reciprocally bound to support each other. Lord Moncreiff observed that "texts of the civil law are not indeed authorities but illustrations, and very important illustrations." I agree with Lord Young in thinking that the rules of the civil law in the age of Justinian furnish a very unsafe guide to the law of Scotland touching the personal relations of parents and their children, whether legitimate or illegitimate. The two systems of jurisprudence differ widely in regard to family relations between the parent and child, and the principles upon which these ought to rest; and I am not prepared to accept in cases like this any canon of the Roman law which is not clearly shown to have been adopted as part of the law of Scotland.

The appellant relied upon seven decisions by the Sheriff or his Substitute in five different counties between 1851 and 1853, finding an adult self-supporting bastard liable in aliment to the natural mother. These were submitted to the Judges in *Samson* v. *Davie*, but were not noticed by them, obviously because decisions of the inferior courts do not constitute the law. It might be otherwise. Upon the faith of them rights had been created which it would be inexpedient to disturb. But it is idle to suggest that any Scotch bastard has been begotten and born since 1851 in reliance upon his future liability to support his mother. Being of opinion that there is not in the law of Scotland sufficient trustworthy authority to support the Judge in the obligation which was affirmed in *Samson* v. *Davie*, I think the interlocutors appealed from must be affirmed and the appeal dismissed, and I move accordingly.

The EARL OF SELBORNE, LORD MORRIS, and LORD MACNAGHTEN concurred.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellant — Rhind — Baxter—M'Ilwraith. Agent- A. Beveridge, for Wm. Officer, S.S.C.

Counsel for the Respondents — Cook. Agents—Deacon, Gibson, & Medcalf, for Simpson & Marwick, W.S.

Tuesday, July 28.

(Before Lords Herschell, Watson, and Morris.)

WELCH *v.* TENNENT.

Ante, June 28, 1889, 26 S.L.R. 600, and 16 R. 876.)

Husband and Wife — Foreign — Heritable Estate of Wife in England — Sale of Wife's Estate with her Consent — Husband's Right to Proceeds—Jus Mariti—Donatio inter virum et uxorem—Surrogatum—Act for the Abolition of Fines and Recoveries (3 *and* 4 *Will. IV. c.* 74).

The wife of a domiciled Scotsman, with concurrence of her husband, sold a heritable estate belonging to her in England and acknowledged the conveyance before two commissioners appointed under the Act for the Abolition of Fines and Recoveries (3 and 4 Will. IV. c. 74), and "declared that she did intend to give up her interest in the said estate without any provision made for her in lieu thereof." Her husband received the price, and applied it to his own purposes. The spouses subsequently separated by mutual consent, and the wife executed a deed of revocation of all her donations and provisions in favour of her husband. She then sued him for declarator that the amount in his hands was a *surrogatum* for her heritage and not subject to the *jus mariti*.

Held (*rev.* the decision of the First Division) that the price of the wife's interest in the estate did not belong to her as a *surrogatum* for her heritable estate.

This case is reported *ante*, June 28, 1889, 26 S.L.R. 600, and 16 R. 876.

The defender Ralph Dalyell Welch appealed.

At delivering judgment—

LORD HERSCHELL — The parties were married in the year 1877 without any marriage-contract, and the domicile of the husband being Scottish, it was not disputed that this was the matrimonial domicile, and that all questions as to the right to moveables accruing to either of the spouses fall to be determined according to the law of Scotland. The respondent was at the time of her marriage the owner of a freehold estate in England called Overton. She was also possessed of a leasehold house situated there. These freehold and leasehold properties were both sold shortly after the marriage. The £950, as to which the declaration I have mentioned was claimed, was the purchase money of the leasehold house, and as the claim in respect of it was abandoned, it need not be further referred to. The £18,000 was part of the price of the freehold estate which was received by the husband on the execution of the conveyance in July 1877. The balance of the purchase money, £5500, was invested as security for the payment of an annuity of £200 a-year which was charged on the estate. It is not questioned that the £18,000 was received by the husband with the full assent of his wife, but the circumstances under which it was received and the precise nature of the transaction will be hereafter considered. Mrs Tennent on the 28th of December 1882 revoked all donations in favour of her husband, and this action was afterwards commenced.

There can be no doubt, as I have said, that the rights of the spouses as regards moveable property must, in the circumstances of this case, be regulated by the law of Scotland, but it is equally clear that their rights in relation to heritable estate are governed by the law of the place where it was situate. This is not denied by the respondent, but it is said that as soon as

the heritable estate in England became by sale converted into moveables the Scottish law became applicable. The case of the pursuer was put in this way. It was admitted that all moveables accrued by the law of Scotland to the husband by virtue of the *jus mariti*, but it was said that there is an exception to this in the case of the proceeds of the heritable estate of the wife, that they do not pass to the husband but remain the property of the wife, and that if she permits her husband to receive and spend them, this is in the nature of a donation which may be at any time recalled by her. It follows, it was argued, that as soon as the estate in England was sold, the proceeds, though they would according to the law of England be the husband's, became subject to the law of Scotland, and so did not pass to him. It is, I think, established that moveables which represent the heritable estate of the wife are not by the law of Scotland subject to the *jus mariti*, and where the matrimonial rights are governed by that law, I think this would be the case, even though the heritable estate of the wife were situate out of Scotland. But it is manifest that the *lex loci rei sitæ* must determine whether the estate be heritable estate of the wife's during coverture, and what is the nature and extent of her right in respect thereof. It becomes necessary, therefore, to inquire what was the effect of the marriage according to the law of England upon the heritable estate of which the wife was then possessed. The husband became immediately possessed of an estate therein during their joint lives, and if there was issue of the marriage, for the term of his own life, though he survived his wife. The wife could not during her husband's lifetime convey her interest in the property to any other person except with the concurrence of the husband, and by a deed acknowledged in the manner prescribed by the 3 and 4 Will. IV. c. 74. She could not during coverture dispose of it by will, and if she predeceased her husband, and there were issue of the marriage, the estate would on the death of the husband descend to such issue.

It is therefore, in my opinion, not accurate to treat the purchase money of the Overton estate as the proceeds of a heritable estate belonging to the wife, and as *surrogatum* for that estate. It was an estate in which both spouses possessed undetermined interests, the extent of their respective interests depending on whether there was issue of the marriage, and which of them survived the other. It was heritable estate of the husband as well as of the wife, and could not be disposed of to a purchaser without the concurrence of both of them. The purchase money of the estate in which they were thus interested cannot, in my opinion, truly be regarded as the price of a heritable estate of the wife's, which, according to the law of England, becomes the husband's only by the *jus mariti*, and which, if the law of Scotland be applicable, must be regarded, if the wife permits her husband to retain it, as a donation by her to him. The right of the husband to the proceeds does not flow only from the *jus mariti*. It cannot be dissociated from the real property law of this country, which gave the husband the estate and interest which I have described in the heritable property possessed by his wife at the time of the marriage. The price received from the purchaser represents as much the husband's estate and interest as the wife's. The wife, it is true, was by the sale deprived of the interest which she had in the heritable property, but I do not think that her assent to the entire price being received by her husband, without that provision being made for her which she could have insisted on as the price of her concurrence in the conveyance, can be regarded as a donation. There could have been no sale without the concurrence of the husband, and if he gives that concurrence on the terms that the whole purchase money of the estate in which they both have an interest shall be received by him, I do not think that this can be regarded as a donation of all the purchase money, or even of so much of it as might be found on an actuarial calculation to represent her interest, especially where, as in the present instance, the husband has, in order to complete the sales, entered by the deed of conveyance into an onerous covenant by reason of the charge which existed on the property. But it is perhaps hardly necessary to determine whether the purchase money could be regarded as a donation by the wife to the husband to the extent to which it represented her interest as ascertained on an actuarial calculation, inasmuch as the claim in this action is not to have it ascertained how much of the purchase money received in 1877 represented the interest of the wife in the heritable subject, and to treat so much of the purchase money as should be found to represent that interest as a donation *inter virum et uxorem*, but to treat the entire price of the estate as *surrogatum* for the heritable estate of the pursuer.

For the reasons I have given, I think it is impossible to do so, even allowing the fullest effect to the Scottish law as regulating the matrimonial rights of the parties. I think the difference between the view I have indicated and that of the Court below has probably arisen from the circumstance that the contention mainly urged upon them on behalf of the appellant appears to have been that the purchase money, according to the law of England, became the husband's upon the conveyance; and that their attention was not so definitely directed as your Lordships' has been to the fact that, having regard to the English law of real property, the price could not properly be regarded as representing the heritable estate of the wife, and as *surrogatum*. Therefore I am of opinion that the interlocutors appealed from ought to be reversed, and the defender assoilzied from the conclusions of the summons, and I move your Lordships accordingly.

LORD WATSON and LORD MORRIS concurred.

Their Lordships reversed the interlocutors appealed from.

Counsel for the Appellant—Rigby, Q.C.—M'Laren. Agent—A. Beveridge, for Carment, Wedderburn, & Watson, W.S.

Counsel for the Respondent—The Lord Advocate — Strachan — Moore. Agent—Charles Turner, for John Elder, S.S.C.

COURT OF SESSION.

Thursday, March 19.

OUTER HOUSE.

[Lord Low.

MILLAR (LIQUIDATOR OF THE PROPERTY INVESTMENT COMPANY OF SCOTLAND, LIMITED) *v.* AIKMAN AND OTHERS.

Company—Winding-up—Compensation of Debts.

A shareholder in a property investment company having received from the manager of the company a letter in which he stated that he was willing to hold whatever money might be deposited in his name as paying, so far as its amount might suffice, any calls that might be made upon his shares, deposited certain sums with the company. The deposits could only be uplifted on giving a month's notice. The company having been ordered to be wound up by the Court, he refused to pay a call made prior to but not payable till after the commencement of the winding-up, and a call made by the Court in the winding-up, and claimed to compensate his liability under these calls by the sums at his credit on deposit with the company.

Held that he had no such right of compensation, and was liable in payment of the calls.

Andrew Aikman, leather merchant, Edinburgh, was the holder of ninety-eight shares of £10 each in the Property Investment Company of Scotland, Limited, incorporated under the Companies Acts 1862 and 1867. Upon these shares prior to 1888 £5 had been paid up. On 18th February 1888, after some correspondence between Mr Aikman's firm of A. & D. Aikman and Peter Couper, the manager of the company, as to the terms on which the company would receive deposits from Mr Aikman, Mr Couper wrote to A. & D. Aikman the following letter—"As requested in your letter of yesterday, I beg to state that the rate of interest allowed on a deposit from your firm will be 4½ per cent. on one month's notice, and that I am willing to hold whatever money may be deposited in the name of your firm, or in your Mr Andrew Aikman's name, as paying (so far as its amount may suffice to that end) any calls that may be made upon Mr Andrew Aikman's shares." On 27th February 1888 Andrew Aikman lodged with the company on deposit-receipt, at 4½ per cent. interest, the sum of £500, and received in exchange therefor a deposit-receipt endorsed as follows—"The within deposit to bear interest at 4½ per cent. When the deposit is to be uplifted, one month's previous notice is required to be given." On 11th November 1889 £300 were repaid to account thereof, and on 16th December 1889 £98 were repaid to account thereof, leaving a balance of principal of £102 due thereon. On 13th March 1888 A. & D. Aikman lodged with the company on deposit-receipt, at 4½ per cent. interest, the sum of £200, and received in exchange therefor a deposit-receipt endorsed as follows—"The within deposit to bear interest at 4½ per cent. When the deposit is to be uplifted, one month's previous notice is required to be given. If the deposit, however, is not then to be uplifted, no notice requires to be given, and the deposit will be held to be renewed for a like period." The said sums deposited were treated as ordinary deposits in the books and balance-sheets of the company, and interest at the said rate was paid from time to time on the sums due at Whitsunday and Martinmas half-yearly up to and including the interest due at the term of Whitsunday 1890. In December 1889 another call of £1 per share was paid by Mr Aikman.

On 30th July 1890 a petition was presented by certain shareholders of said company praying that it should be wound up by the Court, and on 13th August 1890 the company was appointed to be wound up by the Court, and Robert Cockburn Millar, C.A., Edinburgh, was appointed liquidator.

At 30th July 1890, the date of the commencement of the winding-up, £6 had been paid up by Mr Aikman on his shares as before mentioned. On 14th July 1890 a call of £1 per share had been made, but this call was not payable till 13th August 1890. On the 27th January 1891 a further call of the £3 remaining uncalled was made by the Court. Mr Aikman having intimated to the liquidator that he intended to withhold payment of these two calls of £1 and £3 in respect that he was entitled to set off against these calls the sums due by the company to him and his firm in respect of their deposits, and he and his firm of A. & D. Aikman having lodged affidavits and claims in the liquidation in which they claimed this right of compensation, the liquidator presented this note in which he prayed the Court "to find and determine that there was no valid agreement between the company and Mr Aikman or A. & D. Aikman (who were called as respondents) such as was alleged in the said affidavits and claims, and that the calls made upon the 98 shares in the said company, belonging to the said Andrew Aikman, and in respect of which he was a contributory, so far as said calls were unpaid, were payable by him to the official liquidator, free from any right of