statute, for in the present case the prosecutor has seen fit to enumerate no less than three separate statutes, each of considerable length, without giving the accused any notice of which of their many sections he has contravened. We have been referred to a series of decisions in which we have held that justice to the accused required that the sections should be named as well as the statutes. Of these a typical instance is the case of *Hastie* v. *Macdonald*, where we quashed the conviction on this ground.

I think this is a case which ought to follow these decisions. It is in some respects a clearer case than any of them. We have here three Acts referred to, and in no case is there reference to any particular section, and yet we are told from the bar that only one section is at all involved in the contravention alleged.

I cannot understand why, after the repeated notice given to prosecutors from this bench, they should still insist on omitting to mention the section they found on in charging the accused. Unless, indeed, it be this, that in some cases it is very difficult for anyone to say precisely which particular section or sections are in point in the case. But that is just the case in which the accused is entitled all the more to insist on having set out on the face of the complaint the precise sections he is said to have contravened.

LORD TRAYNER—I concur.

LORD MONCREIFF—In the circumstances I agree that this conviction must be quashed.

It is always a matter of degree whether or not a simple reference to a statute is sufficient notice to the accused of the charge brought against him. In the present case we have a reference to three statutes, and no mention of any particular section, and on inquiry it turns out that only one section of one of the three statutes is said to have been contravened, while the other two statutes are not founded on by the prosecution at all.

Such a complaint cannot be sustained.

The Court passed the bill, and suspended the conviction and sentence complained of.

Counsel for the Complainer—M'Lennan. Agent—John Veitch, Solicitor.

Counsel for the Respondent — Graham Stewart. Agent—James Hepburn, S.S.C.

COURT OF SESSION.

Friday, July 17.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MUDIE *v.* CLOUGH.

Husband and Wife—Mutual Settlement — Revocation — Donatio inter virum et uxorem — Conjugal Rights Amendment Act 1861 (24 *and* 25 *Vict. c.* 86), *sec.* 16.

By mutual disposition and settlement a husband and wife disponed certain funds, which had been left to the wife by a relative, to the last survivor of them in liferent allenarly, and to their son in fee, declaring that if the said son predeceased the survivor without children and intestate, the fund should go, half to the next-of-kin of the husband and half to the next-of-kin of the wife. The deed was declared to be irrevocable as regards the said funds.

In a question between the wife's next-of-kin and the husband, who had survived his wife and son, *held* (*aff.* judgment of Lord Pearson) that the mutual settlement being contractual, and in accordance with sec. 16 of the Conjugal Rights Amendment Act 1861, was not revocable by the husband.

Kidd v. *Kidd*, December 10, 1863, 2 Macph. 227, *followed.*

In 1880 John Clough and his wife, Ann Mudie or Clough, executed a mutual disposition and settlement disponing certain shares and bonds to the last survivor of them for his or her liferent use allenarly, whom failing to their son George Mudie Clough in fee, "declaring, in the event of the said George Mudie Clough, our son, dying before the last survivor of us without leaving issue, and intestate, that the shares and monies above mentioned shall, in such event, be divided into two equal parts," one of which was to be divided among the children of Richard Clough, and the other to be paid to the wife's brother James Mudie. The settlement proceeded—"In regard to the residue of the means and estate belonging to us respectively, we severally leave and bequeath, assign, and dispone the same to the last survivor of us, and we severally nominate and appoint the last survivor of us to be executor to the first deceaser, . . . and we severally give full power to the survivor of us" to alter or vary the securities, and to realise and sell the shares, and reinvest the proceeds thereof. The deed was declared to be irrevocable, unless with the joint consent of the parties, as regards the investments and money to be liferented by the survivor.

The securities and shares so disposed of represented part of Mrs Clough's interest in the estate of her deceased granduncle, and amounted in value to between £1000 and £1200. The investments were taken in the joint names of the spouses. There was no

antenuptial marriage-contract between the spouses.

Mrs Clough died in 1881.

The son George Mudie Clough predeceased the surviving spouse intestate in 1889.

After the death of his wife John Clough realised part of the estate dealt with by the mutual settlement, and invested it in his own name in such a manner that most of it has been lost.

On 11th December 1895 James Mudie raised an action against John Clough to have it declared that he had a valid and indefeasible vested right in one half of the investments dealt with in the mutual settlement, and further to have it declared "that the defender has not validly and effectually revoked, and is not entitled to revoke, said mutual deed so as to prejudice or affect the pursuer's right thereunder," and to have the defender interdicted from mortgaging, selling, or disposing of said investments to the pursuer's prejudice.

The pursuer pleaded—"(3) The mutual deed not being in the circumstances in which it was granted revocable by the defender alone, the pursuer is entitled to declarator to this effect as craved."

The defender pleaded that he was "entitled to revoke the said mutual deed if so advised," and was therefore entitled to absolvitor.

On 2nd June 1896 the Lord Ordinary (PEARSON) pronounced the following interlocutor:—"Finds that the mutual deed mentioned in the summons is not revocable by the defender: Finds that the pursuer has a vested right in the investments specified in the summons or their proceeds to the extent of one-half: Appoints the defender to state in a minute what steps he proposes to take to restore the trust funds and put them in a proper state of administration: . . . Grants leave to reclaim."

Opinion.— . . . "The defender's case is that the deed is revocable by him as a donation to his wife, that the legacy to her had vested in him *jure mariti*, and that therefore it was he and not she that settled the money by the mutual deed. He maintains that, although it be true that she had certain rights against him as regards these funds in respect of section 16 of the Conjugal Rights Amendment Act, yet he conceded to her by the deed all the rights she could possibly have claimed, and remained master of the situation to all other. I do not think this position of the defender is sound. In my opinion the surroundings show that it was contractual, and that, in so far as it amounted to a donation, it was dealt with by both parties as a remuneratory donation not to be revoked. The case appears to me to fall within the principle of *Kidd*, 1863, 2 Macph. 227.

The defender reclaimed, and argued—The mutual deed was really testamentary in its character, and therefore revocable by the surviving spouse—*Lang* v. *Brown*, May 24, 1867, 5 Macph. 789; *Nicoll's Executors* v. *Hill*, January 25, 1887, 14 R. 384. Alternatively, Mrs Clough's legacy from her grand-uncle fell to her husband *jure mariti*, his settlement of the liferent upon her was a *donatio inter virum et uxorem*, and she being dead, he was now entitled to deal with the fund as he pleased—*Stiven* v. *Brown's Trustees*, January 10, 1873, 11 Macph. 262. In *Kidd* v. *Kidd*, December 10, 1873, 2 Macph. 227, there was the machinery of a trust, and a provision for the immediate interest of children of the marriage. In *Kerr* v. *Ure*, June 28, 1873, 11 Macph. 780, there was also a trust. The defender relied upon the Conjugal Rights Amendment Act 1861 (24 and 25 Vict. cap. 86), sec. 16. But that section spoke of "a reasonable provision for the support and maintenance of the wife." Here the stipulation which was said to be onerous and irrevocable was a provision for the wife's next-of-kin. The provision accepted by the wife had been the liferent of the fund, the husband consequently remained owner of the fund, and the burden of the liferent being discharged, could do with it what he pleased.

Argued for the pursuer—(1) The mutual settlement was irrevocable at common law. There was here a case of "remuneratory donation"—*Rust* v. *Smith*, January 14, 1865, 3 Macph. 378. See Fraser on Husband and Wife, ii. 940; Ersk. Inst. i. 6, 30. (2) Under the Conjugal Rights Act 1861 the deed was irrevocable. In terms of section 16 the husband could claim no right to these funds without bargaining with his wife. The wife had chosen to commute her right, and it made no difference that the stipulation she had exacted in return for so doing was a provision, not for herself, but for one of her next-of-kin—*Clark* v. *Clark*, May 25, 1881, 8 R. 723; *Ferguson's Curator Bonis* v. *Ferguson's Trustees*, June 20, 1893, 20 R. 835; *Kidd, ut sup.*, and *Kerr, ut sup.*, also referred to.

At advising—

LORD M'LAREN—In this action the pursuer seeks, first, a declaratory decree to the effect that he has an indefeasible vested interest under the mutual deed, to the extent of one-half of certain moveable investments described, and that the defender is not entitled to revoke the mutual deed so as to affect the pursuer's right and interest, and for interdict against mortgaging, selling, or disposing of said investments to the pursuer's prejudice. The argument advanced for the defender was in effect that the mutual deed, in so far as it put one-half of the property beyond the defender's control, was in substance *donatio inter virum et uxorem*, and that the defender was entitled to treat the property as his own.

The Lord Ordinary has found that the pursuer has a vested right in the investments specified in the summons or their proceeds to the extent of one-half, and has appointed the defender to state what steps he proposes to take to restore the trust-funds and put them in a proper course of administration.

I am of opinion that the Lord Ordinary's findings are right, for the reasons which his Lordship has given. It would not, in my view be a historically correct statement of

the law of Scotland, at any time since it has been systematised, to say that money acquired by a married woman became so completely the property of the husband that a reasonable postpnuptial deed giving equal rights to the heirs of the spouses was revocable as a donation. It is no doubt a fair subject of controversy whether the doctrine of the *communio bonorum*, as expounded by the institutional writers, is a sound theory in the sense of being a true representation of the law regulating the rights of the family in the husband's estate. But as regards the personal estate of the wife at least, the theory fairly enough represented the effect of marriage on such estate, because it cannot be said that the wife's estate ever vested in the husband unconditionally. The husband, in virtue of his *jus mariti*, had the administration of the wife's estate, but her interest in it was so far recognised that a reasonable postnuptial settlement was binding in a question between the spouses, and was even effectual against the husband's creditors to the extent of affording a provision to the wife after the husband's death.

The surrender of the claim of *jus relictæ* was regarded as sufficient consideration to support an annuity or life-interest to the wife secured out of her estate, and the exclusion of the claim of the wife's next-of-kin was consideration for such a testamentary provision in their favour, or in favour of selected relations of the wife, as the spouses might agree on.

This principle was no doubt to some extent trenched upon by the 6th section of the Intestate Moveable Succession Act 1855, which deprived the wife's next-of-kin and legatees of all right to a share of the goods in communion. It may be doubted whether the Legislature when it enacted this law, was fully informed as to the state of the common law with respect to wife's personal estate, as it can hardly be supposed that it was intended to deprive married women in Scotland of the only vestige of right which they possessed in their personal estates. But this anomalous condition of the law did not long continue. By the Conjugal Rights Act 1861 the husband or his creditors are not to be entitled to claim the wife's money as falling under the *jus mariti* except on condition of making therefrom a reasonable provision for the support and maintenance of the wife if a claim therefor be made on her behalf. It is only in case of dispute that the amount is to be determined by the Court, and it follows that if the spouses are agreed they may themselves apportion the wife's money so as to secure for her an equitable share of the fund to be held by her exclusive of the *jus mariti*. Again, it is not necessary that this provision shall take the form of an annuity; in cases that have come before the Court for decision it has been held that a capital sum may be set aside as a provision to the wife, which would of course be subject to her testamentary disposition.

In the present case the spouses have divided the fund equally, giving the fee, in the event of their being no issue of the marriage surviving, in the proportion of one-half to the heirs of each. This seems to me to be according to the statute, and in the case of *Kidd* v. *Kidd*, cited by the Lord Ordinary, it is recognised that the statute is a sufficient foundation for a postnuptial settlement of the wife's estate. I am accordingly of opinion that the reclaiming-note should be refused.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson—W. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender—D.-F. Asher, Q.C.—Guy. Agent—David Milne, S.S.C.

Friday, July 17.

FIRST DIVISION.

[Lord Pearson, Ordinary.

THE EARL OF STAIR AND OTHERS (THE EARL OF STAIR'S TRUSTEES), PETITIONERS.

Trust—Administration of Trust—Exercise of Discretionary Power to Sell Estate—Judicial Factors (Scotland) Act 1889 (52 *and* 53 *Vict. c.* 39), *sec.* 18—*Directions of Court — Investment and Distribution of Trust-Estate.*

Trustees, empowered to sell part of the trust-estate at such time as they thought advantageous or expedient, obtained an order under sec. 18 of the Judicial Factors Act 1889 for superintendence of the administration of the estate by the Accountant of Court. The trustees being in doubt as to whether it would be more for the advantage of the trust estate that they should sell the estate or delay selling, the Accountant reported to the Court for directions in the matter.

The Court *declined* to give the direction sought, on the ground that the question raised related neither to the "investment" nor the "distribution" of the trust-estate as required by sec. 18.

Opinion (*per* Lord President and Lord M'Laren) that the jurisdiction conferred by sec. 18 of the Judicial Factors Act 1889 in regard to the administration of a trust-estate is similar to that exercised by the Court in superintending judicial factors.

The Judicial Factors Act 1889, sec. 18, *explained* and *commented* on.

By trust-disposition and settlement the ninth Earl of Stair, who died in 1864, conveyed his estates of Ravenston and Cleland to trustees for certain purposes. *Inter alia,*