session of the disponee. The husband's sasine, however, had not been evacuated by the disponee becoming infeft, and it was held that the widow was therefore entitled to terce out of the lands.

The other case is the case of *Campbell* v. *Campbell*, February 17, 1776, 5 Brown's Supp. 627, and it is there said—"The husband's sasine, says Mr Erskine, b. 2, title 9, sec. 46, is the measure of the wife's terce; thus neither an heritable bond nor a disposition of lands granted by the husband if death has prevented him from giving sasine to the creditor or disponee can hurt the terce, and so the Lords found—'In respect that the deceased John Campbell was not at the time of his death denuded of the subject within mentioned by infeftment, but only by a title which remained personal: therefore find that Katherine Waddell, his relict, is entitled to a terce of said subjects, and not to a third part of the price thereof.'"

Now, it humbly appears to me that both of these cases are—one of them much—*a fortiori* of the present case. There was not only an intention to sell, but an actual disposition, not followed, however, by the infeftment of the disponee. The sasine stood in the husband's name, and with it the widow's right of terce. I cannot find circumstances so strong in the present case, and therefore I think these authorities are conclusive of this case, and it must be held that the widow has a right to terce, and that being so, the irresistible and only conclusion is that the securities being heritable and subject to the widow's right of terce, as a necessary consequence, are not subject to a claim of *jus relictæ*. I agree, therefore, with your Lordships in regard to the bond for £3000, that the only answer we can give is that the widow is not entitled to *jus relictæ* out of it. If that is true of that bond, it is also true of the rest, and so I agree that we must answer the first question in the negative.

I also agree with your Lordship as to the answer to be given to the second and third questions.

Lord Shand was absent.

The Court pronounced the following interlocutor:—

"In answer to the first question, Find and declare that the bonds mentioned in the case were not rendered moveable as to the relict by the steps taken to realise the securities, and that the second party is not entitled to any part of the sums contained in said bonds *jure relictæ:* In answer to the second and third questions, Find and declare that the loss occasioned to the estate of the deceased by the subsistence till 1890 of the lease of the Britannia Music Hall is occasioned by the failure of a speculation in business, and falls to be charged against the moveable estate of the deceased in a question with the widow, and against the residue of the estate under the settlement in a question between the other parties to the case, and does not form any proper charge against the third parties as liferenters, and decern: Find the first and third parties entitled to expenses against the second party."

Counsel for the First Parties—Ure. Agents—Campbell & Smith, S.S.C.

Counsel for the Second Party—Guthrie Smith. Agent—Adam Shiell, S.S.C.

Counsel for the Third Party—Vary Campbell. Agents—Campbell & Smith, S.S.C.

Wednesday, November 28.

FIRST DIVISION.

[Lord Fraser, Ordinary.

WALES *v.* WALES.

Jurisdiction—Burgh Court—Summary Ejection—Heritable Right.

By a mutual disposition and settlement a husband disponed certain premises to his wife "in liferent, for her liferent alimentary use allenarly." After the husband's death his heir-at-law disponed the premises to the widow in fee. She married again, and, as liferentrix of the premises under her former husband's will, she presented a petition in a burgh court for ejection against her present husband. He lodged defences, on the ground that the disposition to the fee in favour of his wife did not exclude his *jus mariti* and right of administration. The burgh court granted decree of ejection. A suspension thereof at the instance of the husband *sustained*, on the ground that the question involved in the case was one of heritable right, and so beyond the jurisdiction of the Burgh Court.

A petition was presented in the Burgh Court of Stranraer by Mary Wales, praying to have her husband Robert Liddle Wales ordained to remove from certain premises, and in the event of his refusing to remove, for warrant to eject him.

The petitioner averred that by a mutual disposition and settlement dated 21st March 1867, executed between John M'Lauchlan (her former husband) and herself, John M'Lauchlan had disponed to her, in case she should survive him, "in liferent for her liferent alimentary use allenarly, whom failing and at her death to my own heirs, executors, and assignees whomsoever, in fee, all and whole my heritable and moveable estate," including the said property mentioned in the prayer of the petition; that she and her husband, the defender, had lived together in the said property, but that she had had to leave home owing to his ill-treatment, and declined to return to live with him; that she had legally warned him to remove, but he refused to do so.

The defender stated—"The pursuer acquired absolute right to the properties in question by disposition granted by William M'Lauchlan, land steward, Billown, near Castletown, Isle of Man, in her favour, dated the 16th and recorded in the division of the General Register of Sasines applicable to the county of Wigtown the 20th, both days of August 1873. The defender's right of *jus mariti* and right of administration are in no way excluded by the terms of said disposition, and no other deed has entered the record in any way affecting or restricting them." To which the pursuer answered—"Irrelevant. Admitted that the pursuer, as alimentary life-

enter allenarly of the properties in question, ome five years after her husband's death, purchased from the fiar of said properties his right to and in the fee thereof, subject to her liferent. The deed bearing this expressly on its face is produced. Admitted that there is no exclusion of rights regarding the property of the fee thus purchased. But averred that the pursuer is not now enjoying or possessing the property under her right to the fee, but in virtue of her liferent provision. *Quoad ultra* denied."

The pursuer pleaded—"(4) The disposition of 1873 in favour of the pursuer, having only and expressly vested pursuer in the fee of the properties subject to her liferent as therein stated, which, being a separate inalienable right in her person, could not be affected in any way by infeftment in the fee, and the existence of such alimentary liferent being quite consistent with such infeftment in the fee, the pursuer is entitled to decree as craved."

The defender pleaded—"(1) It is incompetent for this Court to entertain any consistorial question, such as the pursuer's justification for separating herself from her husband, and all such averments should be deleted from the proceedings. (3) The defender, in entering into the contract of marriage with the pursuer, was entitled to rely on the public records, and the same not disclosing any exclusion of his legal right of *jus mariti* and right of administration in the properties in question, no secret or latent deed containing such exclusion can be competently pleaded against him. (4) Assuming that, by the terms of said mutual disposition and settlement, defender's legal rights were excluded, the pursuer not having taken infeftment thereon, but on a title containing no such exclusion, the defender cannot be affected by the terms of the former deed."

The Magistrates on 28th May 1888 pronounced the following interlocutor:—"Find in fact—(1) That the pursuer was, prior to her marriage with defender in 1877, widow of the late John M'Lauchlan, vintner, at Nos. 1 and 2 Agnew Crescent, Stranraer, who was proprietor, *inter alia*, of said subjects; (2) that by a mutual disposition and settlement executed between the said John M'Lauchlan and the pursuer, then Mrs Mary M'Dowall or M'Lauchlan, dated 21st March 1867, the said John M'Lauchlan gave, granted, assigned, and disponed to and in favour of the pursuer, in case she should survive him, 'in liferent for her liferent alimentary use allenarly, whom failing, and at her death, to my own heirs, executors, and assignees whomsoever in fee, all and whole my heritable and moveable estate,' including Nos. 1 and 2 Agnew Crescent; (3) that the pursuer being the alimentary liferenter of the subjects in question by a disposition in her favour granted by William M'Lauchlan, land steward, Billown, near Castletown, Isle of Man, dated 16th and recorded 20th, both days of April 1873, acquired right to the fee of the properties in question; (4) that the pursuer and defender have been living apart since about the month of July 1887; (5) that the pursuer legally warned the defender to flit and remove from said premises Nos. 1 and 2 Agnew Crescent at and against the term of Whitsunday 1888: And find in law that the liferent alimentary allenarly provision in favour of the pursuer, contained in the mutual disposition and settlement executed by her former husband and herself above referred to, implies an exclusion of the *jus mariti* and right of administration of the defender, and will not fall under the legal assignation implied in the marriage, the effect of such exclusion being to place the pursuer in the same position as if she were an unmarried person; that it is quite competent for pursuer to hold two interests at same time in same property, one the liferent alimentary, the other the fee; that the liferent alimentary provision of pursuer has not been in any way assigned, sold, attached, superseded, or discharged by her acquisition of the fee; that the pursuer's alimentary liferent right has not been consolidated or extinguished by her acquisition of the fee; and that therefore pursuer is entitled to exercise the whole rights of property over the properties in question without being subject to the control or administration of defender: And therefore, and in respect that the term of Whitsunday has now come and is bygone, the Magistrates grant warrant to officers of Court to eject the defender, his family, servants, and effects furth and from the said premises Nos. 1 and 2 Agnew Crescent, Stranraer, in terms of the alternative conclusions contained in the prayer of the petition: Find the defender liable to the pursuer in the expenses of process, &c., and decern.

"*Note.*—The Magistrates think it right to point out that while the pursuer's arguments and pleas were supported by the *dicta* of institutional writers and decided cases, the defender's case was entirely unsupported by such, not a single case or authority having been cited on his behalf."

The defender presented a note of suspension of this decree to the Court of Session. He averred, *inter alia*—"The above-recited judgment of the Magistrates is wrongous and unjust. Not only is it unsound in law, but it deals with questions of right, of which the Magistrates are not competetent judges, and it does so in a summary process of ejection—a form of process under which such a question could not be competently tried even in a competent court. In these circumstances the complainer is humbly of opinion that this note should be passed without caution or consignation."

The complainer pleaded—"(1) The decree complained of is incompetent, and ought to be suspended. (2) The question of right at issue between the complainer and respondent not being a question between landlord and tenant, but between husband and wife, the Court of the royal burgh of Stranraer has no jurisdiction to entertain and decide the said question."

The Lord Ordinary (FRASER) on 8th November 1888 pronounced the following interlocutor:—"Repels the reasons of suspension: Finds the threatened charge orderly proceeded, and decerns: Finds the respondent entitled to expenses, &c.

"*Opinion.*—The first objection stated by the complainer is that the decree complained of is incompetent in respect the magistrates of Stranraer had no jurisdiction. The subjects from which the complainer is sought to be removed were subjects within the royal burgh of Stranraer. The whole proceeding was gone about in a formal manner, as in removings in a burgh.

The complainer was duly warned, as is certified by the burgh officer's execution. A petition for removing was then presented, and the period for removal having expired, the magistrates were entitled to grant a warrant of ejection, which they did. The whole proceedings were in accordance with the law as laid down in *Robb* v. *Menzies*, January 20, 1859, 21 D. 277.

"It is next said that the Magistrates of Stranraer had no power to pronounce judgment in such a case as this, because it was not a case between landlord and tenant but between husband and wife. They had certainly the power to see whether the wife had a title to sue, being the proprietor, and this was all they did. It is of no consequence that this is a litigation between a husband and a wife. The question is simply whether the complainer ought not to be removed from premises within their jurisdiction and that depends entirely upon the title which is produced, and which the Magistrates are entitled to read.

"It is then said that the respondent, the wife, having acquired the fee of the property, the liferent which she formerly possessed vanished, being consolidated with the fee. It is undoubted law that if there be such consolidation there is no longer, in the ordinary case, a liferent, the reason being, as the civilians put it, '*quia re propria nemo uti frui potest.*' But this cannot be taken absolutely and unqualifiedly. The wife in the present case obtained from her husband a disposition 'in liferent for her liferent alimentary use allenarly' of his whole heritable and personal estate, and the property from which it is now sought to eject the complainer was a part of the property so disponed. Now, clearly such a conveyance to the wife was one which excluded the *jus mariti* and right of administration of any husband she might afterwards marry. Alimentary provisions do not fall under the *jus mariti* at all when declared alimentary by the deed of a third party. Therefore if the case stood upon the deed of the first husband, the complainer, the second husband, had no right to the rents of the property, nor to interfere in its administration. But the wife afterwards acquired the fee, and the contention of the complainer is that the protected liferent, with its exclusion of the *jus mariti* and right of administration, was at an end, and there being no restriction of the wife's right contained in the disposition to her by the fiar, the complainer thereby became in right of the rents of the property, and could possess it or let it at his pleasure. This is not the reading of these deeds which the Lord Ordinary adopts. He holds that any protection which the wife had when she acquired the fee still subsists; and it has been determined that the alimentary character of a fund will subsist during the marriage, notwithstanding the union of the two rights of fee and liferent. In *Balderston* v. *Fulton*, January 23, 1857, 19 D. 293, it appeared that the fee had vested in a woman who already liferented the property under a trust excluding the *jus mariti*, and the Court refused to order the money to be paid over to the husband. Still further, supposing it to have been the case that the effect of the junction of the fee and liferent in the present case was to open up the rents and the administration of the property to the husband, this would be a donation revocable by the wife, and she has revoked it by her present action."

The complainer reclaimed, and argued—The decree was incompetent, as the Magistrates had no jurisdiction—(1) in respect that the question was between husband and wife, and the rights involved in the *jus mariti*, while their jurisdiction only extended to the relations between landlord and tenant—Ersk. Inst. ii., tit. 6, sec. 48; (2) in respect that the complainer had an *ex facie* good title, and was therefore neither a vicious or precarious possessor, and the whole question involved was one of heritable right—*Hally* v. *Lang*, June 26, 1827, 5 Macph. 951; *Scottish Property Investment Company Building Society* v. *Horne*, May 31, 1881, 8 R. 737.

The respondent argued—The Magistrates had jurisdiction. (1) They had to deal with rights of possession in general, and not with right of landlord and tenant only. (2) If the argument of the respondent was sound, the complainer was a precarious possessor, as the Lord Ordinary had found him to be. The question of competency, so far as regards this ground, was waived in the Burgh Court.

At advising—

Lord President—In this case we have had an interesting question raised and partially argued before us. But according to the view I take it is impossible to reach the consideration of that question. We are met by the preliminary objection that the proceedings under which the decree of ejection was obtained were incompetent.

My view is contained in the opinion which I gave in the case of *Hally* v. *Lang*. The general rule which applies to summary ejections of this kind is, that there must be an allegation and proof that possession is either vicious or precarious. These words are perhaps a little technical and require definition. A vicious possessor is one who has obtained possession either by force or fraud; a precarious possessor one who holds by mere tolerance.

No doubt, as I said in the case of *Hally* v. *Lang*, there are certain anomalous exceptional cases which do not fall under these two heads, but this case is not one of these. Therefore we have to consider whether the possession was vicious or precarious here.

Now, it is plain enough that it was not vicious, for the husband and wife were in possession of the tenement in question, and lived there as husband and wife. The possession was therefore lawfully obtained. But it is said that it was precarious. That is really an extraordinary proposition in the circumstances of the case. The only existing infeftment of the wife is under a disposition from William M'Lauchlan, heir-at-law of her former husband, proceeding on the narrative of purchase, and though no doubt it is mentioned that the widow was already liferentrix, nothing is said in the deed about the nature of her liferent. And, therefore, taking the existing investiture, it is demonstrable that the husband was entitled either to rent, or to possession of the subjects in the event of their not being let, in virtue of his *jus mariti*.

True, it is said that is so on the face of the existing infeftment, but the pursuer undertakes to show that the infeftment cannot receive its natural and proper effect because of a liferent provision, which she is entitled to represent as a separate title, and

to found upon as a separate title from the disposition. That is a very important and interesting question of heritable right as distinctly as can be. And it is not possible to hold that in a process of summary ejection a burgh court can decide as the foundation of its decree of ejectment that the provision of an alimentary right in favour of a wife is such as can be held on a separate title—a title merely of liferent. It is not competent to the burgh court to decide that question, and if they cannot give a decree of ejection without doing so, the whole proceedings are incompetent.

I agree with what has been said as to the case having been very well treated in the Inferior Court. The judgment is most excellent if there had been jurisdiction to pronounce it. The interlocutor is remarkably well put, but it is self-condemnatory as regards the competency, because it finds in law that a certain right belongs to the wife, and not to the husband as regards heritable subjects.

Lord Mure—I have come to the same conclusion. I should have been very glad if we could have decided the questions raised on the titles. The question of competency, however, is raised, and we must dispose of that first.

I have always understood that inferior courts, with the exception of cases where they have special jurisdiction given them, have no right to entertain questions of heritable right. That I think is quite fixed.

The first time I read the interlocutor of the Magistrates it appeared to me that it distinctly raised and decided a question of heritable right. Mr Ure suggested that it was rather hard that because the Magistrates gave findings in law a decree of ejection, otherwise good, should be touched. But the case stated on record, and the pleas-in-law, forced them to decide the question of heritable right. The third plea for the defender is—"The defender in entering into the contract of marriage with the pursuer was entitled to rely on the public records, and the same not disclosing any exclusion of his legal rights of *jus mariti* and right of administration in the properties in question, no secret or latent deed containing such exclusion can be competently pleaded against him." And the fourth plea is—"Assuming that by the terms of said mutual disposition and settlement defender's legal rights were excluded, the pursuer not having taken infeftment thereon, but on a title containing no such exclusion, the defender cannot be affected by the terms of the former deed."

It was not the Magistrates who raised the question, they merely applied themselves in their findings to dispose of pleas specifically put as to the meaning of the titles. It was simply a question of heritable right which was before them, and I quite agree that it was incompetent for them to entertain it.

Lord Shand—I think it not surprising that the Burgh Court did not take up this question, as the only plea stated to the competency on the record is the first—"It is incompetent for this Court to entertain any consistorial question, such as the pursuer's justification for separating herself from her husband, and all such averments should be deleted from the proceedings."

And apparently, even when the case came up on the suspension, the same view ran through the arguments. The point argued before Lord Fraser, as may be seen from his note, was that the case of husband and wife is not like the case of landlord and tenant. Further, the opening on the reclaiming-note did not suggest the point upon which the case is now decided. The question was raised by Mr Strachan sharply upon this argument, that because the question was one of heritable law, therefore it was incompetent for the Burgh Court to entertain it. That is an objection applicable not merely to Burgh Courts but Sheriff Courts.

Taking the argument as now stated I see no answer to it. The pursuer claims possession of this heritable property in virtue of her right of liferent under the mutual disposition. The defender replies that he has also a heritable right, founding upon the disposition under which the widow bought and was infeft. The question comes to be a competition of heritable rights. Whether that arises in a process of summary ejection or another process makes no difference. The ground of decision is not rested on the fact that this was a process of summary ejection. The objection taken is that a Burgh Court has no jurisdiction in questions of heritable right. This case requires the decision of a question of that kind, and therefore it is incompetent for the Burgh Court to entertain it. I am accordingly of opinion that we must sustain the objection to the competency even though it has been taken late in the day.

Lord Adam—No doubt a summons or petition of removing and ejection is quite competent in a Burgh or Sheriff Court. But where it appears that the whole question on which the decision of the case must depend is one of heritable right, what might be, as originally brought, a competent summons of removing becomes incompetent as involving a question of heritable right. Accordingly from the nature of this case it appears to me that there was necessarily no jurisdiction in the Burgh Court to entertain it.

The Court recalled the interlocutor of the Lord Ordinary and sustained the reasons of suspension.

Counsel for the Complainer — Strachan — M'Lennan. Agent—Robert Broatch, L.A.

Counsel for the Respondent—Ure—A. S. D. Thomson. Agents—Smith & Mason, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Sheriff of Elginshire.

ADAM *v.* M'LEAN.

Reparation — Slander — Privilege — Defamatory Statement by Member of Public Committee with Reference to Business before it.

At a meeting of the Public Health Committee of a village the chairman stated that a case of typhoid fever had been reported to him by a medical practitioner, who said that