cause we have no means of ascertaining what will be the value of land in future. While, then, I agree that all circumstances substantially affecting the result ought to be taken into account, and while we have the authority of the House of Lords that weight must be given to elements which tend to shorten life, such as disease or an unhealthy constitution, or, as in this case, an unfavourable climate, I should wish to reserve my opinion as to whether the case of a person who avers that he is of exceptionally good health can be treated as a special case. My reason for doubting whether effect should be given to such averments is, that no materials exist for determining the weight to be given to such a specialty. We are not bound by the practice of insurance companies, who, as we know, never take into account the fact that a man enjoys exceptionally good health, or comes of a very long lived family. But in the absence of tables of expectancy applicable to exceptionally good lives, I do not see how this element is to be introduced into the calculation.

On all the other points I agree with your Lordship.

LORD KINNEAR—I am of the same opinion. I think the case of *Macdonald* lays down a general rule as to the date at which the value of the heir's expectancy is to be ascertained. But if there were no such guide, I cannot see, after listening attentively to the argument, what other rule could be adopted. Perhaps there may be cases outside the general rule, but I have not been able to figure them. The two other dates suggested are the dates of the approving and the recording of the instrument of disentail. Both are inadmissible under the statute, because the statute requires the value in money of the next heir's expectancies to be ascertained and paid before the consents are dispensed with. It is therefore illogical and out of the question to say that their value is not to be ascertained until the interlocutor dispensing with their consents is pronounced.

On the other points I agree with your Lordship, and have nothing to add.

The petitioner asked for expenses since the date of the Lord Ordinary's last interlocutor, and argued—While a respondent heir would not be found liable in the expenses of a discussion in the Outer House upon questions properly raised by him, that rule did not apply to expenses incurred upon an unsuccessful reclaiming-note by him. The opinion of Lord Gifford in *Macdonald's* case did not apply to Inner House expenses. Here the respondents had been in the main unsuccessful, and they should therefore be found liable in expenses.

The respondents referred to the opinion of Lord Gifford in *Macdonald* v. *Macdonald*, June 7, 1879, 6 R. 1011, and submitted that they should not be found liable in expenses, as it could not be said that they had indulged in any unreasonable litigation, and further that this was a case of divided success.

At advising—

LORD PRESIDENT—I think that no expenses should be found due. The success has been divided, though no doubt the balance is on the side of the petitioner, but all the questions argued were fairly and properly raised. I do not wish to imply that a party is entitled to take the opinion of the Inner House on any question which may be raised in an entail petition. In many cases his proper course is to abide by the judgment of the Lord Ordinary.

LORD ADAM concurred.

LORD M'LAREN—I think it is a sufficient protection against vexatious litigation in proceedings of this kind that the party raising questions has to bear his own expenses. I think the rule applied by the Second Division in *Macdonald's* case is a sound one.

LORD KINNEAR concurred.

The Court varied the Lord Ordinary's interlocutor of 13th May by adding to the value of the third heir's interest the amount of the succession duty deducted by the Lord Ordinary, and *quoad ultra* adhered: Found neither party entitled to expenses in the Inner House, and remitted to the Lord Ordinary to proceed.

Counsel for the Petitioner — Dundas — C. K. Mackenzie. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Respondents—Mackay—Salvesen. Agents—Gill & Pringle, W.S.

Tuesday, June 28.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'GINTY AND ANOTHER *v.* M'ALPINE.

Husband and Wife — Wife's Separate Estate—Earnings of Wife in Business—Married Women's Property Act 1877 (40 *and* 41 *Vict. cap.* 29), *sec.* 3.

Section 3 of the Married Women's Property Act 1877 excludes the *jus mariti* and right of administration of the husband from the wages and earnings of every married woman, acquired by her after 1st January 1878, "in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name."

A man married a woman who had for some time carried on the business of fish-hawking. After the marriage the husband gave up the business of carting which he had previously carried on, and took to the business of fish-hawking, and by request of both spouses the dealers who had previously supplied the woman charged their accounts to the husband's name. The two carts used in the business both

bore the husband's name, but the wife chose the fish for one of the carts, and went a separate round from her husband, who looked after the other cart. The earnings of both spouses were lodged in bank in name of the husband and the wife, or either, or the survivor. The wife predeceased the husband in 1891.

Held that the business was the husband's, and that the wife did not thereby earn any separate estate.

Opinion by the Lord President that in order to get the benefit of the above section the wife must have some other "employer" than the husband, or the "occupation or trade" in which she is engaged must not be simply the occupation or trade of the husband.

Opinion by Lord Adam that the first branch of the above section refers to wages earned by a wife in an employment, occupation, or trade in which she is engaged as the servant of another person; and the second branch to the earnings of a wife in any business which she carries on under her own name.

Opinions by Lords Adam and M'Laren that it is only when the business is carried on in the wife's own name that she can lay claim to the earnings as her separate estate.

This was an action at the instance of William M'Ginty and Mrs Sherry, executors-dative *qua* next of kin of the deceased Mrs Ellen M'Alpine, wife of George M'Alpine, fish-hawker in Glasgow, against the said George M'Alpine. The pursuers sought decree ordaining the defender to render them an account of the means and estate of his deceased wife, and pay over to them the sum which that estate should be ascertained to amount to.

The pursuers averred that the deceased Mrs M'Alpine had been possessed of separate estate to a considerable amount, which had been taken possession of by the defender after her death.

The defender denied that his wife had died possessed of any separate estate.

The material facts of the case as ascertained by the proof were as follows:—In 1875, the defender George M'Alpine married Mrs Campbell, a widow, who had for some time carried on the trade of fish-hawking. Prior to his marriage the defender had contracted for carting work, and at the date of the marriage he was possessed of two horses and a cart which he had used in this business. His wife brought him £22 of savings, and a pony and cart which she had used in the fish-hawking business. About three months after the marriage the defender was persuaded by his wife to give up the business of carting and to take to the business of fish-hawking, and accordingly he sold his horses and cart, which were unsuitable for the latter business. For some time after he gave up carting he accompanied his wife on her fish-hawking rounds in order to learn that business, but when he had learnt it he bought a pony and cart for his own use. After this the defender and his wife went separate rounds. Each looked after one cart, and bought the fish necessary to supply it. The wife was a most efficient saleswoman. Occasionally the wife was off work, and the defender then engaged a substitute for her. The defender's name was on both the carts, and the dealers who had supplied his wife before her marriage to him, at the request of both the spouses, rendered their accounts in the defender's name after he took to the business. The money which the spouses earned was lodged in bank in name of "George and Ellen M'Alpine, or either, or the survivor." Mrs M'Alpine died on 11th August 1891, at which date the money in bank at the credit of the joint account amounted to £800.

By the 3rd section of the Married Women's Property Act 1877 it is provided —"3. *Protection of Earnings of Married Women.*—The *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman, acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name, and shall also be excluded from any money or property acquired by her after the commencement of this Act through the exercise of any literary, artistic, or scientific skill, and such wages, earnings, money, or property, and all investments thereof, shall be deemed to be settled to her sole separate use, and her receipts shall be a good discharge for such wages, earnings, money, or property, and investments thereof."

On 2nd March 1892 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor—"Finds that the defender and his wife Ellen M'Ginty or M'Alpine carried on business jointly as fish-hawkers: Finds that the business was carried on in the name of the defender: Finds that the provisions of the Married Women's Property Acts 1877 and 1881 do not apply: Finds that the said deceased Ellen M'Ginty or M'Alpine did not thereby earn any separate estate: Finds that she predeceased the defender, and that there was no issue of the marriage: Finds that the earnings of said trade now belong exclusively to the defender: Therefore repels the pleas-in-law for the pursuers, and assoilzies the defender from the conclusions of the summons, and decerns: Finds the pursuers liable to the defender in expenses, &c.

"*Note.*—. . . I am of opinion that the defender is entitled to absolvitor.

"At common law the earnings of a wife fall undoubtedly under the *jus mariti* of the husband, and form part of his estate when the marriage is dissolved by the death of the wife. This was so at common law, even where the wife carried on a separate business, much more when she and her husband carry on business together. The business so carried on by the wife is at common law to be regarded as the husband's business, and she as his agent or assistant—*Ferguson's Trustees* v. *Willis, Wilson & Company*, December 11, 1868, 11 R. 261, *per* Lord President, 266.

The fact that the wife carried on the business before marriage, and that after marriage the spouses continued her business, can make no difference.

"This case presents the speciality that the husband regarded the funds as belonging equally to himself and his wife. But that would not, I think, affect the result if the case is to be determined by the law as it stood after 1855 (18 Vict. c. 23, sec. 6), and before the Women's Property Act 1877. I think it really amounts to no more than an admission that the money constituted goods in communion, and if so, it fell under the *jus mariti*, and belonged exclusively to the husband at the wife's death. That would be so unless the admission of the husband could be brought up to this, that part of the money in bank was the separate estate of the wife, from which the *jus mariti* was excluded, which I think it cannot be.

"If that be so, the next question is, whether section 3 of the Married Women's Property Act 1877 (40 and 41 Vict. c. 29) applies to a case where a wife did not carry on a separate business, but carried on a business jointly with her husband. It is a question of some importance. The section provides that the *jus mariti* of the husband 'shall be excluded from the wages and earnings of any married woman acquired or gained by her after the commencement of this Act in any employment, occupation, or trade in which she is engaged, or in any business which she carries on in her own name.'

"The latter words of the section do not apply, because the trade of fish-hawking was not carried on in Mrs M'Alpine's name at all, but in the name of the defender. All the proof points to that.

"The question is, whether the words 'wages and earnings acquired or gained in any employment, occupation, or trade' apply. In the case of *Ferguson's Trustees* v. *Willis, Wilson, & Company*, the Lord President took occasion to state his view as to the proper interpretation of these words. He says (pp. 266-7)—'That seems to point at the case of married women employed in business as a servant or manager or the like, and whether paid by salary or by wages, or by a share of profits, these are in future to be exempted from the husband's *jus mariti*.'

"I am not sure that that opinion was essential to the judgment in that case, but whether it was so or not it is of course of great weight and authority. No case was quoted in which the Act was held applicable to anything but an employment or business carried on by the wife apart from her husband, and I was informed that there have been no decisions in England in which the analogous statute had been applied to such a case.

"To apply the Act to every case where the earnings resulted from the joint efforts of husband and wife would give the Act an alarmingly wide application going far beyond the true scope of the statute. For example, a great many shops are kept by the husband and wife jointly; on many farms the farmer's wife contributes materially to the earnings; in fact, the Act in that case would cover a great number of the ordinary industries of life. If it had been meant that the Act should apply to such cases, there would, I think, have been some provision as to the principles on which joint earnings should be appropriated. I am of opinion that the Act does not apply to a case of trade carried on by husband and wife jointly, and that such trading does not result in any earnings from which the husband's *jus mariti* is excluded.

"The pursuers contended, that inasmuch as the trade was originally carried on by the wife and merely continued by the husband, it should be regarded as her separate trade, and that he was to be held as merely her assistant. I think, however, that there are neither facts nor law to justify that view.

"The pursuers also referred to the Married Women's Property Act 1881 (44 and 45 Vict. c. 21), and in particular to subsection 2 of section 3. The provision is that the *jus mariti* and right of administration shall be excluded by the preceding sections from all estate, moveable or heritable, and income thereof to which the wife may acquire right after the passing of the Act.

"No attempt has been made to ascertain the portion of the whole sum which was earned after 1881. But as I think none of it truly became the property of the wife, I think the clause has no application. I do not think that in any view it refers to earnings from trade covered by the prior statute.

"I am therefore of opinion that this money all belonged in law to the husband; and I would think so, even although I should hold that that was not the opinion of the husband and wife themselves. There is no hardship in this case; indeed, the result is satisfactory, for it is what both husband and wife desired to accomplish by other means, which by reason of certain special rules of our law would have been ineffectual."

The pursuers reclaimed, and argued — Where money was deposited in bank in the name of two parties, or either, or the survivor, the presumption was that each was entitled to one-half of it—*Bank of Scotland* v. *Robertson*, January 12, 1870, 8 Macph. 391; *Trotter* v. *Spence*, January 21, 1885, 22 S.L.R. 353. The rule of these cases applied, for by the 3rd section of the Married Women's Property Act of 1877 the earnings of any occupation or trade in which a wife was engaged were protected from the husband's *jus mariti*. Earnings in the first part of the clause was not to be construed as merely the equivalent of wages, but included the profits of any trade in which the wife was engaged, whether under her own name or not—*Ferguson's Trustee* v. *Willis, Neilson, & Company*, December 11th 1883, *per* Lord Mure 270. In the present case the business in which the earnings were made was the wife's business, or at least it was a family concern in which she had a separable interest, and

in the earnings of which she was entitled to share—*Aitchison* v. *Aitchison*, June 16th 1877, 4 R. 899. The fact that the stock belonged to the husband, and that the money was lodged in joint account, did not prove that the business was not the wife's—*Ferguson's* case, *supra; Morrison* v. *Tawse's Executrix*, December 18th 1888, 16 R. 247. The pursuers were therefore entitled to half the profits which had been earned by the spouses at the date of the wife's death.

Argued for the defenders—The pursuers' claim was founded on the contention that the wife had earned money in business which was separate estate belonging to her at her death, but that contention failed unless it were shown that the business in which the earnings were made had been carried on by the wife in her own name. *Ferguson's* case *supra, per* Lord President, 11 R. 267. It could however not be said that the business had been carried on under the wife's name. Further, everything supported the view that the business in which the money was earned was the husband's, and that the wife merely assisted her husband in carrying it on, for the whole stock-in-trade belonged to the husband, and the goods were purchased on his credit. Assuming that the wife could have claimed part of the earnings of the business as her separate estate, the fact that she had allowed her share to be mixed up with that of her husband was *prima facie* evidence that she had waived her claim—*Hawkins* v. *Providence and Worcester Railroad Company* 1876, 20 American Rep. 353.

At advising—

LORD PRESIDENT—The money in question in this action was made out of fish-hawking carried on by two spouses during the period of their married life. The proceeds of the endeavours of both were daily put together, and the money, according to the terms of its investment with the bank, now belongs to the defender. The pursuer asserts right to some portion of this money as representing the earnings of the wife, in virtue of the Married Women's Property Acts 1877 and 1881.

It seems to me that his success depends on his establishing in fact that the wife had a separate business from that of the husband.

The main facts are these—the wife was a fish-hawker before her marriage to the defender, and the defender on their marriage abandoned his own business of carting and took to the business of fish-hawking. From the date of the marriage the wholesale merchants who theretofore had supplied the woman, now supplied her husband, in this sense that they changed the name of the accounts from hers to his, and they made this change in their debtor at the desire of both husband and wife. It is also to be noted that the carts bore the name of the husband. *Prima facie* therefore the business was the husband's, and the fact that the wife took about one of the carts and was a most efficient saleswoman is quite consistent with that view.

But then the pursuer makes much of the facts that the wife took one cart one road, while the husband took another cart another road, and she chose the fish for her cart. When the wife was unable to go her round, the husband had to provide otherwise for her route, but such was the normal arrangement. This is really all that there is to denote separation of business, and it seems to me quite insufficient. The proper legal view of the position of the wife is that she was the agent of her husband in the conduct of a part of his business, and if this be so, the Act of 1877 has plainly no application.

In order to come under the 3rd section of the Act of 1877 the wife must have some other "employer" than the husband, or the "occupation" or "trade" must not be simply the occupation or trade of her husband if it is to yield "earnings" in the sense of the section.

In the view of the facts which I have stated, the Act of 1881 has no application.

LORD ADAM—This action deals with a claim made by the executor of a Mrs M'Alpine against her husband for the amount of separate estate alleged to have belonged to Mrs M'Alpine, which the executor says was in the hands of her husband at the date of her death. The claim is founded upon the third section of the Married Women's Property Act of 1877. That clause has two branches. The first deals with the wages or earnings acquired by any married woman "in any employment, occupation, or trade in which she is engaged." The second deals with what is acquired by her "in any business which she carries on under her own name." I agree with the construction put upon the clause by the late Lord President in the case of *Ferguson's Trustee*, that the first branch refers to the employment of a married woman in the service of some other person, and the second to business carried on in her own name. The present claim is founded especially upon the latter branch of the clause, and fails, unless it is established in point of fact that the business in which the earnings are alleged to have been made was a business carried on under Mrs M'Alpine's own name. It is unnecessary for me to go over in detail the facts of the case. They have already been referred to by your Lordship. The business, no doubt, was originally hers, but it became the property of the husband on their marriage in 1875 *jure mariti*, the Marriage Act of 1877 not being then in existence. It was thereafter carried on by him. The accounts were in his name. The vans from which the fish were sold bore his name, and I need only further say that I can find nothing in the evidence to show that in any sense the business in question was carried on under Mrs M'Alpine's own name. It is just the ordinary case of a business carried on by the husband and wife for their mutual benefit—she assisting him in the business.

The other branch of the clause seems to me to have no application. I do not say

that if it can be shown, for example, that a husband has employed his wife and paid her wages, which she has kept separate, that that part of the section might not apply, but there is no case of that kind here. This seems to me just the ordinary case of a wife assisting her husband in the management of his business, and that the pursuer's claim therefore fails.

LORD M'LAREN—It appears to me that the general object of the Married Women's Property Act is to place women who have married without entering into a marriage-contract in as favourable a position as those who have married with a contract securing a separate estate to the wife. It is difficult to see how the Legislature could accomplish more than this. The Act of 1877 is not limited in its application to the case of a woman living separate from her husband, but applies also to the case of a woman living with her husband but having a separate business of her own, it may be as a shopkeeper or in the exercise of some literary or artistic occupation. In such a case a voluntary contract made before marriage to the effect that the earnings of such business should belong to the wife as separate estate would be effectual under the common law, and this separation of estates is accomplished by the operation of the Act of Parliament in cases where there is no antenuptial contract. In the present case there was no separate trade carried on by the wife in her own name. The husband and wife together continued to carry on the business of fish-hawking, which had prior to the marriage been carried on by the wife alone. There was no separation either of the capital or profits of the business, and no distinctive use of the wife's name in the business came on after marriage. The case, therefore, does not fall within either the principle or the words of the Act. One can see that there would be extreme inconvenience in practice, and that questions very difficult to solve might arise, if the intention of the Legislature were that there should be separate interests in a business carried on jointly by the husband and wife. It is difficult to see how in such a case the legitimate interests of creditors could be safeguarded, and I am not surprised therefore that the operation of the Act is limited to the case of a business carried on by the wife alone and in her own name.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers — Guthrie — Galbraith Miller. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defender — Salvesen — Younger. Agents — Sturrock & Graham, W.S.

Wednesday, July 6.

SECOND DIVISION.

[Sheriff of Forfar.

KEILLER *v.* MACKENZIE.

Parent and Child—Action for Custody of Bastard Child—Custody of Children Act 1891 (54 *and* 55 *Vict. cap.* 3)—*Sheriff Court —Appeal.*

A mother had allowed her bastard child to remain for six years after its birth in the custody of another person, she contributing a certain amount of aliment. At the end of that time she raised an action in the Sheriff Court for the custody of her child against the person to whose care it had been committed. The Sheriff granted the application "until a permanent arrangement is made by a competent Court."

The defender appealed. Upon a remit by the Court, the Sheriff-Substitute of the county reported that in the absence of any legal difficulty the child was in better hands than if she was with her mother. The Court *dismissed* the petition.

The Custody of Children Act 1891 (54 and 55 Vict. cap. 3), sec. 1, provides—"Where the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to issue the writ or make the order." Sec. 3. "Where a parent has (*a*) abandoned or deserted his child, or (*b*) allowed his child to be brought up by another person at that person's expense, or by the guardians of a poor law union, for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."

In November 1891 Mary Mackenzie, residing in Brechin, raised an action in the Sheriff Court at Forfar against Alexander Keiller, bleachfield worker, Friockheim, concluding that the defender should be ordained to deliver up to the pursuer the illegitimate female child Jane Mackenzie, of which she was delivered on 7th March 1885, and also for interdict against the defender interfering with the pursuer's possession and custody of the child.

The pursuer averred that some weeks after the birth of the child she placed it in the custody of the defender and his wife, and that they had maintained it from that time, but having been for some years anxious to regain possession of her child, she had required the defender to deliver her up, but that he had refused.