accompanied by a letter intimating that, on the execution of the document, they were ready to pay the said sum, as well as all expenses connected with the assignation.

"The said Charles Gulland returned to the said Gibson & Spears the said draft assignation unrevised, stating, in the letter returning same (which, with the said draft assignation, is herewith produced), that it appeared 'to have been framed under a delusion.'

"Thereafter the said Messrs Gibson & Spears having threatened legal proceedings for enforcing the petitioner's rights, the said Charles Gulland requested delay until the date of the second general meeting of creditors, which fell to be held on 10th February current. To this delay the petitioner agreed, with a view to having an amicable arrangement with Messrs Daniel & Green, carried through.

"Notwithstanding the said delay, the said Messrs Daniel & Green, and Samuel Daniel and George Green, still refuse to grant the said assignation in favour of the petitioner; and with the view of attempting to defeat his rights under the said 62d section of the Act, have served upon him a notarial intimation, requisition, and protest, intimating their intention of bringing the heritable subjects over which the said bond and disposition in security extends to sale, under the powers contained in the said bond. The schedule served upon the petitioner is herewith produced.

"At the said second general meeting of creditors, the said Charles Gulland, as mandatory for the said Messrs Daniel & Green, produced a new affidavit by said Samuel Daniel, dated 7th February 1868, to a debt of £1785, 6s. 11d., in which the said firm of Daniel & Green value the said security at £1300, instead of £800, as in their original affidavit, and claimed right to vote for the balance of £485, 6s. 11d.; and a further affidavit and claim, also dated 7th February 1868, against the bankrupt for £2784, 18s. 4d. That upon these affidavits, and again with the view of frustrating the petitioner's rights under the said 62d section of the Statute, the said Charles Gulland, as mandatory foresaid, voted for, and succeeded by means of the said vote in carrying a motion made by Mr John Morton, writer, Cupar, as mandatory for the said Richard Wilson, a creditor claiming to be ranked for the sum of £6, 13s. 11½d., to the following effect:—'In respect the bondholders, Samuel Daniel & George Green, have taken proceedings by notarial requisition, intimation, and protest, for selling the heritable property contained in the bond, the trustees be directed to concur with the bondholders in the sale, in terms of the 112th section of the Bankruptcy Act, in order to fortify the title.

"Against this resolution certain creditors have, with concurrence of the petitioner, presented an appeal to the Lord Ordinary, as the same, so far as the said Messrs Daniel & Green are concerned, is an illegal attempt on their part to escape from granting the said assignation."

The petitioner demanded an assignation of this security at the value thus specified, with the statutory addition of 20 per cent., and the question was whether the circumstances were such as to exclude this statutory right. The respondent lodged answers to the petition, in which they pleaded that in the circumstances the right could not be exercised, and they maintained this upon the ground—(1.) That the trustee was bound by his own actings and conduct from taking advantage of the statutory provision; (2) That his requisition was technically defective; (3) That the affidavit and claim founded on had been withdrawn by a letter written of the same date as the requisition; (4) That the creditors, at a meeting on 10th February 1868, had resolved not to enforce the requisition.

GIFFORD and GIBSON for petitioner.

SHAND and DEAS for respondent.

At advising—

LORD JUSTICE-CLERK was of opinion that the trustee's actings, even if they were of the character alleged, could not deprive the body of creditors of their statutory right; and, on the other hand, that the letter by the respondents' agent founded on did not, even if timeous, amount to an intimation that the valuation was to be altered. The respondents' technical pleas as to the terms of the requisition were met by previous decisions, and altogether the respondents had stated no relevant answer to the petition.

LORD COWAN—I concur in your Lordship's view that this is a statutory right enacted for the purpose of preventing creditors from undervaluing their securities, with the view of enlarging their votes. The statute accordingly gives to the trustee and the creditors the privilege of claiming a security any time within two months after the lodging of the affidavit, and claimed on condition of paying 20 per cent. additional. There is no question here, that this creditor lodged his claim, and voted on it at the election of the trustee, and within 2 months thereafter the trustee, with consent of the Commissioners, intimated that they claimed the security in the statutory form. Now is there anything here to prevent the exercise of their statutory right. I humbly think not. Nothing relevant to obviate this privilege has been averred; but then there have been some technical objections taken to the requisition of the trustee, but on that part of the respondent's case the authority of Simpson & Greig throws great light. There the Lord President said that it was not necessary to put in the minute of requisition the precise words of the statute.

There can be no doubt that the trustee was in communication with Mr Gulland about the time of the requisition which was not intimated to him. And there is a peculiarity in the fact that the letter of Mr Gulland and the requisition are of the same date, but the letter was not received until the 27th January, two days later. Had Mr Gulland's letter, which was written in ignorance of the requisition, contained a direct or even an indirect statement that a new valuation of the security would be made and lodged, and the old one withdrawn, I should have been inclined to have given more effect to it. But I can find no retractation anywhere of the original valuation, and on the whole matter I find no difficulty in agreeing with your Lordship.

LORD BENHOLME and LORD NEAVES concurred.

The Court accordingly held the petitioner entitled to the statutory assignation sought by him, and appointed a draft of the same to be given in.

Agent for Petitioner—James Bruce, W.S.

Agents for Respondents—Adamson & Gulland, W.S.

Friday, March 20.

FIRST DIVISION.

BARR *v.* NEILSONS.

Husband and Wife—Slander—Reparation. Held that a husband is not liable in damages for his wife's slander.

Conjunct and several liability — Husband and Wife—Delict — Separate defenders. A pursuer brought an action of damages against a husband and wife for slander, alleging two acts of slander by the wife on specified occasions, and another act by the husband on a different occasion, and concluding for a slump sum of damages against both defenders, "conjunctly and severally, or severally, or otherwise as shall be determined." Action *dismissed* as irrelevant. Opinion, *per* Lord Deas, that six different debtors may be sued in one summons for six different debts, and that whether or not that rule applies generally in actions of damages, it is at least competent to sue husband and wife in one action for different slanders. Doubt, by Lord Ardmillan, whether the rule applies in the case of wrongdoers, and whether it is competent to include more than one wrongdoer in an action for separate wrongs, and without allegation of combination.

Rebecca Barr was a domestic servant in the house of the defender, James Neilson, from Whitsunday 1865 till 18th September following. She now sued Neilson and his wife for damages for slander, alleging that on 16th and again on 18th September Mrs Neilson falsely and maliciously accused the pursuer of theft; and that, on a day between the 20th and 30th of that month, Mr Neilson made a false and malicious accusation of theft against the pursuer to the district police. The summons concluded—"Therefore the said defenders ought and should be decerned and ordained, by decreet of the Lords of our Council and Session, conjunctly and severally, or severally, or otherwise as shall be determined in the course of the process to follow hereon, to make payment to the pursuer of the sum of £250 sterling, in name of reparation and *solatium*, for the loss, injury, and damage sustained by her in the premises."

The pursuer proposed issues containing the alleged slanders.

The Lord Ordinary (Ormidale) reported the case, indicating an opinion that a plea of incompetency taken by the defenders, on the ground that the action was brought against two different defenders, in respect of different grounds of action, was in this case untenable, keeping in view that the two defenders here are husband and wife—that the wrongous acts complained of had reference to, and were closely connected with, the same matter—and that, under the conclusions and formal part of the summons, the damages, if any, in which the defenders are and might be found jointly liable, can, so far as necessary, be allocated.

W. N. M'Laren for pursuer.

Clark and Burnet for defenders.

The following cases were cited:—*Chalmers*, M., 6083, and 3 Paton, 218; *Murray*, M., 6079; *Gordon*, M., 6079; *Western Bank*, 22 D., 447; *Brown*, M. 13,986; *P.-F. of Cupar*, M. 12,242; *N. B. Ry. Coy.* v. *Leadburn Ry. Coy.*, 3 Macph. 340.

At advising—

Lord President—This case of *Barr and Neilson* raises some questions of considerable importance. The grounds of action, as disclosed in the different issues, are (1) that, on or about 18th September 1865, the defender, Mrs Neilson, made a slanderous statement concerning the pursuer; (2) that, on 20th September, the same defender again slandered the pursuer; and (3) that, on some day between 20th and 30th September, the other defender, James Neilson, made a slanderous charge against the pursuer to the Kirkcudbrightshire police. On these grounds the summons concludes:—"Therefore the said defenders ought and should be decerned and ordained, by decreet of the Lords of our Council and Session, conjunctly and severally, or severally, or otherwise as shall be determined in the course of the process to follow hereon, to make payment to the pursuer of the sum of £250 sterling, in name of reparation and *solatium*, for the loss, injury, and damage sustained by her in the premises." That is, that the one defender, in respect of malicious information given by him to the police, and the other defender, in respect of two acts of slander unconnected with that malicious information, shall be conjunctly and severally, or severally, or otherwise, liable in one slump sum of damages to the pursuer. It is objected that that is incompetent; and the first reply by the pursuer is, *esto* that such an action is incompetent against unconnected parties, the two defenders here are connected by the closest ties, for they are husband and wife, and a husband being answerable for his wife's slander as well as his own, he is answerable in pocket for both, and the action is therefore competent.

The first question is, Is a husband answerable in damages for his wife's slander?

That is a question of a peculiar kind in principle, and if it fell now to be decided for the first time, it would require cautious consideration. But it is settled by authority. As to all delict, followed by punishment, the punishment must fall on the wife, although *vestita viro*. She must suffer in person or estate, and the husband cannot be liable. That is clear, not only as to punishment which is to be suffered in person, but also as to that which is to be suffered in purse. A fine inflicted on the wife cannot be levied on the husband's estate. It must be levied out of the wife's separate estate, if she has any; and if she has none, the fine remains a debt against her; and though not enforceable *stante matrimonio*, it will be recoverable by all competent diligence on dissolution of the marriage. But then comes the question, whether, when delict is not followed by punishment, but only by civil consequences, and where the injured party claims damages, the same rule applies? And here the authorities are not so unanimous or clear, but I think there is sufficient authority to decide this case. Two cases are important in this matter. One is the case of *Murray*, in 1724 (M. 6079), and the other is the case of *Chalmers*, in 1790 (M. 6083). The first was a case of deforcing an officer who was proceeding with diligence, and the claim made was by the creditor whose diligence was defeated for the debt and damages. There the claim for the debt and damages was held to be competent against the wife, but not leviable from the husband, and it was found that the decree could only affect the wife's person and estate after the dissolution of the marriage, or any separate estate she had exempted from his *jus mariti*. This case is all the more important that it is not a case of defamation, for it brings out the principle very clearly. The case of *Chalmers* is all the more important that it is a case of defamation. That case was before the Commissaries, and they found sufficient evidence that the defender "was guilty of the scandal libelled, decreed her to pay to the Procurator-Fiscal of Court a considerable fine, and to the injured party farther sums in name of damages and of expenses, as also to make a palinode." Now the case was brought here by advocation, and the Lord Ordinary reported, and there was a hearing in presence on these

points:—(1) Whether execution ought to pass against the defender's person to compel payment of damages and fine; (2) Whether the husband or the goods in communion were liable for payment of the money awarded in name of damages or of fine. There was a long argument, and the opinion of the Court was, on the first point, that the execution ought not to be allowed to pass against the wife's person during the subsistence of the marriage; and, on the second point, that neither the person nor the effects of the husband could be thus affected. There was a farther question of expenses, but that was not of so much importance, for it was complicated with circumstances; but the other part of the case is a clear authority on the present case, and is entitled to respect, for it was fully argued and well considered. We may therefore hold it to be settled that the husband and his estate cannot be made answerable in this case for damages claimed against his wife in respect of the slanders contained in the first and second issues.

On the other hand, the wife is as little concerned with the damages against the husband,—except indeed in so far as she has an interest in the goods in communion. It is clear that the parties are not by reason of marriage so united that the £250 must all come out of one purse. On the contrary, it is clear on authority, that in so far as that sum is claimed for the wife's slander, it cannot be recovered from the husband, or out of the goods in communion, or out of any part of the estate.

Therefore we return to consider the competency of this action on the assumption that each defender is answerable for his or her own wrong, just to the same effect as if they were not connected. In these circumstances, Is this a competent action? I think it is not. In the first place, I think it is out of the question to hold that these two parties can be made conjunctly and severally liable for two different wrongs. The question then comes to be, are there any other words in the conclusions of the summons to enable us to deal with the case? There is an alternative conclusion that the defenders shall be found severally liable, that is, that each shall be found liable in £250. That will not do, for £250 is the claims for all the three slanders. It is the value of the entire loss sustained in consequence of all the three wrongs. It is clear that it would be just as reasonable to bring an action against two persons who had assaulted the pursuer, the one in Edinburgh in 1866, and the other in Glasgow in 1867, and claim a slump sum of damages from the two.

But it is contended that there are other words in the summons which enable the pursuer's case to be extricated, namely, the words "or otherwise, as shall be determined in the course of the process to follow hereon." I confess I can give no effect to these words, for it is nothing but calling on the Court to make a case for the pursuer. It is his duty to ask the special remedy he thinks he is entitled to, but if we do this, I don't know if it would not be asking us to entertain this as the only conclusion, and the next pursuer would come and ask the Court to give him the remedy by whatever apportionment the Court thought fit. I am therefore of opinion that the action is incompetent and ought to be dismissed. I may add that I think the cases that were cited, the *Western Bank*, and *Leadburn Railway* cases, have no application.

Lord Curriehill—The first question in this case is one of great importance in the law of husband and wife. I think the principle comes to be considered here very purely, and my opinion is the same as that of your Lordship. I shall only add that the doctrine is the same as was taught by Erskine, (1. 6. 24). The case of *Chalmers* clearly established the principle, and I think it was emphatically recognised in the House of Lords. A discussion there took place as to the expenses of process. The husband had been found liable by the Commissary Court, and by this Court, for the expense of process, but it was held in the House of Lords that he was not liable even for these expenses, except in so far as he had conducted the proceedings maliciously, by his way of pleading the case, and there was a remit made to this Court to separate the one part of the expenses from the other.

On the remaining points of the case I concur with your Lordship.

Lord Deas—The first question in this case is an important one, whether a husband and his estate are liable in damages for his wife's slander, in the same way as for slander by himself. I am clear that the husband and his estate are not liable. I had occasion to consider the question in the case of *Friend* v. *Skelton*, (17 D. 548), and I then went into the authorities and satisfied myself that the law was as your Lordship has stated, and I embodied that in my interlocutor. That interlocutor was reclaimed against, and though the findings were not objected to, it is plain that the pursuer, who was found entitled to damages, had a most direct interest to contest them, for he was found entitled to damages only in the very limited way expressed in the interlocutor, and if he could have had it found that the husband was liable it would have been to his advantage. But the interlocutor was affirmed *in terminis*, and it is needless to go into the authorities now.

But the question remains as to the effect of that state of the law upon this action. It was maintained that the result comes to be that here are two separate defenders, and you can't conclude in one summons against more than one debtor, and the decision in the *Western Bank* case is said to contain an observation to that effect. I should not so read that observation, for I hold it to be clear, according to our law, that you may include six defenders, defending for six different debts. That was enacted in 1695. By our old law you might have included as many debtors in one summons as you chose, but by that Act of regulation the number was limited to six, and that Act of regulation has all the force of an Act of Parliament. No authority has been cited to show that that Act is in desuetude. I have seen it often in practice. I have written summonses against six different debtors, and I have seen them in later times again and again. It is clear from our books that this is the rule. (Shand's Practice, 204.; Jur. Styles, 3, 21.; Ivory's Erskine.)

There is no doubt, therefore, that it is competent to call six different debtors for six different acts in one summons. There might be a question whether that applied to actions of damages against different individuals. It is not necessary to go into that here, but in *Friend* v. *Skelton* the action was directed against two women and their husbands. But however that may be as to sueing two different and unconnected parties, I think it is quite competent against husband and wife. In such a case, though the slanders were ever so separate, it is not neces-

sary to have two actions. But, then, the action concludes for decree against the defenders conjointly and severally for £250. That is a conclusion for one slumpsum for two different slanders. On looking at the condescendence as explained by the issues, no joint liability is concluded for at all. In the first article of the condescendence it is stated that a false accusation was made by both defenders on one occasion, but that is not put in issue. There is no statement that the slanders originated from a conspiracy or combination between the defenders, or that the one knew what the other meant to say, or did say. Under that summons, which concludes for £250 for all these slanders, can we separate the claim in such a way as to proportion the damage? Clearly, we cannot be called on to do anything of that sort. The pursuer ought, herself, to have made the proportion. She does not pretend to say that she can get decree against the defenders jointly, or even severally, for £250, but she says that the Court can give so much damage against one defender, and so much against the other. That is quite impossible. The case of the *Western Bank* is no authority for that. There, the conclusion was against the defenders respectively, but there is nothing about "respectively" here. It was difficult enough to sustain that summons, but there is no ground on which we can sustain the summons in the present case.

Lord Ardmillan—I am a good deal impressed by what Lord Deas has said. I do not doubt the competency of such a summons as he spoke of against mere ordinary debtors; but as regards an action against two wrongdoers for separate wrongs, unconnected by any allegation of combination, I doubt whether such an action ought to be sustained. The analogy of the procedure in justiciary cases is against that. In the present case it is very clear that if there is no conjunct and several liability, the summons will not stand. That raises the important question whether a husband is liable in damages for his wife's slanders. I think he is not liable, and that that is clearly settled by the authorities. Marriage affords no indemnity for *delict*, and a wife remains liable in person for her crime, and liable pecuniarily if she has a separate estate, and in person after the dissolution of the marriage. It is clear, in the present case, that the pursuer has no claim against the defenders, respectively or severally, for the £250, and all that remains is the remaining words, "or otherwise," &c. But the contention of the pursuer on that branch of the argument cannot be sustained.

Agent for Pursuer—J. M. Macqueen, S.S.C.
Agent for Defenders—Wm. S. Stuart, S.S.C.

Friday, March 20.

HENDERSON'S TRUSTEES *v.* HENDERSON, *et e contra.*

Husband and Wife—Donation—Proof—Foreign. In a question between a widow and the trustees of her husband,—(1) the widow claiming certain City of Edinburgh bonds of annuity, which had been orginally purchased with money belonging to her mother, as having been gifted to her by her husband, *held*, that she had failed to prove donation. (2) Claim by the widow to the sum in an English security *sustained*, the security having been taken to the "husband and wife, their executors, administrators, and assigns," when the spouses were by English law resident in England, and the effect of such a bond being to vest the sum contained in it in the wife in the event of her survivance.

These are conjoined actions—one at the instance of the trustees of the late Dr Henderson against his widow, and the other at the widow's instance against the trustees. Dr Henderson died in 1859, in Edinburgh in possesion of a Scotch domicile, leaving a settlement conveying his whole estate, under which his widow was to receive the free income of the whole during her life. Part of the estate consisted of (1) twenty bonds of annuity granted by the City of Edinburgh, eighteen of which were issued in the name of "Mrs Mary Henderson" or the bearer thereof:" and (2) three bonds by the commissioners of the Township of Birkenhead, granted to Dr Henderson and his wife, "their executors, administrators, and assigns." In the action at Mrs Henderson's instance she maintained that she was entitled to *jus relictæ* in addition to the provisions in her favour in the settlement. On 20th July 1865, Lord Jerviswoode held that she could not maintain this, and she elected to take her settlement provisions. In the action at the instance of the trustees, they sought to have it declared that the Edinburgh and Birkenhead bonds were part of Dr Henderson's estate at the time of his death, and were carried to them by the general disposition in the trust-deed for the purposes therein mentioned. Mrs Henderson opposed this action on the grounds, (1) that the Edinburgh bonds were purchased chiefly with her own money, or otherwise were gifted to her by her husband; and (2) that the Birkenhead bonds, according to the law of England, by which the matter was to be regulated, fell to her on her surviving her husband. The trustees maintained, (1) that whether the Edinburgh bonds were purchased with Mrs Henderson's own money or not, they became her husband's property *jure mariti*, and that all the evidence went to disprove her allegation of donation; (2) that even if there had been donation, it was revocable by the husband, and revoked by the general conveyance of all his property in the trust-deed; and (3) in regard to the Birkenhead bonds, that although the law of England, as the *lex rei sitæ*, determined the character of the property as heritable or moveable, it did nothing more; and that as by that law it was personal estate, it belonged to the husband by the law of Scotland *jure mariti*.

The Lord Ordinary (Jerviswoode) sustained the contention of the trustees in regard to both the Edinburgh and Birkenhead bonds.

The defender reclaimed.

Dundas and Black for reclaimer.

Clark and Burnet for respondent.

At advising—

Lord President—There are two actions here—the one an action by Dr Henderson's trustees and executors, and the other a counter action by Mrs Henderson, in which she claimed her *jus relictæ;* but the Lord Ordinary has decided that question against her, and she has not reclaimed. The summons at the instance of the trustees concludes for declarator that certain bonds of annuity, granted by the city of Edinburgh, and certain bonds or mortgages, granted by the Birkenhead Commissioners, belong to the pursuers, as trustees and executors of Dr Henderson, as part of the trust-estate, so that the two questions are (1) as to the property of the