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

City of Edinburgh bonds, and (2) as to the property of the Birkenhead bonds. Both of these questions the Lord Ordinary has decided against the widow. As regards the City of Edinburgh bonds, a certain distinction must be taken, and that is sufficiently brought out in the seventh article of the condescendence, which appears to explain the matter with sufficient correctness. Eighteen bonds of annuity for £3 each were issued in name of "Mrs Mary Henderson, or the bearer thereof;" the remaining bond of annuity for £3 was issued in name of John Henderson, and was acquired by Dr Henderson from him; and another for £18 was purchased by Dr Henderson. The history of the matter appears to be this—Mrs Henderson's mother had some money of her own, which she had lent to the city of Edinburgh, and she desired that this money should be transferred to the name of her daughter; and accordingly, in the city books, Mrs Mary Henderson became the creditor in place of her mother. This was before the bankruptcy of the city, and on that occurrence, and on the Arrangement Act of 1838, it became necessary that this debt should be converted into bonds of annuity under the Act of Parliament, and these were issued necessarily and properly in the name of the party standing in the city books as creditor in the debt. The bonds so granted to an individual by name were so conceived as to be really transferable by delivery only, for they are in favour of that individual or bearer, and were transferable by delivery without assignation. Mrs Henderson's name appears as the holder of these bonds. The first thing to consider is the effect in law of Mrs Henderson's mother transferring this debt to her daughter in the books of the city, and the effect of these bonds being taken in name of Mrs Henderson. At both dates Mrs Henderson was married, and there is no doubt that the effect of her mother giving her these debts was that they passed to her husband by the assignation implied in marriage, and so also the bonds became his property.

But the question comes to be, whether, although these bonds were thus in law the property of the husband, he did not, by his conduct and by facts and circumstances, indicate his intention that they should be gifted to his wife, and did, in fact, so gift them?

The first circumstance relied on is that of the bonds being originally taken to Mrs Henderson. There is not much in that, taken by itself, for nothing was more natural than that the money in the bonds should be in the name of the creditor appearing on the face of the city books. But there were subsequent proceedings of some consequence. The bonds had to be registered, and the way in which that is done is shown in the papers before us. They are entered in three different pleas—one being at page 59 of the register. There is, first, a column with the date, 21 December 1828, and the number of the book. Then comes the number of the bond, No. 1945. Then there is a column, "to whom granted," in which is entered the name, "Mrs Mary Henderson." There follow next a column with the amount of the annuity, and another column headed, "Subscriptions in terms of the above Act"—*i.e.*, 1 and 2 Vict., c. 55, in terms of which this register of bonds was kept. In this last column is the subscription "Andw. Henderson" In like manner, we have the register of the bond, No. 1962, at page 61, the subscription being again "Andrew Henderson." As to the rest of the bonds, the subscription in terms of the Act is "Andrew Henderson, Mary Henderson." That leads to the enquiry, what is the meaning of subscription in terms of the Act? who is required to subscribe? That is made plain by the 46th section of the Act of Parliament [*reads section*]. It is an entry of considerable importance. It is a receipt to the city for the bonds by the bondholders; a very necessary thing for the city to have for a bond transferable by delivery, for they might have no evidence of having granted them to the proper creditors but for this receipt. The person whose receipt is taken in the case of two of the bonds is Dr Henderson, and of the others Dr Henderson and his wife. The latter was a very proper course to take, for Mrs Henderson's name was in the bonds; but then the Doctor, to whom the bonds belonged in law, is required to grant his receipt, so as to be evidence that he has received the bonds. That is not like an intention of donation by him. It was argued in favour of donation, that as the money came through the wife's friends, and it was therefore natural and reasonable that his wife should have it as a separate estate. Unfortunately, the law holds otherwise, and thinks it reasonable and natural that the money should belong to the husband. The circumstance that the bond was taken in Mrs Henderson's name is, I think, sufficiently accounted for by the fact that she was entered as creditor in the books. Now, that is otherwise accounted for by the circumstance that Dr Henderson was much abroad, and it was convenient that his wife should have the means of dealing with funds in his absence. That precaution was not necessary in the case of the bonds, for they could at any time be disposed of. These bonds are lodged in the Bank of Scotland in 1844, and Mrs Henderson takes a letter from the manager of the bank in these terms:—"To Mrs Dr Henderson. I hereby acknowledge to have received from you, to be retained by the bank for safe custody, 19 City of Edinburgh bonds of £100 each, with the relative interest warrants, which will be drawn as they become due, and placed to your credit." There are 19 bonds, 18 bought with the money of Mrs Henderson's mother, and the other by Dr Henderson himself; and it is said this indicated that the whole were meant to be Mrs Henderson's separate property. That is a very violent supposition. This is just a convenient arrangement to enable Mrs Henderson to draw the interest on these funds, and the account is kept with the bank, in accordance with this arrangement, down to 1855. The manager places the interest half-yearly to the credit of Mrs Henderson's account. But, then, though these bonds were lying in bank for the purpose of Mrs Henderson drawing the interest, we must look at the contemporary letters and other evidence to see whether these bonds were dealt with as being her separate property. Now, there is a letter from Dr Henderson in 1841, from Hobart Town, which is important, and which contains this passage:—"I shall send out, immediately on my arrival home, £1000 to buy land from the Government. . . . I am advised to remit from rather than draw upon home, as it is of greater advantage to us. Tell Mr Roughead this, as I wrote to him. I had drawn bills, but they are now torn up. You will, however, be pleased to sell, immediately on receiving this, as many of *all* of our town bonds as will realise £1000 and more." This is quite intelligible. He is to buy land in a colony, and the natural thing to do would be to draw on home; but he has been advised that it is more profitable to remit money from home, and he instructs his wife to sell some of the city bonds.

He does not mean that these are her property, from which he is to get a loan. He speaks peremptorily, and says, "let there be no difficulty or delay about the matter, otherwise I shall be put to considerable inconvenience and not a little displeased." That is not the language of a man who has gifted any of the bonds to his wife, and put them beyond his control. His Lordship then read some of the other correspondence in the case, and continued—These letters seem to me inconsistent with the notion that the bonds had ever been made over, or meant to be made over, to Mrs Henderson.

But then comes another proceeding in 1856, which bears on the question. The bonds are again deposited in bank, and on this occasion Dr Henderson writes to his banker:—"I have lodged with this bank 19 City of Edinburgh bonds of annuity for £3 each, and one bond of annuity of £18, with the relative interest coupons. Likewise, an Eastern Counties Railway Company mortgage for £500. . . . . The interest to be received as it becomes due, and placed to the credit of Mrs Mary Henderson's account, and the bonds and mortgage to be at the disposal of myself and Mrs Henderson, or either of us." Not only the bonds purchased with the money of Mrs Henderson's mother are here, but those purchased by Dr Henderson's own money. They are all lodged together. It seems to me that, if the defender depends on this letter as indicating an intention to make a gift to her, it proves too much, for it proves not noly that she got a gift of the 18 bonds, but also of this mortgage of the Eastern Counties Railway Company.

I think, therefore, that these letters are strong evidence against the claim.

It would appear that Dr Henderson had made a settlement shortly before that date. He writes to his agent that he wished to add to this settlement a clause about his son James, and then he says, "Mary's Horse Wynd Property she may do with as she pleases. If it is necessary I shall give my sanction to her doing so in any form you may point out." Surely when he was so dealing with the separate estate of his wife, it would occur to deal with the bonds if he meant them to be her property. But there is no word about the bonds. After this he made a new settlement in November of the same year, and there again there is nothing to indicate any intention like that contended for. That is the evidence in the case. There is very little to be got out of the documents. I think there is no sufficient evidence of donation. Nothing can be clearer than that the money was at the commencement, Dr Henderson's, *jure mariti*, and no gift of it has been proved.

But there remains the question of the Birkenhead bonds. There was originally but one bond for £1000, and the question is, was that the property of Mrs Henderson? Now the £1000 invested in that security belonged to the husband. But it must be kept in mind that at that time the spouses were living in London, and were there not on a visit merely, but they were settled there. Dr Henderson made up his mind to take an English investment, and the bond which he took was not a mere formal document as in the case of the city of Edinburgh bonds. It was not such a bond as the Birkenhead Corporation would have granted if left to themselves, and therefore the terms must have been dictated by Dr Henderson. The document bears that the commissioners, in consideration of £1000 paid to them by Andrew Henderson and Mary Henderson, his spouse, both then residing at No. 335 Strand, London, thereby granted, bargained, sold, and assigned unto the said Andrew Henderson and Mary Henderson, their executors, administrators, and assigns, &c., to be had and holden unto the said Andrew Henderson and Mary Henderson, their executors, administrators, and assigns, until the said sum of £1000 and interest should be paid. It is impossible not to see that in taking such a security, Dr Henderson must have taken advice, and any one whom he consulted would tell him the effect of such a document by the law of England. We now know what advice he would have obtained, and it is clearly stated in the opinion of Mr J. Anderson, Q.C., who says that "the limitation to Andrew Henderson and Mary Henderson, &c., creates a joint tenancy, one of the properties of which is that on the death of either joint-tenant the interest accrues to the survivor. This is clear at common law." And he adds, "all this would be free from any doubt were the law of England exclusively to govern the question, as I think it does." I think so too, and that the law of England must govern the question, for when a man residing in England takes a deed in these technical terms, he must be presumed to know the effect of it, and to intend that effect.

The result is, that this bond must be separated from the City of Edinburgh bonds, for here there is satisfactory evidence that Dr Henderson intended to make a gift of the money. I therefore agree with the Lord Ordinary as to the first branch of the case, and differ from him as to the second.

The other Judges concurred.

Agents for Trustees—M'Naughton & Finlay, W.S.

Agents for Defender—D. Curror, S.S.C.

Friday, March 20.

WESTERN BANK AND LIQUIDATORS, PETITIONERS.

Public Record—Deed—Foreign—Proof. Petition for authority to Sheriff-clerk to deliver up deed recorded in Sheriff-court books, for transmission abroad, *refused*, there being merely an affidavit by foreign lawyer that an office copy of the deed was not competent evidence by the law of the country where the deed was to be produced, but no proof that production of the original document was essential, or that the copy might not be made competent evidence if supported by parole.

This was a petition to the Court for authority to the Sheriff-clerk of Lanarkshire to deliver up to the petitioner a power of attorney recorded in the books of the Sheriff-court of Lanarkshire, for the purpose of exhibiting the same in the Supreme Court of New York. The ground of the application was, that the factor appointed by this power of attorney had accepted bills for his constituent; that these bills now belonged to the liquidators; that they were trying to enforce payment thereof in New York where the constituent lived. He denied liability on the ground that the factor had no right to grant these bills. This rendered production of the power of attorney in New York necessary, and an affidavit was produced to the effect that an office copy of that document was not competent evidence by the law of the State of New York. Therefore the present application was made for authority to