of the whole charges, but selected one of them on which to found a prosecution. The pursuer now proposes to prevent the defender from proving what were the grounds and circumstances on which he sent his total communication to the police, and maintains that the defender must confine himself to the particular charge which was the subject of the prosecution. I think that such a course would be a denial of justice to the defender in this matter. If a person finds something suspicious in the behaviour of another person pointing to the possibility of a criminal charge, it is ordinary common sense that he will be influenced if he finds other things of the same sort. One isolated incident he might not report, whereas if there were a succession of such incidents he probably would report.

A case of *A* v. *B*, 22 R. 402, was quoted to us, but I do not think it has any application. That was an action of damages for rape, and the pursuer was not allowed to attempt to prove that the defender had previously attempted to ravish two other women. That decision rests on considerations which would commend themselves to everyone. But the pursuer quoted certain general observations by the Lord President on the matter of limiting proof, in all of which I concur. The true limitation in this case is very clear. If the defender were proposing to put in a whole set of averments connected with the pursuer's character, which he never communicated to the police, the case would fall under the case of *A* v. *B*. He does no such thing. He admits on record that he laid certain matters before the procurator-fiscal for investigation, and the defender must understand that his proof will be limited to these communications, and that he will not be entitled to prove facts and circumstances which are not connected with the communications to the police.

I am therefore of opinion that we should recall the Lord Ordinary's interlocutor, find that the defender is entitled to a proof of the averments which the Lord Ordinary has disallowed, and remit to the Lord Ordinary to proceed.

LORD M'LAREN—I concur. We are not proposing to allow the defender to lead evidence ranging over the whole life of the pursuer to show that he is a dishonest man. The inquiry will be confined to the information lodged with the public authority by the defender. While the pursuer may select one item out of the information given on which to base his action, he cannot prove his case except by producing the information or proving its tenor. When an information is laid before a jury which includes several charges it must be open to the defender to show the grounds on which he gave the information as a whole. It would be unfair to the defender that the case should go to the jury on the footing that he made several charges and only tried to substantiate one of them. But that might possibly be the result if we were to sustain the Lord Ordinary's finding.

LORD KINNEAR and LORD PEARSON concurred.

The Court recalled the Lord Ordinary's interlocutor except in so far as it appointed the pursuer to lodge issues for the trial of the cause, and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer (Respondent)—M'Lennan, K.C.—D. P. Fleming. Agent—George Stewart, S.S.C.

Counsel for the Defender (Reclaimer)—Graham Stewart, K.C.—Constable. Agents—Davidson & Syme, W.S.

Tuesday, March 12.

SECOND DIVISION.

[Lord Guthrie, Ordinary.

KERR'S TRUSTEES *v.* KERR'S CURATOR.

Trust—Petition to Borrow on the Heritage—"Not Inconsistent with the Intention"—Trustees having Power to Borrow to Pay Bonds and Mortgages—Equitable Mortgage—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 97), *sec.* 3

Section 3 of the Trusts (Scotland) Act 1867 provides—"It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; . . . (3) To borrow money on the security of the trust estate or any part of it. . . ."

A testator by his settlement conferred upon his trustees "express power to borrow money from time to time for repaying bonds or mortgages on any heritable property which may be called up, and to grant . . . bonds or mortgages over said heritable property for that purpose." He died possessing certain heritable estate in Scotland subject to a loan by an English bank, in security of which he had granted an "equitable mortgage," that is, he had deposited with the bank the title-deeds to the estate, and had given an undertaking to grant a formal mortgage if required. He was possessed also of certain real estate in England similarly burdened by two equitable mortgages, but nothing else in the nature of a bond or mortgage affected his estates. The bank, without demanding the execution of a formal mortgage, having called up the loan on the Scottish estate, the trustees presented a petition to obtain the authority of the Court to borrow money on it. The curator of the son succeeding to that estate opposed.

The Court *held* that the testator intended to include "equitable mortgages" in the expression "bonds and

mortgages," and *granted* authority to borrow money on the security of the Scottish estate to pay off the loan.

William Kerr and John Kerr, trustees and executors of James Kerr, who died on 9th September 1905 possessed of, *inter alia*, the farm of Shenrick in the Stewartry of Kirkcudbright, presented a petition under the Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 3 (*supra, in rubric*), for authority to borrow on the security of Shenrick money to pay off the balance of a loan, granted by bankers in Mansfield, Nottinghamshire, to the testator in security of which they held an equitable mortgage of the said farm. At the date of the petition this balance, including interest, amounted to £1662, 11s. 7d., the amount due at the testator's death having been £1562, 2s. 6d.

The following narrative of the *facts* and summary of the material *clauses* of the *trust-disposition* and settlement is taken from the opinion of Lord Stormonth Darling—"This is a petition by the trustees of a gentleman who died comparatively young in possession of a small estate in the stewartry of Kirkcudbright which he had purchased for £3500. He was also possessed of certain real property in England, where he had carried on business at Mansfield, in Nottinghamshire. He died leaving a widow, a son, and three daughters. By his trust-disposition and settlement he conveyed his whole estate to trustees, and directed them to pay an annuity to his widow until the attainment of majority by his youngest child, to convey to his son on his attaining majority his farm of Shenrick in Kirkcudbright, free of the expenses of the conveyance and of succession or other duties, and on his youngest child attaining majority to pay one-third of the residue of his estate to his widow if then alive and not re-married, and the other two-thirds, or, if his wife were dead or had re-married, the whole, equally among his children other than his son who was to get Shenrick. The only other clauses to which I need refer are the first, which provided 'That my said trustees shall from the readiest of my moveable means and estate pay all my just and lawful debts (excepting any bonds or mortgages on my heritable properties) . . . ;' and a clause by which he gave his trustees 'express power to borrow money from time to time for repaying bonds or mortgages on my heritable property which may be called up, and to grant . . . bonds or mortgages over said heritable property for that purpose.' The position in which the truster's estate stood at his death was this. He possessed real property in England burdened by two equitable mortgages and by no other encumbrances. He also possessed the farm of Shenrick, in Scotland, the titles to which he had deposited with a banking firm at Mansfield, executing in their favour another equitable mortgage as security for certain advances which at his death amounted to £1562, 2s. 6d. These equitable mortgages had the effect of giving the lenders power to demand at any time that they should be converted into legal mortgages. The bank which held this equitable mortgage did not demand the execution of any legal mortgage, and have now called up the money due at his death, namely, £1562, 2s. 6d. The trustees' desire is to obtain the authority of the Court to borrow money on the estate of Shenrick for the sum due under this equitable mortgage, which (we are told) was actually expended in part payment of the price of Shenrick, and the question is whether this is 'not inconsistent with the intention' of the trust, there being no doubt of its expediency for the execution of the trust."

On 28th November 1906 the Lord Ordinary (ARDWALL) remitted to Arthur B. Paterson, W.S., to examine into the facts and circumstances stated in the petition, and to report as to the propriety of granting the powers craved by the trustees.

On 15th January 1907 Paterson reported that in his opinion it was expedient for the execution of the trust, and not inconsistent with the intention thereof, that the petitioners should be authorised to borrow on the security of Shenrick the sum of £1562, 2s. 6d., being the amount of the debt to the bank as at the date of the testator's death, but that, as the truster's intention was that the interest on his heritable debts should be paid out of the income of his general estate, and as the clause providing for the widow's annuity continued "and any remaining income which there may annually be I direct my said trustees to apply to the reduction of any debt which there may be secured on my heritable property," he did not think that the interest accrued since the date of death should be included in the charge.

On 16th January 1907 the Lord Ordinary (ARDWALL) appointed The Right Honourable Lord Kinross to be *curator ad litem* to the pupil son, and on 1st February 1907 answers were lodged for the *curator ad litem* which, *inter alia*, stated—"The respondent avers that the question whether the equitable mortgage in question is a bond or mortgage on or over the testator's heritable property falls to be determined by the *lex rei sitæ*, viz., the law of Scotland, and that according to the law of Scotland such equitable mortgage is in no sense a bond or mortgage over the testator's heritable property, but merely imports a personal obligation on the part of the testator to repay the debt referred to therein, coupled with an undertaking to execute a good and effectual mortgage security of the estate of Shenrick, if called upon to do so, which undertaking the testator was never called upon to fulfil, or at all events never fulfilled. . . . . The respondent contends that in respect that the said loan is not secured by a bond or mortgage over the testator's heritable property, it falls to be dealt with by the trustees under the first trust purpose of his trust-disposition and settlement, and therefore to be paid out of 'the readiest of the testator's moveable means and estate.' . . . . In these circumstances the respondent humbly submits that the petition should be refused, in respect that the power

to borrow, which the petitioners seek to obtain, is inconsistent with the intention of the trust, in terms of section 3 of the Trusts (Scotland) Act 1867."

On 12th February 1907 the Lord Ordinary (GUTHRIE) refused the prayer of the petition.

Opinion.—"The parties are agreed that the truster's domicile was Scotch, and the petitioners do not maintain any argument founded on English law. They claim that, on a sound construction of the late Mr Kerr's trust-disposition, the powers to borrow on the security of the truster's property of Shenrick which they ask are not inconsistent with the intention of the trust. No question is raised as to the powers asked being expedient for the execution of the trust.

"The clause in question runs thus—'I hereby give power to my said trustees to sell for the purposes of the trust all or any part of my said estate, and also power to feu and excamb lands, and express power to borrow money from time to time for repaying bonds or mortgages on my heritable property which may be called up, and to grant bonds or mortgages over said heritable property for that purpose.'

"The powers asked are to be used in borrowing to pay off a sum of £1662, 11s. 7d. due to the Union of London and Smith's Bank, Limited, for which an equitable mortgage was executed by the deceased in favour of the bank on 15th February 1900. If the clause above quoted expressly authorises the trustees to borrow on Shenrick to pay off equitable mortgages in general, then the petitioners do not require the powers asked. If, on the other hand, the power to borrow to pay off mortgages is so expressed as to exclude equitable mortgages, it would appear to follow that to grant a power to borrow to pay off equitable mortgages would be inconsistent with the intention of the trust.

"On the question of the true construction of the clause as argued before me, it was scarcely maintained that, apart from the special circumstances, the word 'mortgages' used in a clause conferring power to borrow to repay mortgages on heritable property would cover equitable mortgages. These are deeds which may be made to affect heritable property by the subsequent granting of legal mortgages, but until that is done there is nothing but an undertaking to execute a legal mortgage. If so, it is obvious that such deeds cannot, in the absence of special intention, be included in the expression 'mortgages on heritable property'—*Kennard* v. *Futroye*, 1860, 29 L.J. Ch. 583.

"But the petitioners argue that there is sufficient evidence within the trust-disposition and in the admitted facts to show that the truster intended the above expression to include the particular equitable mortgage in question. They found on these facts (1) the money borrowed under this equitable mortgage was used for the purchase of Shenrick; (2) the deceased had no other mortgages except equitable mortgages. The first point does not carry the petitioners far, and the force of the second point is destroyed by the fact that while he provides for repaying bonds on his heritable property, he never had any such bonds. The words of the will do not seem to me to imply the existence at its date either of bonds or mortgages, but only that at his death such deeds may exist."

The petitioners reclaimed.

The question as to the interest accrued on the loan since the testator's death was not referred to in the Inner House.

Argued for the petitioners—An equitable mortgage by deposit of deeds was a good security according to the law of England, and where as here accompanied by an agreement to execute a legal mortgage entitled the equitable mortgagee to either sale or foreclosure—*Underwood* v. *Joyce*, 1861, 7 Jur. (N.S.) 566; *James* v. *James*, 1873, L.R. 16 Eq. 153; *Backhouse* v. *Charlton*, 1878, 8 Ch. D. 444; *York Union Banking Company* v. *Artley*, 1879, 11 Ch. D. 205. The testator must be presumed to have known that equitable mortgages were good securities by the law of the country where they were granted. There was a strong presumption that he intended to include equitable mortgages in the expression "bonds or mortgages," for they were the only mortgages he had granted; they contained an express obligation to give a legal mortgage if called upon, which was transmissible against executors; the particular equitable mortgage in question was granted for the purpose of borrowing money to pay for Shenrick, and the result of the contrary being held would be that the son would get a disproportionate amount of his father's estate. The question was not whether the equitable mortgage on Shenrick was by the law of Scotland a valid hypothecation, but whether the testator intended to include in "bonds or mortgages on my heritable property" the equitable mortgage on Shenrick.

Argued for the respondent—The question whether any heritable subject is validly hypothecated fell to be determined by the law of the country where it was situated. By the law of Scotland infeftment was necessary for the hypothecation of immoyables—*Christie* v. *Ruxton*, June 27, 1862, 24 D. 1182. The personal obligation in the equitable mortgage transmitted against the executors and not against the heir, and the position was analogous to that if a portion of the price had remained unpaid. Even by the law of England the obligation here was not a mortgage—*Kennard* v. *Futroye*, 1860, 29 L.J. Chan. 583.

LORD STORMONTH DARLING—[*After narrating the facts as above quoted*]—The Lord Ordinary has refused the prayer of the petition on the ground that to grant such a power would be inconsistent with the intention of the trust, as he holds that the power to borrow to pay off bonds or mortgages cannot include power to borrow to pay off equitable mortgages. Now, I think that this is too strict a reading of the settlement, and that we should grant the prayer of the petition as proposed by the reporter—I do so for these reasons. Intention is to

be gathered from the whole tenor of the deed. The truster in the first clause expressly excepted from the operation of the direction to pay debts such debts as were constituted by bonds and mortgages. Therefore he intended lands burdened with bonds and mortgages to be conveyed *cum onere*. This clause must be read with the clause giving express power to borrow money for repaying bonds or mortgages. Did the truster intend to include equitable mortgages in the expression bonds and mortgages? I think he did. It is not, therefore, in my opinion inconsistent with the intention of the trust that money should be borrowed to pay off this equitable mortgage, for the intention of the trust was, I think, that the heritable property should bear its own burdens. On the other hand, I think that the *curator ad litem* was perfectly justified in submitting this question for the decision of the Court.

LORD LOW—I am of the same opinion. The question whether the trustees are entitled to obtain the authority which they crave depends upon whether the course which they propose to follow is—in the words of the Act—"expedient for the execution of the trust, and not inconsistent with the intention thereof."

It is admitted that the course proposed is expedient, and the only question to be decided is whether or not it is inconsistent with the intention of the truster. The position of matters when the trust-disposition and settlement was executed, and when the truster died, was that he owned heritable estate in Scotland, which he had purchased partly with the proceeds of a loan made to him by an English bank. In security of the loan he had granted what in England is termed an "equitable mortgage," which means that he had deposited with the bank the title-deeds of the property, and had given an undertaking to grant a formal mortgage if required to do so. Of this loan the bank are now asking repayment. The truster was also possessed of certain freehold property in England, in connection with which he had granted two equitable mortgages to banks which had advanced money to him. With the exception of these three equitable mortgages the truster's real estate was not burdened with any bonds or mortgages whatever.

Now by his settlement the truster conferred on his trustees "express power to borrow money from time to time for repaying bonds or mortgages on my heritable property which may be called up, and to grant . . . bonds or mortgages over said heritable property for that purpose." The trustees rely on that clause as showing that the course proposed by them is not inconsistent with the intention of the truster. The Lord Ordinary, however, has taken a different view, and says that a mortgage on heritable property means, according to its ordinary signification, a completed mortgage actually affecting the property, and not a mere undertaking to execute a mortgage if required to do so.

I appreciate the force of that view, but I am satisfied that it is neither in accordance with the intention of the truster nor a fair construction of the language which he has used. The truster was a domiciled Scotsman although carrying on business in England, and his settlement is in the Scotch form. Now the word "mortgage" is not a term of Scottish legal phraseology at all, but I understand that transactions such as that in question are known in England as "equitable mortgages," and I think it is interpreting the settlement too strictly to hold that the word "mortgage" as used in it does not include "equitable mortgage." There being the three equitable mortgages in existence, and there being nothing else of the nature of a bond or mortgage in existence which the truster could have had in view when he conferred upon his trustees the power which I have quoted, the inference is to my mind irresistable that he intended the power to apply to these equitable mortgages as well as to any mortgages which he might subsequently grant. I think that that view is strengthened by the first clause of the settlement, which provides that the trustees are to pay out of his moveable estate all his debts, "excepting any bonds or mortgages on my heritable properties." No one knowing the facts could, I think, doubt that within that exception the truster meant to include the equitable mortgages, and I may observe that the attention of the Lord Ordinary does not seem to have been specially directed to that clause.

I am therefore of opinion that the prayer of the petition should be granted.

LORD ARDWALL—I concur. I had this matter before me in the Outer House in its early stages, and I confess I never had any doubts that the application of the trustees was one which should be granted. Still I think that the objection stated by the *curator ad litem* was a proper one for him to state, and that he was right to lodge answers in order to try the point. If the question had been whether the equitable mortgage over Shenrick was a "bond or mortgage on heritable property in Scotland," I do not think that, strictly speaking, we could have answered that question in the affirmative. But that is not the question. What we have to consider in this case is the intention of the testator, and, looking to the terms of the settlement, and particularly of the first purpose thereof and the power to borrow for repaying banks and mortgages, I have no doubt that the testator intended to include in the words, "bonds or mortgages on my heritable property" the equitable mortgage relating to his estate of Shenrick which was one of the three deeds to which alone the words could apply, and that he intended this equitable mortgage to be paid off, if necessary, by money raised on the security of his heritable estate.

The LORD JUSTICE-CLERK was absent.

The Court recalled the interlocutor reclaimed against and granted warrant to

and authorised the petitioners to borrow on the security of the said farm and property of Shenrick a sum not exceeding £1562, 2s. 6d., and to grant a bond and disposition in security, or bonds and dispositions in security, for sums not exceeding in whole that amount in favour of any party or parties lending the same, and decerned.

Counsel for Petitioners (Reclaimers)—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Counsel for Respondent—J. H. Millar. Agents—Mackenzie & Black, W.S.

Saturday, March 9.

FIRST DIVISION.

[EXCHEQUER CAUSE.]

[Lord Johnston, Ordinary.

INLAND REVENUE *v.* GUNNING'S TRUSTEES.

Revenue—Estate-Duty—Property Passing on Death—Donations inter virum et uxorem—"Competent to Dispose"—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 2 (1) (*a*) *and* 22 (2) (*a*).

Donations *inter virum et uxorem* unrevoked at the donor's death form by the law of Scotland part of his, or her, estate of which he, or she, was "competent to dispose," and on which consequently estate-duty is payable.

Process—Revenue—Summons—Estate-Duty—Property Passing on Death—Donations inter virum et uxorem—Summons Calling on Executors to Lodge Account of All Unrevoked Donations.

Opinion (*per* Lord President) that a summons on behalf of the Inland Revenue calling upon the executors of a deceased spouse to lodge an account, for the purpose of calculating estate-duty, of all donations unrevoked at death made by the deceased to the other spouse where the executors denied all knowledge of the alleged donations, would fall to be dismissed.

Statute—Taxing Statute—Interpretation—Application of Imperial Statute to Scotland—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2 (1) (*a*).

Donations *inter virum et uxorem* are by the law of Scotland revocable, and by the law of England irrevocable. A claim having been made for estate-duty on donations by a deceased spouse to the other spouse, unrevoked at death, the executors resisted on the ground that such a construction of the statute would result in an unequal incidence of taxation, and was contrary to the rule established by *Lord Saltoun* v. *Advocate-General*, April 30, 1860, 3 Macq. 659, and *Lord Advocate* v. *Earl of Moray's Trustees*, August 4, 1905, 7 F. (H.L.) 116, 42 S.L.R. 839.

Held that the rule did not apply.

The Finance Act 1894 (37 and 38 Vict. cap. 30) enacts, sec. 1—"In the case of every person dying after the commencement of this part of this Act there shall . . . be levied and paid upon the principal value . . . of all property . . . which passes on the death of such person a duty called estate-duty. . . ."

Sec. 2 (1)—"Property passing on the death of the deceased shall be deemed to include the property following—that is to say, (*a*) Property of which the deceased was at the time of his death competent to dispose. . . ."

Sec. 22 (2) (*a*)—"A person shall be deemed competent to dispose of property if he has such an estate or interest therein, or such general power as would, if he were *sui juris*, enable him to dispose of the property, including a tenant in tail, whether in possession or not; and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit. . . ."

On 25th July 1906 the Lord Advocate on behalf of the Commissioners of Inland Revenue raised an action against Dame Mary Agnes Winwood Hughes, of Shelsley Grange, Worcestershire, and others, the executors acting under the joint last will and testament of the deceased Dr Robert Halliday Gunning, who died on 22nd March 1900, and his widow the said Dame Mary Hughes, dated 5th November 1896, and recorded in the Court Books of the Commissariot of Edinburgh on 3rd May 1900. The summons concluded for an account of "all donations" made by Dr Gunning to his wife after their marriage and remaining unrevoked at his death, for purposes of ascertaining the estate-duty due on the personal property passing on his death, and for a sum of £1000 in name of such duty.

The pursuer averred—"(Cond. 3) It is believed and averred that Dr Gunning gifted or made over certain of his funds or portions of his estate to his wife. The total value is not known, nor to what extent the property given consisted of personalty or heritage. By a trust settlement dated 19th July 1900, and recorded in the Books of Council and Session 21st March 1901, Dr Gunning's widow, the said Dame Mary Agnes Winwood Hughes, made provision for his niece Miss Elizabeth Gunning and his grandniece Miss Jane Gunning Carruthers. This deed proceeds on the narrative that Dr Gunning had made over to his said wife certain funds as her absolute property, but on the understanding that she should apply or bequeath them in terms of his wishes as expressed to her verbally, and that she should ultimately bequeath any unused surplus to his testamentary trustees for the purposes of his testamentary settlement. The amount of the funds which Dr Gunning handed over to his wife has not been disclosed, but by the said deed she expressed her resolve forthwith to place the sum of £10,000 in the hands of the parties therein named as trustees for the purposes therein declared." [An extract of the said trust settlement by Dame Mary Hughes was produced.]