maintain a separation, that he withdrew himself and her children from her society, and concealed from her his place of residence. The case differs in very material respects from that of *Gibson*.

LORD TRAYNER — The Lord Ordinary thinks that this is a case of a wife leaving or forsaking the conjugal residence on account of her husband's cruelty. If I thought that that was the proper or necessary view of the facts proved, I should agree with the Lord Ordinary in refusing a decree of divorce. But I think the fact is quite otherwise. The pursuer did not leave the conjugal residence. She was extruded from it. The defender put his wife out of the house, sold off the furniture, and took away the children, having previously forbidden them to speak to their mother the pursuer. The defender's conduct leaves no doubt on my mind that what he so did was done with the intention and purpose of putting an end to conjugal cohabitation with the pursuer. He has since lived away from the pursuer for about eight years, has never communicated with her, and done nothing towards her support. That, I think, is desertion, and entitles the pursuer to the decree concluded for. This case is distinguished from the recent case of *Gibson* in respect that there the facts were regarded by the majority of the Court as warranting the conclusion that the wife acquiesced in the husband's conduct, which (however cruel and unjustifiable in itself) did not necessarily lead to the view that he desired or intended to put an end to conjugal cohabitation. The Court thought that the parties living separate was a matter as to which both spouses were agreed. Such a view is, I think, excluded by the evidence in this case. I am therefore for recalling the Lord Ordinary's interlocutor and giving decree. I differ from the Lord Ordinary's opinion that a deserted wife, before being entitled to decree of divorce, must satisfy the Court that during the whole or any part of the statutory period of desertion, she was desirous of returning to conjugal cohabitation.

LORD YOUNG was absent.

The Court recalled the Lord Ordinary's interlocutor reclaimed against and gave decree in terms of the summons.

Counsel for Reclaimer—W. Campbell—Mackintosh. Agents — Snody & Asher, S.S.C.

Friday, March 16.

FIRST DIVISION.

[Lord Low, Ordinary.

BUNTINE *v.* BUNTINE'S MARRIAGE-CONTRACT TRUSTEES.

Succession—Husband and Wife—Married Women's Property (Scotland) Act 1881, *sec.* 8—*Marriage Prior to Act—Jus Relicti —Marriage-Contract.*

A husband and wife, married in 1874, by antenuptial contract of marriage contracted that in the event of the husband surviving the wife, and there being no children of the marriage, he should enjoy the liferent of all his wife's estate, the fee remaining at the absolute disposal of the wife or her heirs or assignees. The husband renounced his *jus mariti*, right of courtesy, and right of administration. The wife died in 1883 intestate, leaving no children but survived by her husband, who after enjoying the liferent of his wife's whole estate after her death, in 1893 claimed a half of said estate, so far as moveable, in fee, under the Married Women's Property Act 1881. That Act confers a *jus relicti* upon widowers, whether married before or after the passing of the Act, similar to the *jus relictæ* enjoyed by widows, but provides that it "shall not affect any contracts made or to be made between married persons before or during marriage."

Held (*rev.* Lord Low) that the claim was inconsistent with the provisions of the marriage-contract, and fell to be rejected.

James Robertson Buntine, advocate, Sheriff-Substitute of Stirlingshire, was married to Miss Jane Sandeman in 1874. By antenuptial contract of marriage dated 12th October and recorded 22nd December 1874 Miss Sandeman (afterwards Mrs Buntine) conveyed to trustees her whole estate, heritable and moveable, belonging or which should belong to her during the subsistence of the marriage, except legacies of £500 or under, revenue falling to her from estate separately settled on her, and revenue due to her from the trust-estate prior to the last date of the contract, and that in trust for the following purposes:—(1) To pay the expenses of the trust; (2) for behoof of Mrs Buntine in liferent; (3) in the event of her husband surviving her, for his behoof in liferent for his liferent alimentary use allenarly; (4) to hold the fee of the trust-estate for behoof of the children of the marriage; and (5) failing children, for behoof and at the absolute disposal of Mrs Buntine or her heirs and assignees. By it Mr Buntine renounced his *jus mariti* and rights of courtesy and administration in, of, and in relation to the whole estate presently and in future belonging to Miss Jane Sandeman.

Mrs Jane Sandeman or Buntine died in 1883 intestate, and no children were born of the marriage.

The marriage-contract trustees duly paid the income of the estate to Mrs Buntine until her death, and thereafter paid it to Mr Buntine, who married again in 1886.

In 1893 Mr Buntine raised an action against the marriage-contract trustees and against Mrs Buntine's next-of-kin, to have said trustees decerned and ordained to pay to him the sum of £15,000, or otherwise such other sum as should be found to be one-half of (1) the trust funds to which the said Mrs Buntine had a personal right at the time of her death; or otherwise (2) the said free moveable estate, and pleaded —"(1) In respect of the provisions of the Married Women's Property (Scotland) Act 1881, sec. 6, the pursuer is entitled to decree as concluded for. (2) On a sound construction of the said marriage-contract and Act of Parliament, and in the circumstances which have arisen, the pursuer is not barred from insisting in his present claim. (3) The defences stated are irrelevant."

The defenders pleaded—"(1) The pursuer's statements are irrelevant. (2) The pursuer having by antenuptial marriage-contract renounced his whole legal rights in his wife's estate, is barred from insisting in his present claim. (3) The pursuer having by antenuptial contract accepted, and further, and *separatim*, having enjoyed for ten years the liferent of the whole of his wife's estate, is barred from insisting in his present claim. (5) Further, if he has not already elected, the pursuer is now bound to elect between his conventional provisions under the marriage-contract and his rights at common law. (6) Should the pursuer be held entitled now to take and should he take his legal rights, he is bound to account for the conventional provisions which he has enjoyed."

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), by sec. 6, 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 same share and interest in her moveable estate which is taken by a widow in her 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." And by sec. 8 it provides that "This Act shall not affect any contracts made or to be made between married persons before or during marriage or the law relating to such contracts." . . .

Upon 9th November 1893 the Lord Ordinary (Low) pronounced the following interlocutor:—"Repels the first, second, third, and fifth pleas-in-law for the defenders: Finds and declares in terms of the alternative declaratory conclusion of the summons, and decerns, &c.

"*Opinion.*—There are two questions in this case—First, whether the pursuer is barred from claiming one-half of his wife's estate under the 6th section of the Married Women's Property Act of 1881 by reason of the renunciation of his legal rights contained in his antenuptial contract of marriage; and second, whether, assuming the first question to be answered in the negative, the pursuer's claim is barred by the provision to him in the marriage-contract of a liferent of his wife's whole means and estate.

"I have no difficulty in answering the first of these questions in the negative. The renunciation by the pursuer in the marriage-contract applied only to his legal rights as they then existed, and cannot, in my opinion, be extended so as to include a legal right which was brought into existence for the first time by a subsequent legislation. Further, the point seems to me to be settled by the case of *Simon's Trustees*, 18 R. 135.

"The second question is attended with more difficulty. It seems to have been raised in argument in the case of *Simon's Trustees*, but I think that the opinions delivered show that the learned Judges did not consider the determination of the question necessary for the decision of the case. The late Lord President, however, expressed a very clear opinion that the husband would have been entitled to enjoy the liferent, and also to claim *jus relicti*, while Lord M'Laren took the view that it would not be consistent with our practice to allow legal and conventional provisions to be claimed concurrently.

"The 6th section of the Married Women's Property Act provides that the husband shall take by operation of law the same share and interest in his wife's moveable estate which is taken by a widow in her deceased husband's moveable estate, 'subject always to the same rules of law in relation to . . . the exclusion, discharge, or satisfaction thereof, as the case may be.'

"The question is, whether, applying the rules applicable to *jus relictæ*, the pursuer's claim must be held to be excluded or satisfied by the provision of a liferent of his wife's whole estate.

"The case put by the defenders as being analogous to, and ruling the present case, was that of a husband by antenuptial marriage-contract giving to his wife a liferent of his whole estate. In such a case the defenders argued that although the wife did not renounce her legal rights, she would be barred from claiming both *jus relictæ* and a liferent of the remainder of the estate.

"There is a good deal of authority for that proposition, and I shall assume it to be sound. I do not, however, think that the principles upon which it rests are applicable to the present case.

"In entering into a contract such as that supposed, both husband and wife know that the wife will, in the event of the husband's death, be entitled to one-third or one-half of his moveable estate, as the case may be. When, therefore, the husband offers and the wife accepts a liferent of the whole estate, the natural implication is that the intention and agreement of the parties is that the fee of the whole estate should be at the husband's disposal. In

such circumstances, for the wife to claim *jus relictæ* in addition to a liferent would be to make a claim inconsistent with the contract—that contract not only being one to which she was herself a party, but also her only title to the liferent.

"The wife's claim to both provisions in the case supposed would be rejected (1) on account of the implied intention of the parties arising out of the inconsistency between the provision made for the wife in the contract, and her legal rights, which the parties are assumed to have known and had in view, and (2) because the implied intention being read into the contract, the wife cannot claim both the liferent and *jus relictæ* without approbating and reprobating the same deed.

"In the present case there is no room for implied intention in regard to the right which the pursuer now claims, because as it did not exist at the date of the contract, it is certain that the parties had no intention in regard to it the one way or the other.

"The question then is, Whether the pursuer's claim is inconsistent with the contract, so that he cannot make it without reprobating the contract which he has already approbated?

"The answer to that question seems to me to depend upon whether the wife, or anyone else is deprived by the pursuer's claim of anything which was stipulated for in the contract, because if not, I do not see how the pursuer can be regarded as reprobating the contract. In the supposed case which I have been considering, the husband would, in the event of the wife getting both provisions, be deprived of the power which by implication he had stipulated for, of disposing of the *jus relictæ*. I do not think that there is anything analogous to that in this case. The wife as the counterpart of the liferent which she gave to her husband made two stipulations in regard to her estate. In the first place, she stipulated that the pursuer should renounce his *jus mariti* and right of administration; and in the second place, that failing children, the trustees should hold the estate for behoof, and at the absolute disposal, of her and her heirs and assignees. The pursuer is asking nothing contrary to these stipulations; indeed, they are the foundation of his claim. It is because his *jus mariti* was excluded, and because the trustees held the estate for his wife's absolute behoof, that the pursuer is in a position to make the present claim.

"It seems to me that the only ground upon which it could be held that the pursuer's claim is contrary to the marriage-contract, is that the succession of the wife's heirs is protected. The defenders did not argue that that was the case, and I think that any such argument would be untenable. I think that the mention of heirs and assignees does not add anything to the declaration that the estate is to be held for the wife's behoof; at all events, it does not give the heirs and assignees any *jus crediti* under the contract.

"All that the marriage-contract does in regard to the fee of the estate (in the event, which has happened, of there being no children of the marriage) is to ensure that it shall belong to the wife. If there had been children, the question might have been materially different, but there being no children, the result of the contract was that the fee of the estate remained the absolute property of the wife. A subsequent statute has enacted, that in such a case the husband is to be entitled to a certain share of the wife's estate. I am unable to see anything to prevent the husband taking advantage of that enactment. He cannot be prevented doing so on the ground of the intention of the parties, because there is no expressed intention, and there is no room for implied intention. And he cannot be prevented doing so on the ground that the claim involves a reprobation of the contract, because the contract has been implemented in every term, and the pursuer, so far from claiming against the contract, rests his claim upon its provisions.

"I am therefore of opinion that the pursuer is entitled to one-half of the free moveable estate belonging to his late wife."

The defenders Mrs Jane Sandeman or Buntine's next-of-kin reclaimed, and argued — (1) To give effect to this claim would be to go in the teeth of an antenuptial marriage-contract, the most binding contract known to the law, and which the Married Women's Property Act 1881 specially provides shall not be affected by that Act. By marriage-contract here the wife stipulated that her whole estate should be at her disposal, or at the disposal of her heirs and assignees. She disposed of it in favour of her heirs by leaving no will. This claim proposed to substitute a right of disposal of half the estate for the right of disposal of the whole estate as contracted for. (2) It was impossible to say the husband's claim was under the contract. He was in no sense his wife's heir. The *jus relicti* like the *jus relictæ* was the right of a creditor—*Inglis* v. *Inglis*, Jan. 28, 1869, 7 Macph. 435. (3) Under the Act a widower was to be in the same position as a widow. He must therefore elect between his legal and his conventional provisions. But the pursuer here must be held to have elected to take his conventional provisions, for he had already enjoyed more under them than he would have enjoyed under his legal ones.

Argued for respondent — (1) The Act applied to marriages entered into before the Act. This could not be disputed—*Poë* v. *Paterson*, December 13, 1882, 10 R. 356—*aff.* July 16, 1883, 10 R. (H. of L.) 73. (2) There was here no question of intention of parties. The question was, had the Act not given the husband the right now claimed. If it had, he was entitled to his marriage-contract rights and to his statutory rights. Neither was there any question of election. (3) The renunciation of his *jus mariti* was not a bar to his claim. That was settled by the case of *Fotheringham's Trustees*, June 27, 1889, 16 R. 873. He could not renounce a right the law

had not yet conferred upon him — *cf. Dunbar's Trustees*, December 19, 1877, 5 R. 350, and July 12, 1878, 5 R. (H. of L.) 221. (4) The enjoyment of the liferent was not a bar—*Simon's Trustees* v. *Neilson*, November 20, 1890, 18 R. 135, espec. Lord President Inglis. (5) This claim was not affected or excluded by the marriage-contract. It was not in opposition to it but under it. The Act had passed before the wife's death. She had made no will, and therefore her her succession was regulated by the rules applicable to intestacy. According to them since the Act of 1881 the husband took a half of his wife's moveable estate.

At advising—

LORD PRESIDENT—The present question depends primarily upon the provisions of the pursuer's antenuptial marriage-contract, and these so far as relevant may be stated in two sentences. The property of the wife was placed in the hands of trustees; the husband renounced his *jus mariti*, and (regarding the event which has happened of the wife's predecease without issue) agreed that the estate should be held for behoof of and at the absolute disposal of the wife and her heirs and assignees. On the other hand the husband was to get, in the event which I have stated, the income of the estate paid over to him by the trustees during his life.

These stipulations are clearly and directly reciprocal. In return for the husband giving up his *jus mariti*, and engaging that the capital of the wife's estate shall be hers and her heirs, he gets a liferent of the whole.

What, then, is the pursuer's present demand? He proposes to carry off from the hands of the trustees, and from the disposal of his wife's heirs one-half of the capital of his wife's estate. This claim is rested on the 6th section of the Married Women's Property (Scotland) Act 1881, which gives what for shortness may be called a *jus relicti* to the husbands of women who have died domiciled in Scotland. Now, while this section is applicable to persons married before as well as after the Act, it is qualified by the 8th section, which lays it down that the Act shall not affect any contracts made or to be made before or during marriage.

If we give effect to the pursuer's claim, shall we be allowing the Act to affect Mrs Buntine's marriage-contract? It seems to me that only one answer can be given. If to upset a contract be to affect it, then this contract is affected. The result of holding the Act to apply would be that whereas under the contract before the Act the pursuer had the liferent and none of the capital, under the contract after the Act he has the whole liferent and half of the capital besides. To put it in another way (although rather to understate it), on the pursuer's contention the Act would operate so as to let him retain all that he stipulated for, and also carry off one-half of the consideration of that stipulation.

The only answer to this view of the case which is suggested is, that the husband is really claiming as in right of his wife. But this answer seems to me to rest on an omission to remember the nature of *jus relictæ*, and therefore of *jus relicti*. When a widow claims her *jus relictæ*, she claims not in right of her husband but against her husband, and as his creditor. This is very clearly stated by the Lord President in *Inglis*, January 28, 1869, 7 Macph. 435. The pursuer is in no sense of the term a representative of his wife. If he has a claim, he is claiming because he is by statute a creditor of her estate. Now, I hold that when he executed this marriage-contract he guaranteed to his wife that, so far as he was concerned, her estate should be dealt with according to the contract. I take the first case suggested by the words of the marriage-contract. The pursuer agreed that his wife should have the right of absolute disposal of the capital of her estate after they were both dead. If Mrs Buntine had left a will giving the estate to some of her own relations, the pursuer would according to his contention have had right to defeat that will by carrying off one-half of what it purported to bequeath. As it happens, Mrs Buntine has died without leaving a will. In my opinion she was entitled to rely so far as the other party to the contract was concerned on her succession being determined by the clause in her marriage-contract, which in express terms gave it to her heirs. It is, as I think, contrary to the contract for the pursuer to plead any right not derived from Mrs Buntine against the execution of the contract, and this *jus relicti* is not a right derived from Mrs Buntine.

I am therefore for recalling the Lord Ordinary's interlocutor and assoilzieing the defenders.

LORD ADAM—Mr and Mrs Buntine were married in 1874 and executed an antenuptial contract of marriage which is dated 12th October of that year. By this marriage-contract Mrs Buntine conveyed her whole estate *de presenti et acquirenda*, with some exceptions, to certain trustees, and she directed them to pay the income as there set out to her husband, and the fee they were told to hold for the children of that or any future marriage of Mrs Buntine, and failing children it was declared that the estate conveyed by Mrs Buntine should be at the absolute disposal of herself or her heirs and assignees. That marriage was dissolved by her death without issue in 1883. As I understand, since that date Mr Buntine has enjoyed the income of the estate. Now, in the year 1881 the Married Women's Property Act was passed, and as your Lordship has pointed out, by section six of that Act it was declared that a surviving husband should have the same rights in his wife's estate as a surviving widow had in her deceased husband's estate prior to the passing of that Act. That is, shortly stated, that a husband should have a *jus relicti* of the same nature and extent as a widow had, but that was to be subject to the same rules as to the exclusion, discharge, or satisfaction thereof. In this

case, there being no children, Mr Buntine besides having enjoyed the whole income of the estate, claims half of the fee. In my opinion that claim is excluded or discharged by the terms of the marriage-contract, in which Mr Buntine renounced his *jus mariti* and rights of courtesy and of administration of and in relation to "the whole estate and effects heritable and moveable now owing or belonging to or which may hereafter be owing or belonging to the second party." But it is said that the right with which we are now dealing is neither a right of *jus mariti* nor a right of courtesy, and therefore that it is not discharged by that renunciation. I think the cases of *Fotheringham* and *Simson* referred to are authorities to the effect that such a clause as that would not discharge legal rights such as those which were in existence at the date of the contract, and I think these cases therefore show that a trust-estate in such circumstances vests in the surviving wife subject to all legal claims, and consequently it would be subject to *jus relicti* if that claim be not excluded or discharged by the terms of the marriage-contract. In this case the husband binds himself, as I think clearly, that, so far as he is concerned, the estate shall be at the absolute disposal of his wife Mrs Buntine, or of her heirs or assignees. Now, I cannot see how this claim for one-half of the fee of the estate is consistent with its being at the absolute disposal of Mrs Buntine or her heirs or assignees. I think with your Lordship that the two things are totally inconsistent, where, as in this case, Mr Buntine has bound himself, so far as he is concerned that the whole trust-estate shall be at Mrs Buntine's disposal; and if it be at her disposal it is inconsistent with the terms of the contract to sustain this claim, and therefore I think it should be repelled. Now, the heirs here do not take *ab intestato*, but, as it appears to me, under provision of the contract and under the provisions of that contract Mr Buntine has bound himself, as I have said, that that estate shall be at her disposal. On these grounds I agree with your Lordship that the claim should be repelled.

LORD M'LAREN—The Married Women's Property Act 1881, while taking from the husband rights which were usually excluded by contract where the wife had property, has given to the husband an interest in the wife's succession which is equivalent to the *jus relictæ* of the common law, and has subjected this new right to the conditions and incidents which belong to the *jus relictæ*. One of the incidents of *jus relictæ* was that the claim might be excluded by antenuptial contract, and that this exclusion might be either express or by implication. If the husband in the antenuptial contract completely disposed of his whole estate in contemplation of death, say by giving his wife a liferent or an annuity and directing the division of what remained of his estate amongst the children of the marriage, the wife could not successfully claim *jus relictæ* because by becoming a party to the contract she had assented to a disposal of the husband's estate which made it impossible to satisfy such a claim. This principle is very well illustrated by the case of *Edward* v. *Cheyne*, March 12, 1888, 15 R. (H. of L.) 33, for while the deed there in question was not a contract but a mutual will, the principle of the decision is not the less applicable to the case where the promised spouse being free to contract, agrees before marriage to a particular disposition of the property of the other spouse. But again, if any part of the husband's estate, great or small, be undisposed of, and whether this be the result of the failure of objects or of failure to dispose of the particular subject, the wife, if she has not expressly renounced her *jus relictæ*, will be entitled, in addition to her liferent provision under the contract, to claim her half or third, as the case may be, of the undisposed of succession. The reason of this distinction is that an implied exclusion of the *jus relictæ* can only be the result of an inconsistency between the claim which the lady is preferring against her husband's estate, and the disposition of that estate to which she has assented. But plainly, there is no such inconsistency in claiming or taking a conventional provision out of property which is disposed of, and a legal provision out of that which is undisposed of.

Applying these principles (as we are required to do by the statute), *mutatis mutandis*, to the case of the husband's claims against his wife's estate, I find that Mr Buntine has assented by antenuptial contract to a scheme of disposition of his wife's estate under which he receives a life interest through trustees, while the fee is destined in the first place to the lady's children of that or any subsequent marriage, and failing issue it is to be at the absolute disposal of Mrs Buntine and her heirs and assignees, showing that the lady's property is by the contract vested in trustees. I consider that this declaration is equivalent to a direction to the trustees to hold the capital for the benefit of Mrs Buntine's testamentary heirs, if any, or failing these, for her heirs *in mobilibus*. I think it is perfectly fixed in the law of Scotland that a gift to the heirs of A takes effect in favour of the heirs *in mobilibus* on the failure of the preceding branches of the destination; also, that the rights of a wife or husband are not covered by such a destination. On this subject I shall only refer to the case of *Gregory* in the Lords, April 8, 1889, 16 R. (H. of L.) p. 10, where it is laid down that destinations to "heirs" and destinations to "next-of-kin" are to be interpreted on common principles.

It appears to me that in the event which has happened, Mrs Buntine's moveable estate is destined to her heirs *in mobilibus*, and as this destination is contained in an antenuptial contract to which the husband is a consenting party, Mr Buntine cannot claim his *jus relicti* consistently with his antenuptial obligation. The Married Women's Property Act 1881 reserves

entire the effect of marriage-contracts, and independently of that provision I should have assumed that marriage obligations were not intended to be rescinded by the Act of Parliament.

LORD KINNEAR—I am of the same opinion. I think the validity of the claim in cases of this kind must depend on the construction of the marriage-contract, whether the parties have entered into the contract before or after the passing of the Act. If the claim is inconsistent with the provisions of the marriage-contract, then it is excluded by the Act of Parliament itself. If it is not inconsistent with these provisions there is nothing in the Act to prevent it receiving effect. The Lord Ordinary, as I understand his Lordship, has sustained the claim because of this, that the husband is claiming, not against but in terms of the marriage-contract, because his Lordship appears to consider that the gift, or the provision in favour of the wife or her heirs and assignees, is exactly to the same effect as if it had been stipulated that on the wife's death her estate should go to the persons who would be entitled to it under the law in force at the time being, whosoever these persons might be, and accordingly he holds that Mr Buntine, having right by the law now in force to a share of his wife's moveable estate, is claiming, not against but in terms of the contract when he asks that that receive effect. Where an antenuptial contract of marriage has been conceived in terms that will bear such a construction as that, I should agree with the Lord Ordinary, but in the present case I agree with your Lordship that that is not the true construction of the contract at all, but that the wife has agreed with the husband that in the event, which has happened, of having no children, her estate shall be at her absolute disposal or shall be held for her behoof, and at the absolute disposal of herself or her heirs and assignees. Now, if this estate is at her absolute disposal, then she can test, and that is the obvious and inevitable construction of the clause in her favour, and failing her testing then it is to go absolutely to her heirs *in mobilibus*. The husband says that by virtue of a supervening law he has a right to take one half of the estate because the *jus relicti* gives him a right which the wife could not defeat by her will, and in the event which has happened, of her making no will, it gives him right, he says, to take the one half from her heirs and so defeat the provisions of the marriage-contract which say that it shall be held absolutely at her disposal. Now, the Act of Parliament says that the right which it gives to the husband shall not be allowed to affect any contract between spouses before or after marriage, and the only question under that clause appears to me to be whether the husband in this case is not claiming in terms of the contract which he has made with his wife before marriage. Under the contract the wife and her heirs have an absolute right to the whole of her moveable estate, but the pursuer says that he is entitled to defeat that right in consequence of the *jus relicti* which the Act confers upon him.

It appears to me it would be quite impossible to give effect to the claim on any other ground except that the Act of Parliament has altered the provisions of the contract by the introduction of a new right in favour of the husband. I therefore concur with your Lordships.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for the Pursuer and Respondent—Sol.-Gen. Asher, Q.C.—Dundas. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Defenders the Marriage-Contract Trustees—H. Johnston—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defenders and Reclaimers the Next-of-Kin of Mrs Buntine—H. Johnston—Fleming. Agents—Murray, Beith, & Murray, W.S.

Friday, March 16.

FIRST DIVISION.

[Lord Low, Ordinary.

MAGISTRATES OF GALASHIELS *v.* SCHULZE.

Burgh—"Regular Line of Street"—Setting Back Buildings—General Policee Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 162.

The General Police Act 1862, by section 162, provides that "When any house or building, any part of which projects beyond the regular line of the street, . . . has been taken down in order to be . . . rebuilt, the commissioners may require the same to be set backwards to or towards the line of the street." . . .

In 1877 the Magistrates of Galashiels resolved to widen one of the streets in the burgh to a minimum width of 40 feet. In 1893 the width of the street opposite most of the houses was 40 feet, and in some cases more, but three houses still projected 13 feet to 15 feet beyond that limit. Upon one of these houses being taken down in order to be rebuilt the Magistrates sought to have the proprietor ordained to set it back to the 40 feet line.

Held (*rev.* Lord Low) that there was no regular line of street to which they were entitled to have the house set back.

Burgh—Turnpike Act 1831 (1 *and* 2 *Will. IV. cap.* 43), *sec.* 91—*Adoption of that Act by Local Act—Street.*

The Turnpike Act 1831, by section 91, provides "That no houses, walls, or other buildings above 7 feet high shall be erected without the consent of the trustees . . . within the distance of