defender, the right thereto remained vested in the pursuer as the owner of the said estate, and she is entitled to payment thereof, on the foresaid annuity ceasing to be chargeable, as concluded for. (5) Assuming the said defender to have acquired right to the foresaid several sums, the same formed a donation by the pursuer to him, which was revoked by the pursuer, and she is entitled to decree therefor in terms of the conclusions of the summons."

The defender pleaded—"(2) The pursuer having entered into a contract of sale of the said estate of Overton prior to her marriage, and the price stipulated to be paid therefor being personalty at the date of her marriage, fell to the original defender *jure mariti* as his absolute property on the marriage taking place. (4) By the law of England the manor and estate of Overton having been sold, and the conveyance thereof executed and acknowledged, all as set forth in the second and two following statements of facts for the present defender, the whole price thereof belonged to the original defender as his own absolute property *jure mariti*. (5) The rights of parties in the said manor and estate of Overton,

and the price thereof, falling to be determined by the law of England, which does not confer upon the pursuer any right to insist that the said price, or any part thereof, shall be paid to her, the defender should be assoilzied. (6) The said sum of £5500 being part of the price of the said manor and estate of Overton, belonged, by the law of England, to the original defender, and now belongs to the present defender, as his executor, absolutely, subject to the purposes for which it is held in trust, and the pursuer is therefore not entitled to decree as concluded for thereanent. (7) The Scots law of donation *inter virum et uxorem* does not apply, and the deed of revocation alleged to have been executed by the pursuer on 20th December 1882 cannot affect the conveyance of the Overton estate, and Grove End Road property, and their consequences, which are regulated by the law of England. (8) Also *separatim*. The defender ought to be assoilzied from the conclusions of the summons, in respect that, assuming the Scots law of donation to apply, the money sought now to be recovered as a donation was spent during the subsistence of the marriage by the spouses, or with the knowledge and consent of the pursuer, for the joint uses and purposes of the spouses."

On 16th July the Lord Ordinary (FRASER) allowed the defender a proof of his averments contained in the first article of the statement of facts for him, and on 21st January 1887 the Lord Ordinary having heard counsel on the proof already led, of new allowed the defender a proof of his averments contained in the first article of the statement of facts by him, and also a proof of his other averments.

Against this interlocutor the defender reclaimed to the First Division, and after hearing parties their Lordships allowed the reclaimer to put in a draft case with a view to ascertaining the English law applicable to the facts ascertained by the proof. The case was thereafter adjusted, and remitted to the Chancery Division of the High Court of Justice in England for its opinion on the questions of law stated in the case in terms of the Law Ascertainment Act (22 and 23 Vict. cap. 63).

These questions were as follows—"(1) Whether at the date of her marriage to the original defender, viz., 24th March 1877, a valid and binding contract of sale of Overton had been entered into by or on behalf of the pursuer as vendor and Lord Boyne or his trustees as purchasers, enforceable by an action for specific performance at the suit of Lord Boyne or his trustees as purchasers, or of the pursuer as vendor, or of either of them? (2) Whether such contract operated as a conversion of said estate of Overton into personalty in the person of the pursuer, so as to vest the proceeds in her husband absolutely at the date of the said marriage? (3) Whether such contract was by English law a chose in action, and consequently did not become the property of her husband until the reduction of the same into his possession? In the event of the Court deciding that no valid and binding contract for the sale of Overton had been entered into before the marriage of the pursuer, and that the original defender took no interest in the price thereof, (4) What, after their marriage, were the respective rights or interests of the pursuer and the original defender, as the husband of the pursuer, by the law of England, in the estate of Overton; and were these rights or interests, or either of them, saleable by them or either of them, and on what conditions? (5) On the conveyance of the estate, as set forth in par. 14 herein, what were the original defender's right and interest by the law of England in the price thereof; and did such right and interest in the price pass to the original defender by the said conveyance or by his *jus mariti*? (6) Whether under the trusts of the indenture set out in par. 15 herein the pursuer is entitled absolutely to the said sum of £5500, she having survived her husband, or whether she is otherwise entitled to it as a chose in action not reduced into possession by the husband during his coverture?"

The opinion of the consulted Court was given by Mr Justice Kay, and was to this effect—"This Court is of opinion that at the date of the marriage of the pursuer to the original defender, namely, the 24th March 1877, no valid or binding contract of sale of Overton in the said special case mentioned had been entered into by or on behalf of the pursuer as vendor and Lord Boyne or his trustees as purchasers; and that after the said marriage the said estate of Overton belonged to the pursuer in fee-simple, subject to a freehold estate of the original defender therein during the continuance of the coverture, and that those rights and interests were saleable by them, as to the original defender's estate, without the concurrence of the pursuer, and as to the pursuer's estate, only with the concurrence of the original defender in an acknowledged deed, and under the conditions imposed by the Statute 3 and 4 Will. IV. cap. 74, and the rules thereunder: And that on the conveyance of the estate, as set forth in paragraph 14 of the said special case, the original defender by the law of England became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by the said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti*; and that under the trusts of the indenture, set forth in paragraph 15 of the said special case, the pursuer is not entitled by the law of England to the sum of five thousand five hundred pounds therein also mentioned, either as having survived the original defender, or as a chose in action not reduced into possession by the original defender during his coverture." [*Note.*—To this "Opinion" there was appended an "Advising," in which Mr Justice Kay stated his views at greater length; and certain passages from the "Advising" are quoted by Lord Fraser in his opinion as from the "Opinion" of Justice Kay, but in the Inner House the Judges considered that they should confine their attention strictly to the "Opinion."]

The case having been remitted to the Outer House, the Lord Ordinary on 20th October 1888 pronounced the following interlocutor:—"Finds that the domicile of the deceased Charles Welch Tennent was at the date of his marriage on 24th March 1877, and continued to be till his death, in Scotland: Finds that the pursuer his wife acquired on her marriage the domicile of her husband: Finds that the rights of parties as to the price of the Overton estate, so far as paid to the husband, and of the £5500 now held in trust, must be de-

termined according to the law of Scotland: Further, allows to the defender a proof of the averment contained in the 8th statement of facts by him, and to the pursuer a conjunct probation: Appoints the proof to be led before the Lord Ordinary on a day to be afterwards fixed.

"*Opinion.*—The law of England was invoked in this action in order to ascertain what was the character, as heritable or moveable, of certain English property which at the date of the marriage belonged to the pursuer.

"By a series of decisions it has been determined that the character of the subject, as heritable or moveable, shall be ascertained according to the law of the place where it is situated—*Egerton* v. *Forbes*, 27th November 1812, F.C.; *Newlands* v. *Chalmers' Trustees*, 22nd November 1832, 11 S. 65; *Clarke* v. *Newmarsh*, 16th February 1836, 14 S. 488; *Downie* v. *Christie and Others*, 14th July 1866, 4 Macph. 1067. It was upon this footing that the case was sent for the opinion of the Court of Chancery, and that has now been returned. Mr Justice Kay has held that the Overton estate was converted into personalty.

"Then comes the question what law shall determine as to the right to such personal estate. The late Charles Welch Tennent and the pursuer of this action were domiciled in Scotland, and the contention on the part of the pursuer is that her rights must be determined according to Scots law. If the English property had remained unconverted, then the interests of the husband and wife in it would have been determined by the law of the *situs;* but as soon as it is changed into personalty the law of the domicile steps in and declares the rights of the spouses in it. Mr Justice Kay in his opinion assumes this doctrine as correct. 'Supposing the parties to have been domiciled in England, it would follow from the mere fact of such conversion that the husband by his marital rights would become entitled at once to whatever interest the wife might have in such personal property.' With regard to the £5500 held in trust he expresses himself as follows:—'I am of opinion that under the circumstances in this case the £5500 cannot be treated as a chose in action to which the wife is entitled, but that if the domicile of the husband and wife had been English the whole would now belong to the executor of the husband.' But if the domicile of the husband and wife were not English but Scottish, then the opinion of the learned Judge evidently is that resort must be had to the Scots law to ascertain the rights of the parties. There can be no doubt that the operation of the *jus mariti* is regulated by the law of the domicile. Lord Glenlee in the case of *Newlands* v. *Chalmers' Trustees*, November 22, 1832, 11 S. 65, stated the rule as follows:—'The English lawyers having given an opinion that the right was vested by the law of England, then we held that it transmitted *jure mariti* by the law of Scotland. As to the effects of the *jus mariti* therefore that judgment—*Egerton* v. *Forbes*, November 27, 1812, F.C.—settles that it is the law of Scotland which rules between husband and wife if there domiciled. But again, on the other hand, it is the law of the country where the subject is situated that must regulate the character of the subject as heritable or moveable. . . . By the law of Scotland bonds bearing interest are held to to be heritable, and this has only been relaxed as to succession by positive statute; but by the law of Jamaica they are held strictly moveable. Although therefore the law of Scotland regulates the *jus mariti*, yet we must go to the *lex rei sitæ* to ascertain what is heritable and what is moveable.' And again, Lord Mackenzie, in *Clarke* v. *Newmarsh*, February 16, 1836, 14 S. 488, said—'It is enough for the law of Scotland if the subject be moveable and vests as such in the wife. That being the case, the law of Scotland immediately applies to the effect of bringing it under the *jus mariti*. I decided the case of *Newlands* on this principle, and I perceive that it was on this precise ground that Lord Glenlee gave his opinion when concurring with the Inner House in adhering to my judgment. The English law is to be referred to for the purpose of determining whether the character of a particular subject was heritable or moveable, but so soon as that is fixed, the law of Scotland decides what is the right of a husband under a Scottish contract of marriage in moveable effects which have accrued during the marriage to his wife.' In a subsequent case these principles were held settled. The property in dispute was English mortgages, which if secured over property in Scotland would have been considered heritable, but being by the English law moveable, it was decided that they were in all respects to be regulated according to the law applicable to moveables in settling the rights of widow, heir, and executor in this country—*Downie* v. *Christie and Others*, July 14, 1866, 4 Macph. 1067.

"Therefore, dealing with this case as one to which the Scottish law applies, then the husband's *jus mariti* carried the price of the Overton property, including the £5500. But granting that the pursuer, the widow, maintains two propositions—first, that a wife who converts her heritable estate into moveable is not presumed thereby to intend anything more than to perform an act of administration, and is assumed to be waiting for another investment of a heritable character; far less is she presumed to convert it into moveables so as to fall under the *jus mariti*. The money is regarded as the legal surrogate of the heritable estate, even although the husband has manipulated it and embarked it in his business. To this effect there are many decisions, the whole of which will be found collected in Fraser on Husband and Wife, i. p. 703, *et seq.*, and *Cuthill* v. *Burns*, March 20, 1862, 24 D. 849. But these decisions must be taken with a qualification which is thus stated by Erskine, ii. 2, 16—'Thus also a sum belonging to the wife not falling under the *jus mariti*, *e.g.*, a bond bearing interest, continues heritable as to the husband, notwithstanding a demand of payment from the debtor. Nay, though the wife should not only demand but actually recover payment, there is no alteration in the heritable nature of the bond *quoad maritum*, unless a presumption shall arise from her allowing the husband to apply the sum to his own use, or from other circumstances, that she truly intended a donation to him.' The defender has a special averment upon record that the price of the Overton estate, and of the leasehold property at Grove End Road, St John's Wood, London, were not invested by the husband, 'or otherwise applied to his own purposes.

They were lodged in bank and afterwards entirely spent by the pursuer and the said defender, or by the said defender with the knowledge and consent of the pursuer, upon their joint establishment and for their joint uses and purposes. The said prices form no part of the said defender's executry estate.' If this be true then it would bring the case within the qualification stated by Erskine.

"Then there arises, secondly, another point. Erskine says that in such circumstances it would be considered a donation. If so, is it a donation revocable, and has it been revoked by the deed of revocation mentioned in the fifth article of the condescendence? Now it has been determined that if a wife allow the rents and profits of her separate estate to be employed in maintaining the family she is debarred from insisting for repayment. Such a claim was made after the husband's death, and the judgment of the Court met it in a very specific manner. It was found that, as to any portions of the annual proceeds and profits of the wife's separate estate invested for her separate use in her own name, which the husband was from time to time allowed by her to draw, it was incumbent on the wife, by whom no demand was proved to have been made against the husband himself, to prove that the same or corresponding sums were applied by him to increase his own estates and funds, or to some specific purposes of his own, and were not applied and consumed, from time to time as they were drawn, in the expenses of the family or other occasional purposes, and that in the event of the wife failing in such proof the legal presumption as to portions of the annual proceeds of her estate so received by the husband was that they were used and consumed by the husband, with the wife's sanction and concurrence, for objects and purposes of the spouses known to her, and that she obtained the benefit or enjoyment of such use and consumption during the marriage; and that in the event of the wife failing to prove all this there was no ground in law on which she could insist in her action against the representatives of her husband—*Allan or Hutchison* v. *Hutchison's Trustees*, February 1, 1843, 5 D. 469; and see *Williams* v. *Williams*, November 15, 1844, 7 D. 112, opinion of Lord Cuninghame.

"The wife did not go on with her proof in the case of *Allan or Hutchison*, and the case must be taken as deciding the general point, that where a wife's money has been applied in family expenditure in the benefit of which she has participated, it must be held to have been so done with her sanction and concurrence, and all right of revocation on the ground of donation is barred. This view of the decision was accepted in the House of Lords in the subsequent case of *Edward* v. *Cheyne*, L.R., 13 App. Cas. 393, in which Lord Watson is found expressing himself as follows—'The Second Division decided that it was incumbent upon the widow to prove that the money was applied by the husband to increase his own funds, and was not used for family expenditure. Their Lordships also decided that if the widow failed in such proof effect must be given to the presumption that all sums received by him had been used and consumed with her sanction and concurrence.' This case of *Edward* v. *Cheyne* (reported in 13 R. p. 1209, under the name of *Baxter's Executor* v. *Baxter's Trustees*, and in the House of Lords under the name of *Edward* v. *Cheyne*, L.R., 13 App. Cas. 385, and in 25 S.L.R. 424) was a case which presented not two questions but only one, and in this respect it differs from the present case. The claim for accounting was made not by the wife against the husband's representatives but by the wife's executor, and the only question there was one of fact, viz., whether or not the wife did gift or donate her separate estate to her husband. By the law of Scotland she is entitled to deal with that separate estate as she thinks fit, and she may give the whole of it to a stranger on the streets or to her husband without consideration, and that gift will remain irrevocable by her representatives. The only person who can revoke it from the husband (though not from a stranger donee) is herself, and if she dies without doing so her representatives have no ground of complaint and no right of action as against the stranger donee or the husband, and they cannot exercise any right of revocation. Accordingly, the case was treated in the Court of Session as one of fact—as to whether she did donate. There was no second question as to whether, supposing there was a donation, there was a revocation. In the House of Lords the learned Judges, besides so treating the case, also referred largely to the English law as to the propriety of upholding such gifts, which law, however, is widely distinguishable from the law of Scotland, inasmuch as a gift once granted is not by English law subject to revocation by the donor. For example, the statement by Lord Macnaghten of the English law cannot be accepted as the law of Scotland when he says that 'where the circumstances are such that the wife's consent or acquiescence may fairly be presumed, the presumption arises immediately on each receipt' [of the wife's income] 'by the husband, and bars all claim on the part of the wife or her representatives. To displace the rule it is not sufficient to show that the wife's separate income has accumulated in the husband's hands and remains unspent.' On the other hand, the law of Scotland is, that if the wife's money can be traced and earmarked, and has not been spent in carrying on the household, it still may be reclaimed by her—though not by her representatives—as a donation. The last illustration of this doctrine by decision was *Cuthill* v. *Burns*, already referred to. This rule bears very materially on the right as to the £5500 now held in trust, and which was the price of the wife's real estate.

"It is necessary, before any operative judgment can be given, to ascertain the facts as to how the money was spent, for it is admitted that it was received by the late Charles Welch Tennent. The £5500 is still extant, and judgment could now be given in regard to it, finding that it was or was not a donation revocable and revoked. But it is desirable to keep the whole case together so that one interlocutor will suffice."

The defender having stated that he did not intend to lead any proof as allowed by the above interlocutor, the Lord Ordinary (Fraser) on 10th November 1888 pronounced the following interlocutor:—"First, Decerns against the defender for payment of the sum of £18,000

sterling; and secondly, finds that the sum of £5500 sterling, which was part of the price of the heritable estate of Overton, formerly belonging to the pursuer, and which is now held in trust to meet a liferent annuity chargeable on the said heritable estate, is, subject to the burden of said annuity, the property of the pursuer, and upon the said annuity ceasing to be chargeable, the pursuer is entitled to payment of the said sum, and all interest accruing thereon or income derivable therefrom, from the 8th day of October 1884, being the date of the death of the pursuer's husband Charles Welch Tennent, after payment of the said annuity, and decerns: Finds the defender liable in expenses subsequent to 16th December 1885, &c.

"*Opinion.*—The Lord Ordinary has explained, in the opinion which he delivered on 20th October 1888, the grounds upon which he holds that the rights of the parties in this cause as to the £18,000 and £5500 concluded for must be determined according to the law of Scotland. A proof was allowed, however, to the defender to show that the £18,000, of which repetition was asked, was spent in household and family expenditure, and if this had been established the Lord Ordinary was prepared to find that that £18,000 could not be claimed by the pursuer. It has, however, been intimated to the Lord Ordinary by the defender that he is unable to undertake such a proof. It is admitted upon the record that the original defender Charles Welch Tennent did receive the said sum of £18,000, part of the price of the estate of Overton, which belonged to the pursuer, but it is denied that that sum was retained by him and forms part of his estate; and it is averred that that sum never was invested by said defender, but was lodged in bank, and afterwards spent by the spouses, or by Welch Tennent, with the knowledge and consent of the pursuer, on their joint establishment. It was this latter averment that was sent to proof, and which the defender now admits he cannot prove. The admission that the money was received by Charles Welch Tennent, the husband, throws the *onus* of proof upon him so as to show to the Court in what way he disposed of the money.

"The £18,000 being thus traced into the husband's possession, and the right to that money being to be determined by the law of Scotland according to the interlocutor already pronounced, the question comes to be, whether it fell under the *jus mariti?* It is quite settled, according to Scottish law, that the transmutation of the wife's heritage into money does not transfer to the husband *jure mariti* the price into which the heritage has been transmuted; and further, if such were the legal result of such a change from heritage to personality, the wife was entitled to revoke the gift so made in favour of the husband, and this revocation she has in the present case done by express deed.

"There is thus, therefore, no defence against the wife's demand for payment of this £18,000. But, according to Mr Justice Kay, it is the law of England that 'after the marriage the estate of Overton belonged to Mrs Tennent in fee-simple, subject to a freehold estate of the husband therein during the continuance of the coverture. Those rights and interests were saleable by them, as to the husband's estate without the concurrence of the wife, as to the wife's estate only with the concurrence of the husband in an acknowledged deed.' This legal right of the husband, called a 'freehold estate,' is more clearly explained in the record by the defender in these words—'The pursuer being, at the date of her marriage with the said defender, seized of the said manor of Overton and other hereditaments for an estate of inheritance in fee-simple in possession, and no settlement of the pursuer's estate having been executed prior to the pursuer's marriage to the said defender, by the law of England the said defender, on his marriage with the pursuer, *ipso facto* acquired a freehold interest in the said manor of Overton and hereditaments foresaid which entitled him to the rents and profits thereof during the joint lives of himself and wife, and which, in the event of there being issue of the marriage who could inherit, entitled him to such rents and profits during the remainder of his life. This freehold interest it was competent for him to alienate at pleasure.' This is a kind of right similar to the courtesy of the law of Scotland, with this difference, that instead of commencing at the wife's death it commences at the date of the marriage; and this right the Lord Ordinary is of opinion must be given effect to, and it is given effect to by the interlocutor which he has pronounced whereby no interest is made payable to the pursuer upon the £18,000. Charles Welch Tennent obtained the money and used it for his own purposes, in consequence of his freehold right thus explained, and apparently upon this ground no interest is asked upon the £18,000. If he was entitled to the rents and profits of the estate before it was sold, he was entitled to the interest upon the price during his life. No interest has been asked by the pursuer upon this money since Charles Welch Tennent's death in 1884, and the Lord Ordinary is therefore not called upon to pronounce any judgment as to whether such a claim could be effectually made.

"The next point has reference to the sum of £5500 which has been set apart and is now held in trust to answer an annuity payable out of the estate of Overton. Mr Justice Kay says in regard to this sum—'The trusts of this were declared by a deed dated 24th July 1877 to be out of the income to pay the annuity of £200 and meet the costs of the trustees, and the residue of the income to Mr and Mrs Tennent, or their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time, and for the time being determined or regulated; and after the death of the annuitant the capital was to be applied in payment of succession duty and costs, and the residue was to be in trust for Mr and Mrs Tennent, their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time, and for the time being determined or regulated. Mrs Tennent having survived her husband, and the annuitant having also survived him, the question is, whether she is entitled to this amount, either under the provisions of this deed, or as a chose in action, not reduced into possession by the husband in his lifetime?' He examines this question with reference to the law of England, and he states his opinion—'That under the circumstances in this case the £5500 cannot be treated as a chose in action to which the wife is entitled, but that if

the domicile of the husband and wife had been English, the whole would now belong to the executor of the husband.'

"The domicile of the husband and the wife being, however, Scotland, and the law of the domicile being that which must be applied here, this sum of £5500 must be held for the pursuer. It never was mingled amongst the husband's funds, but was set apart and earmarked, and was part of the price of her heritable estate, and was therefore, according to the authorities referred to by the Lord Ordinary in his former opinion, the property of the wife."

The defender reclaimed, and argued—1. The doctrine of surrogation did not apply to the circumstances of this case. Formerly a wife could not sell heritage in England, and now she could only sell it under certain conditions to which the sale was subject. The result was that the price of the estate of Overton never became moveable so as to be affected by the *jus mariti*, but passed to the original defender by the law of England, and in accordance with the opinion of the consulted Court. The decision of the Lord Ordinary was not justified by the cases on which it rested, for in *Clarke*, *Newlands*, &c., it was laid down that it was the *lex rei sitæ* which decided whether property was moveable or heritable. The decision in *Hall's* case was not of great authority. It seemed to be repugnant to the above-mentioned cases, and had been criticised by Lord Fraser in one or two passages of his book on Husband and Wife—Fraser on Husband and Wife, i. 703, 743. The argument of the pursuer landed her in this dilemma—If the price of Overton was *surrogatum*, it was heritable, and passed to the husband under the English law; if it was not *surrogatum* it passed to the husband *jure mariti*. The doctrine of surrogation was based on the presumption that where a married woman disposed of her heritage she did it, not with the intention of parting with the property, but as a change of investment. The intention to convert might be gathered from facts and circumstances—*Rollo* v. *Forrest*, 1685, M. 5795. Here that presumption was overcome by the terms of the affidavit taken by the pursuer before the commissioners, which showed that the pursuer did intend to convert. 2. There was no donation here. The property was heritable, and the right of parties thus fell to be determined by the law of England, by which such a donation was not revocable—Fraser on Husband and Wife, 1322; Burge's Comm. i. 639. Suppose the case were to be decided by the Scots law, donation was not to be implied from the fact of a spouse selling her heritage. If it were, the rule would apply to sales by husband as well as by the wife, because such a sale increased the goods in communion; but such a view was opposed to the decision in the case of *Lees* v. *Wilson*, February 17, 1808, Hume, 191. 3. Suppose the Court to be against the defender on the main argument, the value of the freehold estate of the husband in the estate of Overton should be calculated as at the date of the sale, and should along with the expenses of the sale be deducted from sum sued for. The interlocutor of the Lord Ordinary should also be altered so far as directed against the present defender personally.

Argued for the pursuer and respondent—1. The estate of Overton was converted into money, and the rights of parties with regard to it were to be governed by Scots law, being the law of the domicile—see cases quoted in Lord Ordinary's note. By Scots law the price of the estate was set aside as a *surrogatum* for the wife in place of the estate which could be revoked as a donation even if it passed into the hands of the husband—Fraser on Husband and Wife, i. 703; *M'Lennan* v. *Hathorn*, 1758, M. 6098; *Hall's Trustees* v. *Hall*, July 13, 1854, 16 D. 1057; *Cuthill* v. *Burns*, March 20, 1862, 24 D. 849. The answers of the English Court to questions 4 and 5 were not obligatory on the Scotch Court, as they proceeded on the assumption that the English law applied, which it did not. The effect of the sale was clearly separable from the transaction of sale itself, and was to be decided by Scots law. The transaction of sale was complete when the deed was executed and delivered. The defender argued that if the price was *surrogatum* it was heritable, and therefore must be dealt with according to English law. That is, he first employed the law of the domicile to attach a certain character to the fund, and then applied the *lex rei sitæ* as the law applying in consequence of that character. The doctrine of surrogation was based on the presumption that a wife by selling heritage did not intend to convert. That presumption was not rebutted here. The certificate founded on by the defender did not go far enough, because the pursuer may quite well have relied on her rights under Scots law. 2. Further, if it was established that the wife intended to convert, that implied a donation, which might be and had been revoked. The only answer of the defender on this branch of the argument was an appeal to the doubtful law as to donations *inter virum et uxorem* in immovable subjects. It was difficult to see how English law could bear in any way upon the capacity of Scotch spouses to donate—Barr's International Law (Gillespie), 404, sec. 97. 3. The value of the freehold estate of the original defender had been ascertained by his death, and it would be absurd to enter upon an actuarial calculation of what it was at the date of the sale; besides, the valuation would have depended on such circumstances as the health of the defender, which were not ascertainable now. He had elected to keep the fund in his hands, and pay himself the interest thereon, and his interest had thereby been satisfied. The pursuer did not object to the expenses of the sale being deducted from the sum sued for, nor that the interlocutor should be altered so far as directed against the present defender personally.

At advising—

Lord Adam—The pursuer Mrs Tennent was married to the late Mr Welch Tennent on the 24th March 1877.

At the date of the marriage Mr Welch Tennent was a domiciled Scotsman. No marriage-contract was entered into between the spouses.

At the date of the marriage Mrs Tennent was possessed of a large amount of property, both heritable and moveable, the heritable property being situated partly in England and partly in Scotland. In particular, she was possessed of the estate of Overton in the county of Salop, in England.

On the 24th July 1877 Mrs Tennent, with concurrence of her husband, conveyed this estate to the marriage-contract trustees of Lord Boyne. The price was £23,500, and of this sum £18,000 was received by Mr Tennent, and the balance of £5500 was vested in trustees to meet a liferent annuity charged on the estate. This sum still remains in the hands of the trustees.

On the 21st December 1882 Mrs Tennent executed a deed of revocation, by which she revoked all donations, provisions, deeds, writings, or things whatsoever made, executed, or done by her in favour of her husband.

On 1st June 1883 she raised this action against her husband, by which, in so far as now insisted in, she seeks (1) to recover payment of the said sum of £18,000; and (2) as regards the said sum of £5500, to have it found and declared that it is her property, and that, on the foresaid liferent annuity ceasing, she is entitled to payment of it.

Mr Welch Tennent died on 8th October 1884, but the action has been transferred against the present defender, who is his executor and general disponee.

It appears that prior to the conveyance of the estate of Overton, as before mentioned, and prior to the marriage of Mr and Mrs Tennent, certain negotiations had been going on with Lord Boyne as to the purchase by him of the estate, and it was pleaded by the defender, in answer to the pursuer's claims, that these negotiations had resulted in a binding contract of sale, and that—although the sale had not been carried into effect by actual conveyance—the effect of this contract was to convert the heritable estate into moveable—that accordingly the price being personalty at the date of the marriage by the law of England passed *jure mariti* to her husband. This and various other questions as to the respective rights of the parties according to the law of England in the estate of Overton and the price thereof having thus arisen, a case for the opinion of the High Court of Justice in England was prepared, and laid before that Court in terms of the Law Ascertainment Act (22 and 23 Vict. cap. 23), for the determination of these questions. We have now that opinion before us, which is conclusive on all questions of English law at issue between the parties.

That opinion is short, and I may read it—"This Court is of opinion that at the date of the marriage of the pursuer to the original defender, namely, the 24th March 1877, no valid or binding contract of sale of Overton in the said special case mentioned had been entered into by or on behalf of the pursuer as vendor, and Lord Boyne or his trustees as purchasers, and that after the said marriage the said estate of Overton belonged to the pursuer in fee-simple, subject to a freehold estate of the original defender therein during the continuance of the coverture, and that those rights and interests were saleable by them, as to the original defender's estate, without the concurrence of the pursuer, and as to the pursuer's estate, only with the concurrence of the original defender in an acknowledged deed, and under the conditions imposed by the Statute 3 and 4 Will. IV., cap. 74, and the rules thereunder: And that on the conveyance of the estate, as set forth in paragraph 14 of the said special case, the original defender by the law of England became absolutely entitled to the price thereof, and that such right and interest in the price passed to him by said conveyance, and by the refusal of the pursuer, on her separate examination, of any provision, rather than by any *jus mariti;* and that under the trusts of the indenture, set forth in paragraph 15 of the said special case, the pursuer is not entitled by the law of England to the sum of five thousand five hundred pounds therein also mentioned, either as having survived the original defender, or as a chose in action not reduced into possession by the original defender during his coverture."

The first thing accordingly which this opinion establishes is, that the estate of Overton had not been converted into personalty at the date of the marriage, but that it then belonged to Mrs Tennent in fee-simple, subject to a freehold estate of the husband therein during the continuance of the coverture—that is, as we should say, that the husband was entitled to the rents during the subsistence of the marriage. Had the estate been personalty at the date of the marriage there would seem to be no room for doubt that, whether by the law of Scotland or of England, the price would have belonged to Mr Welch Tennent.

But that not being so, and the estate being heritable estate in the person of the wife at the date of the marriage, the question arises, whether the price of the estate on its sale after the marriage belonged to the husband or the wife, and that question appears to me to depend for its solution entirely upon this other question, whether the answer is to be sought in the law of England or in the law of Scotland. If the question is to be ruled by the law of England, there can be no doubt as to the answer, because, in the opinion of the High Court of Justice, by the conveyance of the estate Mr Welch Tennent became by the law of England absolutely entitled to the price.

On the other hand, if the law of Scotland is to determine the matter, I think that it is conclusively settled by the authorities referred to by the Lord Ordinary that where a wife sells her heritable estate the price received is regarded as the *surrogatum* of the heritable estate, and does not fall within the *jus mariti* of the husband, but remains the property of the wife, and indeed I did not understand that this was seriously disputed by the defender.

The question therefore is, whether the rights of the husband and wife in this fund are to be regulated by the law of Scotland or by the law of England. That the fund is personal estate by the laws of both countries I do not think is disputed, because, as I understand the opinion, it is because it is personal estate that the High Court of Justice holds that by the law of England it belongs to the defender. But if it is personal estate, then it is the law of the domicile of the spouses which rules the matter. I think that this is quite settled by the authorities to which the Lord Ordinary refers, and which I need not again quote.

The domicile of the spouses in this case being Scotch, the result is that as soon as this moveable fund came into existence the right to it fell to be regulated by the law of Scotland, and it being the *surrogatum* of the wife's heritable estate did not go to her husband, but remained her own property.

Nor do I see anything in the circumstances attending the sale to take the case out of the ordinary rule. The sale was simply a sale by a married woman of her heritable estate, with concurrence of her husband, under the authority of the Act 3 and 4 Will. IV. c. 74. No doubt there are provisions in that Act by means of which Mrs Tennent might, had she chosen, have protected herself to a greater or less extent from the operation of the law of England, by which the price of the estate, as a moveable fund, would become the property of her husband. She did not avail herself of these provisions, and had there been any question in this case as to whether she intended that the price should go to her husband that circumstance no doubt might have been material. But as all gifts between husband and wife are revocable by the law of Scotland, it is of no materiality whether she intended to give the price to her husband or not seeing that she has competently revoked all gifts.

The defender further pleaded that the £18,000, which it is admitted that Mr Welch Tennent had received, had not been applied to Mr Welch Tennent's own uses and purposes, but had been applied, with the pursuer's consent, to the joint uses and purposes of himself and his wife; but the defender intimated that he was not prepared to undertake the proof thus allowed. That being so, it must be held that the money was applied to Mr Welch Tennent's own uses and purposes.

But the defender further pleaded that it appeared from the opinion of the High Court that the sale of the estate was a sale of the joint rights of husband and wife in the estate, and that Mr Welch Tennent would have been entitled to have the price received for it apportioned according to the value of their respective rights, and I understand that he proposes that an inquiry should now be made as to what would or might have been the actuarial value put upon Mr Welch Tennent's rights as at the date of the sale, and to retain this sum out of the price as his share thereof.

Had this claim been made at the time I think it probably would have been difficult to resist it. But I think that such an inquiry now is quite out of the question. Mr Welch Tennent's right was a right to the rents of the estate during the subsistence of the marriage. He received the whole available price of the estate, and appropriated the whole interest or income of it to his own uses during the subsistence of the marriage.

The defender is not asked to repay any part of that interest or income. I agree with the Lord Ordinary in thinking that the price of the estate must be considered as coming in place of the estate itself, and that the interest or income of the price which Mr Welch Tennent received must be held as equivalent to the rents to which he was previously entitled.

I am of opinion therefore that the interlocutor of the Lord Ordinary should be in substance adhered to. There is, however, a small matter apparently not brought under his Lordship's notice, in respect to which I think it should be slightly altered. He has decerned against the defender for the full sum of £18,000, but I think that there should be deducted from this sum the expenses of the sale, and any other charges of a similar kind which formed proper deductions from the price received by him.

The LORD PRESIDENT, LORD MURE, and LORD SHAND concurred.

The Court varied the first finding of the Lord Ordinary in so far as he had decerned against the defender for the full sum of £18,000, and both findings in so far as directed against the defender personally; decerned against the defender as executor and general disponee of Charles Welch Tennent for payment of £18,000, subject to a deduction of the sums which had been paid by the said Charles Welch Tennent in connection with the sale of Overton; *quoad ultra* adhered.

Counsel for the Pursuer and Respondent—Asher, Q.C.—Low. Agent—Peter Douglas, S.S.C.

Counsel for the Defender and Reclaimer—Gloag—H. Johnston. Agents—Hagart & Burn Murdoch, W.S.

Friday, June 28.

FIRST DIVISION.

HOGARTH AND ANOTHER (FOTHERINGHAM'S TRUSTEES) *v.* FOTHERINGHAM.

Husband and Wife—Antenuptial Contract—Exclusion of Jus Mariti—Succession—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 6.

The Married Women's Property (Scotland) Act, by its 6th section, gives to the husband of any woman who may die domiciled in Scotland the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland.

By antenuptial contract a woman conveyed her whole estate to trustees for behoof of herself, whom failing for behoof of her own representatives, or other parties that might be thereafter named by her, excluding her husband's *jus mariti* and right of administration, which were also expressly renounced by the husband in the deed. Some years after the marriage she died, domiciled in Scotland, survived by her husband and certain issue of the marriage, and possessed of certain moveable estate. *Held*—following *Poë* v. *Paterson*, 10 R. (H. of L.) 73—that the husband was entitled to one-third of the said moveable estate.

On 20th March 1877 John Fotheringham, farmer, Orrock, was married to Isabella Hogarth, Kirkcaldy. In contemplation of the marriage an antenuptial marriage-contract was executed between the intended spouses, which dealt solely with the wife's estate. By this deed she conveyed her whole estate, *acquisita* and *acquirenda*, to trustees, and she directed them to hold the same for behoof (1) of herself, whom failing (2) of her own representatives, or other parties that might be thereafter named by her. The husband's *jus mariti* and