tionment a will. Such a deed is in reality a will. It is the expression of the will of those who are vested with the power of apportionment, and it is not difficult to understand how Lieutenant Dunsmure, knowing that his father besides his own trust-disposition and settlement had left the deed of division executed by him and by Mrs Dunsmure, should, as if to exclude all doubt, use the words "any other will." I think this phrase was very likely employed by the testator with reference to the deed of apportionment and division, the technical name of which Lieutenant Dunsmure did not recollect, if indeed he had ever known it.

I am of opinion therefore that the first question put in the case should be answered in the affirmative. This answer supersedes the second question.

The Court therefore answered the first question in the affirmative and found it unnecessary to answer the second.

Counsel for First and Second Parties—Kinnear—Mackintosh. Agents—Mylne & Campbell, W.S.

Counsel for Third Party—Balfour—Murray. Agents—Morton, Neilson, & Smart, W.S.

Saturday, November 22.

SECOND DIVISION.

SPECIAL CASE — HODGE (HODGE'S FACTOR LOCO TUTORIS) *v.* DUNCANSON OR HODGE.

Succession — Heritable Bond — Whether Moveable as between Husband and Wife — Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 117.

By the Titles to Land Consolidation Act 1868, sec. 117, it is provided that bonds and dispositions in security shall be moveable as regards succession except where conceived expressly in favour of heirs excluding executors and *quoad fiscum*, and as regards all rights of courtesy and terce; and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife. Where a married daughter succeeded to a share in a bond and disposition in security in which her father was creditor (he having died intestate), *held* that her share remained heritable and did not fall under her husband's *jus mariti*.

Succession—Collated Heritage—Whether Heritable or Moveable.

The fact of collation does not alter the character of property from heritable to moveable unless where it is actually sold.

The parties to this Special Case were (1) Thomas Hodge, executor of the late Peter Hodge, and factor *loco tutoris* to Peter Hodge's son, and (2) Mrs Helen Duncanson or Hodge, Peter Hodge's widow. At the death of Thomas Duncanson, Mrs Peter Hodge's father, intestate on 20th Dec. 1871, his estate consisted of (1) certain house property in Alloa in which his widow was liferented, (2) a bond and disposition in security for £900, and (3) personal estate worth about £1600. Mr Duncanson left three children and a widow. His widow took one-third of the moveables, her liferent of the Alloa subjects, and her terce of the £900 bond. There was no dispute as to her rights, and she was therefore not a party to the present case. Mr Duncanson's eldest son, J. J. K. Duncanson, M.D., collated his father's heritage, and thereupon each of Mr Duncanson's three children became entitled, subject to their mother's admitted rights, to (1) One-third of the fee of the Alloa subjects, (2) One-third of the bond for £900, subject to old Mrs Duncanson's terce, and (3) One-third of the moveables after payment therefrom of the deceased's debts and of old Mrs Duncanson's *jus relictæ*. Accordingly Mrs Helen Duncanson or Hodge (the second party), as one of the three children, had vested in her immediately on her father's death, or at least from the date of the collation by Dr Duncanson, one-third of the Alloa subjects, one-third of the bond for £900, and one-third of the personalty after paying debts and the widow's *jus relictæ*.

Before Mr Duncanson's estate was divided, Peter Hodge, the husband of his daughter Mrs Helen Duncanson or Hodge, the second party to this case, died intestate on 14th July 1872, and Thomas Hodge, the first party, was thereupon appointed executor and factor *loco tutoris* to the only child of that marriage. In dividing Mr Duncanson's estate the share which fell to Mrs Hodge (including the collated heritage, the bond, and the moveable estate) was dealt with as moveable as regarded her succession thereto, and as having passed to her husband *jure mariti*, and was thus included in the inventory of her husband's personal estate. The collated heritage had not been disposed of. The second party thereafter claimed that her share of the collated heritage and of the bond had been improperly included in her husband's estate, both being in point of fact heritable, the first being heritable and remaining heritable in her person, and the second heritable as between her and her husband under the Titles to Land Consolidation Act of 1868, sec. 117.

This Special Case was therefore adjusted, in which the questions submitted were as follows:—"(1) Is the share of the said collated heritage moveable, and did it pass to the deceased Peter Hodge *jure mariti?* (2) Was the interest of the second party in the said bond and disposition in security moveable as between her and her husband, and did it pass to him *jure mariti?* (3) In the event of the foregoing questions or the second question being decided in favour of the first party, will he be justified as factor *loco tutoris* foresaid in paying the expenses of this case out of the fund in dispute?"

At the discussion the point as regarded the collated heritage was not argued on behalf of the first party, as he admitted that collation did not alter the character of property unless it was actually sold.

Argued for the first party—The Titles to Land Consolidation Act 1868, sec. 117, provided that heritable securities should remain heritable as between husband and wife only where the security "is or shall be conceived in favour of the wife" or the husband, as the case might be; here it was not so, for the wife succeeded to the share of the bond *ab intestato*, and the ordinary

rule under the statute applied, and the bond was moveable.

For the second party—It was provided in the same section of the statute that except in the excepted cases heritable securities were to be moveable and were to belong to the executors of the creditor "in the same manner and to the same extent and effect as such security would under the law and practice now in force have belonged to the heirs of such creditor"—that is to say, the bonds were to belong to the heirs as the law then was. It therefore made no difference whether the bond was actually conceived in favour of the wife or whether she succeeded to it as heir *ab intestato;* she was to succeed to it as she would have under the law and practice at the date of the Act.

The 117th clause in the Titles to Land Consolidation Act 1868, after providing that heritable securities were thereafter to form moveable estate except where conceived in favour of heirs excluding executors, proceeded, *inter alia*—"Provided that all heritable securities shall continue and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after the marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband, unless the husband or relict has or shall have right and interest therein otherwise."

The opinion of the Court was delivered by

Lord Gifford—[*After stating the facts*]—So standing matters, I am of opinion that Mrs Hodge's third of the fee of the Alloa subjects and her third of the fee of the bond for £900 did not fall under the *jus mariti* of her husband, the late Peter Hodge, and did not belong to him at the date of his death on 14th July 1872, and were improperly included in the inventory of Peter Hodge's personal estate. The only part of his wife's succession to her father which fell under Mr Hodge's *jus mariti* was his wife's share of Mr Duncanson's free personalty. No doubt Mr Hodge had also right to any rents of the Alloa subjects and to any interest of the £900 bond which might fall to his wife during the subsistence of the marriage, but no more; his wife's share of the fee of the Alloa subjects and her share of the fee of the £900 bond belonged to herself alone, and did not fall under his *jus mariti*. They still belonged to Mrs Hodge in her own right, and as she is still alive, neither her husband's executor nor the child of the marriage has any right to them.

The mere circumstance that the Alloa subjects were collated by Dr Duncanson did not make them moveable in the persons of his two sisters. So long as they were unsold, unrealised, and undivided, they remained heritable *sua natura*, and the true right which has vested in each of the sisters in virtue of the contract of collation is a *pro indiviso* right to the heritable subjects as they stand. The collation is very commonly carried out and given effect to by the eldest son or heir-at-law disponing the whole heritage *pro indiviso* to himself and his younger brothers and sisters equally, but until actually sold the heritage and the *pro indiviso* shares thereof remain heritable *sua natura*, and this whether the heir-at-law be bound specifically to convey or not. By collation the heir-at-law gives his younger brothers and sisters an equal share in the heritage, and he obtains an equal share with them in the moveables. But this does not alter the nature of the right; the heritage remains heritable, and the moveables remain moveable in all questions as to the intestate succession of any of the children. Nothing but actual sale or actual payment in money of Mrs Hodge's third share of the Alloa heritage would make that heritage moveable in her person. It fellows that her third share of that heritage did not fall under her husband's *jus mariti*, but only the rents thereof if any.

Then as to the £900 bond, Mrs Hodge took one-third of it in her own right as one of the three children, subject to her mother's terce. But although bonds and dispositions in security are moveable in questions of succession under the provisions of the Titles to Lands Consolidation Act 1868, section 117, they are still declared by the statute to remain heritable *quoad fiscum* and as regards all rights of courtesy and terce. I think the provisions of the statute fairly read exclude such heritable bonds from falling under the *jus mariti* of the husband, he having only right to the accruing interest thereon. And although it was said that the clause applied only to bonds taken expressly in favour of the wife, I think that is not so, but that the clause includes bonds to which the wife succeeds. A bond in this position is in my opinion as much heritable as the other.

The result is that I am for answering the first and second questions in the case in the negative, and by these answers the third question is superseded.

The Lord Justice-Clerk and Lord Ormidale concurred.

The Court therefore answered the first and second questions in the negative.

Counsel for First Party — Rankine — Forbes. Agent—A. P. Purves, W.S.

Counsel for Second Party — Paterson. Agent —J. Gillon Fergusson, W.S.

Monday, November 24.

COURT OF TEINDS.

(Before the Lord President [Inglis], Lord Mure, Lord Gifford, Lord Shand, and Lord Rutherfurd Clark).

STEVENSON AND OTHERS *v.* MACNAIR AND OTHERS.

Church—Erection quoad sacra—*Act 7 and 8 Vict. cap.* 44 (*Disjunction and Erection Act* 1844), *sec.* 8; 23 *and* 24 *Vict. c.* 50 (*Annuity Tax Abolition Act* 1860), *sec.* 21; 33 *and* 34 *Vict. cap.* 87 (*Annuity Tax Abolition Act Amendment Act* 1870), *sec.* 19—*Competency.*

The Annuity Tax Abolition Act 1860 and the Annuity Tax Abolition Act Amendment Act 1870 did away with the Old Church Parish of Edinburgh, which then became in every respect a part of the City Parish. But