Nor do I see anything in the circumstances attending the sale to take the case out of the ordinary rule. The sale was simply a sale by a married woman of her heritable estate, with concurrence of her husband, under the authority of the Act 3 and 4 Will. IV. c. 74. No doubt there are provisions in that Act by means of which Mrs Tennent might, had she chosen, have protected herself to a greater or less extent from the operation of the law of England, by which the price of the estate, as a moveable fund, would become the property of her husband. She did not avail herself of these provisions, and had there been any question in this case as to whether she intended that the price should go to her husband that circumstance no doubt might have been material. But as all gifts between husband and wife are revocable by the law of Scotland, it is of no materiality whether she intended to give the price to her husband or not seeing that she has competently revoked all gifts.

The defender further pleaded that the £18,000, which it is admitted that Mr Welch Tennent had received, had not been applied to Mr Welch Tennent's own uses and purposes, but had been applied, with the pursuer's consent, to the joint uses and purposes of himself and his wife; but the defender intimated that he was not prepared to undertake the proof thus allowed. That being so, it must be held that the money was applied to Mr Welch Tennent's own uses and purposes.

But the defender further pleaded that it appeared from the opinion of the High Court that the sale of the estate was a sale of the joint rights of husband and wife in the estate, and that Mr Welch Tennent would have been entitled to have the price received for it apportioned according to the value of their respective rights, and I understand that he proposes that an inquiry should now be made as to what would or might have been the actuarial value put upon Mr Welch Tennent's rights as at the date of the sale, and to retain this sum out of the price as his share thereof.

Had this claim been made at the time I think it probably would have been difficult to resist it. But I think that such an inquiry now is quite out of the question. Mr Welch Tennent's right was a right to the rents of the estate during the subsistence of the marriage. He received the whole available price of the estate, and appropriated the whole interest or income of it to his own uses during the subsistence of the marriage.

The defender is not asked to repay any part of that interest or income. I agree with the Lord Ordinary in thinking that the price of the estate must be considered as coming in place of the estate itself, and that the interest or income of the price which Mr Welch Tennent received must be held as equivalent to the rents to which he was previously entitled.

I am of opinion therefore that the interlocutor of the Lord Ordinary should be in substance adhered to. There is, however, a small matter apparently not brought under his Lordship's notice, in respect to which I think it should be slightly altered. He has decerned against the defender for the full sum of £18,000, but I think that there should be deducted from this sum the expenses of the sale, and any other charges of a similar kind which formed proper deductions from the price received by him.

The Lord President, Lord Mure, and Lord Shand concurred.

The Court varied the first finding of the Lord Ordinary in so far as he had decerned against the defender for the full sum of £18,000, and both findings in so far as directed against the defender personally; decerned against the defender as executor and general disponee of Charles Welch Tennent for payment of £18,000, subject to a deduction of the sums which had been paid by the said Charles Welch Tennent in connection with the sale of Overton; *quoad ultra* adhered.

Counsel for the Pursuer and Respondent—Asher, Q.C.—Low. Agent—Peter Douglas, S.S.C.

Counsel for the Defender and Reclaimer—Gloag—H. Johnston. Agents—Hagart & Burn Murdoch, W.S.

Friday, June 28.

FIRST DIVISION.

HOGARTH AND ANOTHER (FOTHERINGHAM'S TRUSTEES) *v.* FOTHERINGHAM.

Husband and Wife—Antenuptial Contract—Exclusion of Jus Mariti—Succession—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 6.

The Married Women's Property (Scotland) Act, by its 6th section, gives to the husband of any woman who may die domiciled in Scotland the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate according to the law and practice of Scotland.

By antenuptial contract a woman conveyed her whole estate to trustees for behoof of herself, whom failing for behoof of her own representatives, or other parties that might be thereafter named by her, excluding her husband's *jus mariti* and right of administration, which were also expressly renounced by the husband in the deed. Some years after the marriage she died, domiciled in Scotland, survived by her husband and certain issue of the marriage, and possessed of certain moveable estate. *Held*—following *Poë* v. *Paterson*, 10 R. (H. of L.) 73—that the husband was entitled to one-third of the said moveable estate.

On 20th March 1877 John Fotheringham, farmer, Orrock, was married to Isabella Hogarth, Kirkcaldy. In contemplation of the marriage an antenuptial marriage-contract was executed between the intended spouses, which dealt solely with the wife's estate. By this deed she conveyed her whole estate, *acquisita* and *acquirenda*, to trustees, and she directed them to hold the same for behoof (1) of herself, whom failing (2) of her own representatives, or other parties that might be thereafter named by her. The husband's *jus mariti* and

right of administration were excluded by the deed, which also contained an express renunciation by him of these rights.

Mrs Fotheringham died on 7th February 1888, domiciled in Scotland, and without having executed any writing disposing of her estate except the said contract. She was survived by her husband and five children.

She left no heritage, but her moveable estate in the hands of the trustees above referred to amounted to £5000. Her husband claimed one-third of this amount under the provisions of the Married Women's Property (Scotland) Act 1881.

As Mrs Fotheringham's trustees did not feel justified in meeting this claim without judicial authority, the present special case was presented to the Court, the first parties to which were the trustees above mentioned, and the second party was the said John Fotheringham.

The second party based his claim upon the alternative grounds—(1) That he was a creditor of his wife under the provisions of the Married Women's Property (Scotland) Act; or (2) that he was one of his late wife's legal representatives, and therefore that he was entitled to succeed to the said portion of her estate as one of her "representatives" within the meaning of the destination in the said antenuptial contract.

The first parties maintained that the second party had by his antenuptial contract discharged all his rights in or to his wife's estate, which they were bound to hold for the children of the marriage, who were the truster's own representatives.

The following question was submitted for the opinion of the Court—"Is the second party entitled to receive, and are the first parties bound to pay to him, one-third of the free moveable means and estate of the late Mrs Isabella Hogarth or Fotheringham?

By the 6th section of the Married Women's Property (Scotland) Act 1881 it is provided as follows:—"After the passing of this Act the husband of any woman who may die domiciled in Scotland, shall take, by operation of law, the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be."

Argued for the second party—The case of *Poë* v. *Paterson*, July 19, 1883, 10 R. (H. of L.) 77, practically determined the present case, as it was there decided that section 6 of the Married Women's Property (Scotland) Act applied to marriages contracted before the passing of the Act. All that the second party renounced in the marriage-contract was his *jus mariti*, which only existed during and terminated with the marriage. The language of section 6 was of the widest application, and there was no reason, as the second party had in no way contracted himself out of the Act, why its provisions should not apply. The object of the deed was to protect the wife's estate from the husband or his creditors *stante matrimonio*, and there was nothing to have prevented the second party accepting a legacy from his wife. His true position was that of a statutory creditor on her estate to the extent of one-third of the moveables—*Poë* v. *Paterson*, *supra*; *Ramsay* v. *Ramsay's Trustees*, November 24, 1871, 10 Macph. 120.

Argued for the first parties—Whatever rights the second party might have had under the Married Women's Property (Scotland) Act were renounced by him when he signed the marriage-contract. By so doing he gave up all right in his wife's moveable estate—*Hume* v. *Watson*, 5 Brown's Supp. 330. At the date of her death Mrs Fotheringham was not divested in favour of her trustees. The money was destined by the wife to her representatives, and these were her children, to the exclusion of the second party.

At advising—

Lord President—It is important to observe that we have already decided in the case of *Poë* v. *Paterson* that the provisions of the 6th section of the Married Women's Property (Scotland) Act 1881 are applicable to marriages contracted before, as well as to those contracted after, the passing of that statute, and we accordingly in that case gave a husband one-half of his wife's moveable estate, the division being bipartite, as there were no children of the marriage.

Now, it follows from what we then decided that the 6th section of the Act can never operate except in cases in which the *jus mariti* of the husband had been excluded, because if this had not been effectually done then the wife could not have any moveable estate.

In the present case the position of Mrs Fotheringham during the subsistence of the marriage was simply this, she was absolute owner of her moveable estate, free of all liferents or burdens whatsoever. She could therefore have disponed of it as she chose. So standing matters, she died. Is her husband not entitled in these circumstances, under the provisions of the 6th section of the statute, to one-third of her moveable estate? It is of course incumbent upon the second party to establish (1) that there is moveable estate to which his right applies, and (2) that he has done nothing to discharge the right which he derives under the statute.

It appears to me that he has made out both these points. All that the second party renounced was his *jus mariti* and right of administration, but such a renunciation cannot exclude the operation of the 6th section of the statute.

I think therefore that the second party is entitled to prevail.

Lord Mure—I am entirely of the same opinion. The scheme and purpose of this antenuptial marriage-contract was, that this lady was to have the entire management of her own estates, and further, that she was to have power to deal with her property in any way that seemed good to her. She died in 1888, and the purpose for which the deed was executed was fully realised, as she left separate moveable estate amounting to about £5000.

The Married Women's Property (Scotland) Act was passed some time after this antenuptial contract was executed, and the opening words of its 6th section are exceedingly comprehensive and quite clear. It provides that "after the passing of this Act, the husband of any woman, who may die domiciled in Scotland, shall take, by operation of law," the benefits therein set forth. I think that the Act applies in all cases where a married woman

dies leaving moveable estate, and I therefore agree in the result arrived at by your Lordship.

LORD ADAM—I agree with the construction of this marriage-contract, whereby the husband's rights over his wife's moveable estate are held to be excluded *stante matrimonio*. The wife's power over her estate during the subsistence of the marriage was absolute, and she could dispose of it as she chose. I also agree that the 6th section of the Married Women's Property (Scotland) Act applies to the present case, unless it can be shown that its provisions are excluded by the husband's renunciation. Now, the only exclusion mentioned in the deed is the husband's *jus mariti*, which only lasts during and terminates with the marriage. I therefore think with your Lordships that the provisions of section 6 of the Married Women's Property (Scotland) Act apply to the present case.

LORD SHAND was absent.

The Court answered the question in the affirmative.

Counsel for the First Party—Jameson—Hay. Agent—James Skinner, S.S.C.

Counsel for Second Party — Low — Cook. Agents—Wishart & Macnaughton, W.S.

Wednesday, July 3.

SECOND DIVISION.

CHRISTIE'S TRUSTEES AND OTHERS.

Succession—Vesting—Trust—Direction to Trustees to Retain.

A testator appointed trustees, and left his property to be divided equally among his three children—two daughters and a son. He directed that any share his daughter M might receive was "to go direct to her and her children." His daughter H's share he "settled in like manner," but provided, "also my trustees shall retain charge of her share. It is not to go into her hands." He further directed, "the same with reference to my son C, his share to remain in the hands of my trustees for his behoof."

Held that the property vested at the testator's death in his three children, but that, whereas the trustees were bound to pay over M's share to her at once, they were to retain the shares of H and C for their behoof.

Major-General Hugh Lindsay Christie died on 20th September 1888 leaving a holograph will or general settlement dated 14th March 1887, whereby he appointed trustees, and made provision for his wife. He further provided—"To my three children I leave all the rest of my property, consisting of stocks and shares, or whatever belongs to me at my death. To be divided equally. My money being principally in stocks and shares, I do not wish these to be uplifted unless it should be advisable so to do. My trustees are to invest my money or leave it invested in any fairly good security without limitation. Any share that my daughter Mary Agnes may receive, to go direct to her and her children Failing the above mentioned, her share to return to her nearest of kin, except her husband shall have the liferent. My daughter Hughina Margaret's share I settle in like manner, excepting in the event of her decease without issue her share shall return to her nearest of kin. Also my trustees shall retain charge of her share. It is not to go into her hands. The same with reference to my son Charles, his share to remain in the hands of my trustees for his behoof. In the event of his demise, his share to return to his nearest of kin."

The testator was survived by his wife, his two daughters, and his son. His daughter Mrs Mary Agnes Christie or Murray had one child, and by her antenuptial contract of marriage she was bound to pay over to her marriage-contract trustees all *acquirenda* excepting sums not exceeding £100 each. His daughter Mrs Hughina Margaret Christie or Rowland had no marriage-contract, and there were no children of the marriage. His son Charles Robert Christie was under curatory, and had been since 1884 an inmate of the Dundee Royal Lunatic Asylum.

Various questions having arisen in regard to the rights of parties under the said settlement, a special case was submitted to the Court for their opinion by (1) the testator's testamentary trustees, (2) Mrs Murray's marriage-contract trustees, (3) Anthony Hugh Murray, Mrs Murray's only child, and his father, as his administrator-in-law, (4) Mrs Murray, (5) Mrs Rowland, and (6) Charles Robert Christie's *curator bonis*.

The questions of law were as follows:—"1 (*a*) Did the fee of the share of testator's estate bequeathed to his daughter Mrs Mary Agnes Christie or Murray vest in her *a morte testatoris*, and is the capital of it now payable by the first parties, General Christie's trustees, to the second parties as her marriage-contract trustees? 2 (*a*) Did the fee of the share bequeathed to the testator's daughter Mrs Hughina Margaret Christie or Rowland vest in her *a morte testatoris*, and are the first parties bound to pay the capital now to her? or (*b*) Are the first parties bound to hold the fee of this share? 3 (*a*) Did the fee of the share bequeathed to the testator's son Charles Robert Christie vest in him *a morte testatoris?* (*b*) Are the first parties bound to pay the capital thereof now to the party of the sixth part as his *curator bonis?* or (*c*) Are the first parties bound to retain the capital?"

Argued for the first parties—It was evidently the intention of the truster that there should be a continuing trust. There was no direction to realise and pay. On the contrary, the money invested was not to be uplifted, but was to be left invested. The widow was to pay a rent for the use of certain premises, and Mrs Murray's husband was to have the liferent of his wife's share in the event of her predecease. The case might be regarded as falling either under the principle of *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858, in which case the children of the testator would have only a liferent, the fee being in their issue, or under that of *Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173, in which case, although the fee would be held to vest *a morte* in the testator's children, their issue would have a protected right of succession. The Lord Justice-Clerk (Moncreiff)