any stock, without a careful veterinary examination at their own ports. Consequently their buyers in this country cannot buy without insuring against the risk of the stock being rejected on its arrival at the Argentine ports. Underwriters are accustomed to insure against this risk, provided they have a reliable veterinary certificate before delivery. This they can rarely get when the sale is in public market, consequently they buy by private bargain, and their buyers do not appear as bidders at auction unless in exceptional cases. But Mr Rodger had accidentally found an underwriter who, I assume in ignorance of what he was doing, undertook the risk of rejection on landing in the Argentine without stipulating for the necessary tuberculosis certificate. Hence Mr Rodger was able to intervene at the sale not only with a free hand as to price, but untrammelled by the necessity of obtaining the tuberculosis certificate, and I think that it is not too much to say, as many of the witnesses did, that his advent made the sale. As an illustration of the consequence, the highest priced animal, which he bought at a price of 1200 guineas, was rejected on examination, and afterwards sold for £100 on account of the underwriters, for show purposes merely. Such adventitious circumstances could not possibly enter into the valuation of the herd as a marketable commodity, either at the date of the death or at the date of the sale.

"I shall therefore assoilzie the defenders with expenses."

The Lord Ordinary assoilzied the defenders.

Counsel for the Pursuer — Solicitor-General (Ure, K.C.)—A. J. Young. Agent — P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defenders—Cullen, K.C. —Jameson. Agents—Finlay, Rutherford, & Paterson, W.S.

Tuesday, March 19, 1907.

FIRST DIVISION.

[Lord Dundas, Ordinary.

LOVE *v.* LOVE AND OTHERS.

Jurisdiction—Foreign—Husband and Wife —Right of Administration of Husband Resident Abroad—Heritage in Scotland —Bond and Disposition in Security.

In an action by a wife against her husband for declarator that sums contained in bonds and dispositions in security over heritage in Scotland belonged to her, and that she was entitled without his consent to grant all necessary deeds in connection therewith, the defender, who was resident in India, pleaded "*no jurisdiction.*"

Held that as the subject in dispute was heritable estate in Scotland the Court had jurisdiction, and plea *repelled.*

On 16th November 1906 Mrs Margaret Marshall or Love, residing at Newton of Barr, Lochwinnoch, Renfrewshire, wife of Andrew Love, chief engineer, s.s. "Hassara," B.I.E. Club, 4a Ravelin Street, Bombay, India, raised an action against her husband (the compearing defender), and certain others who were called for their interest, in which she sought declarator that certain sums of money contained in three bonds and dispositions in security over heritable property in Scotland belonged to her exclusive of the *jus mariti* and right of administration of her husband, and that she was entitled without his consent to discharge or assign the said bonds, and to grant all necessary deeds in regard thereto.

In his answers the defender stated that he was resident in India, and, *inter alia*, pleaded *no jurisdiction.*

On 2nd March 1907 the Lord Ordinary (DUNDAS) repelled the defender's plea of no jurisdiction, found and declared in terms of the conclusions of the summons in regard to the first two bonds, and *quoad* the third allowed a proof before answer.

Opinion.—The pursuer, a married woman, seeks declarator that certain bonds and dispositions in security, described in the summons, so far as she has right thereto, belong to her exclusive of the right of administration of her husband, who is the compearing defender; and that she is entitled without his consent 'to discharge or assign and to grant all necessary deeds in connection with the said bonds and dispositions in security, sums of money therein contained, and lands therein described.' The compearing defender maintains the negative of these propositions. But he states a preliminary defence which requires consideration. It appears from the pursuer's pleadings that the parties were married on 6th August 1902; that on 17th October 1902 the defender 'returned to India to a situation which he had held previous to the marriage'; and that, 'with the exception of the two months after the marriage, and the six months in 1906 when he was home on leave of absence, the pursuer's husband had been continuously resident in India since the date of the marriage.' The defender is described in the summons as 'chief engineer, s.s. "Hassara," B.I.E. Club, 4a Ravelin Street, Bombay, India.' He explains that he is 'resident in India. He is a marine engineer, sailing from and to various ports in India, and has his headquarters at Bombay.' The defender pleads—'1. No jurisdiction.' His counsel argued that in this state of the pleadings I ought to sustain this plea *de plano* and dismiss the action. The plea as stated — though it has passed muster in various reported cases—is not, I think, in point of form a plea-in-law at all, because it does not amount to a proposition in law. But the defender's counsel contended that his client being resident in India was *eo ipso* outwith the jurisdiction of this Court. He referred to the dicta of Lord Kyllachy in *Buchan*, 1905, 7 F. 917, at p. 922, 42 S.L.R. 706—that 'apart from the owner-

ship of heritage in Scotland, or arrestment *jurisdictionis fundandæ causa*, residence, and not domicile, is what in ordinary actions determines the jurisdiction'; and in *Tasker*, 1905, 8 F. 45, at p. 51, 43 S.L.R. 42—that 'the only domicile to be regarded in ordinary civil actions is the ordinary forensic domicile—the domicile held to be constituted by forty days' residence—and so held, as Erskine explains, "by custom, and in order to prevent disputes."' I do not think that the wide general question which was the subject of Lord Kyllachy's observations in these cases is here raised for consideration or decision. In the first place, the defender's averments are not, in my judgment, sufficiently specific to raise it, even if the pursuer's somewhat gratuitous contributions on the subject are prayed in aid. The defender's record contains no substantive averment that he is not subject to the jurisdiction of this Court; nor any definite statement as to the character or quality of his residence in India, or other facts from which an inference might be drawn that the jurisdiction of the Scots Courts is ousted. I would have given the defender's counsel an opportunity of amending his record if I had not formed an opinion adverse to his plea upon grounds other than want of specification in his averments upon this matter. It appears to me that the questions in dispute in this case relate essentially to Scots heritage. The bonds and dispositions in security are heritable, and there is a dispute as to the title necessary for their discharge, or for the transfer of the lands contained in them. The pursuer claims that she is entitled to deal with these heritable subjects apart from her husband's curatorial right of administration. The defender, on the other hand, maintains that he is entitled to exercise this right. The question so raised is admittedly one of Scots law, and it can, in my opinion, be determined only by the Court in Scotland. I am not aware of any decision expressly determining the point under consideration. The case of *Ashburton*, 1892, 20 R. 187, 30 S.L.R. 194, is instructive but not conclusive. It was there decided that the defender, a foreigner, being infeft in Scots land under a bond and disposition in security, was subject to the jurisdiction of the Scots Court in all actions relating to the land contained in the security; and also that, being a trustee in a Scots trust including Scots heritage, he was subject to the jurisdiction of the Scots Courts in all actions relating to the trust and the trust-estate, and therefore in an action in which this Court had to determine whether the trust still subsisted or had been brought to an end. In the present case the defender is not infeft in Scots heritage. But that fact is not, in my judgment, material. The dispute is none the less one as to the right of administration and transference of Scots heritage, and must therefore, as I think, be determined by the Scots Courts and by them only. If these views are correct, they afford sufficient ground for repelling the defender's plea of 'no jurisdiction.' . . .

"When one comes to the merits of the case the course is plain enough. The pursuer avers that her father Mr Marshall, who died in 1890, by his trust settlement left a legacy to her of £1000 payable on her attaining the age of twenty-five, which should be expressly exclusive of the *jus mariti* and right of administration of any husband she might marry; that at the date of his death her father held the bonds (first) and (second) respectively described in the summons; and that his trustees did not realise these bonds, but by arrangement with the pursuer, who was then unmarried, made up title to them and assigned them to her in *pro tanto* satisfaction of her legacy. In regard to these bonds the defender's counsel frankly, and I think properly, admitted that upon the merits of the case he could state no defence to the pursuer's demand; and I shall therefore grant decree of declarator as concluded for so far as they are concerned. The pursuer further avers that when the balance of her legacy was paid over to her by her father's trustees, she invested it in a share, viz.—£200, of the bond (third) described in the summons. This statement is denied by the defender; and he goes on to aver that the £200 so invested by the pursuer was money which he had remitted to her before the marriage to be invested by her on his behalf. Counsel for the parties were agreed that there must be a proof upon this part of the case, and I shall allow one accordingly."

The defender reclaimed.

The argument of the reclaimer appears from the opinion *supra* of the Lord Ordinary. The respondent was not called on.

LORD M'LAREN—I do not think it necessary to call on counsel for the other side, and I am quite satisfied that everything which could be said has been clearly put before us.

The case for the reclaimer was a very difficult one to maintain in view of a systematised chapter of law like that of jurisdiction, and I am clearly of opinion that the Lord Ordinary has rightly determined the point at issue. It is not necessary to consider the limits or possible extensions of jurisdiction against defenders who are not resident within the territory. On the one hand, it is perfectly settled that the forensic domicile will give jurisdiction in ordinary civil actions, and it is also settled that in questions of status the true domicile is the proper ground of jurisdiction. The Lord Ordinary has decided the case on the ground that it relates to heritage in Scotland, viz., the right to the proceeds of heritable bonds. Now the ownership of heritage in Scotland may be a good ground of jurisdiction in two ways. If the defender is the owner of heritage in Scotland, that may be maintained to be a sufficient ground for convening him in the Courts of Scotland in an action which is unconnected with the estate of which he is the owner. We do not need to consider whether this proposition is universally true, because the case falls within a more restricted rule, which is that where the dispute relates to the heritable estate itself,

there is jurisdiction *ratione rei sitæ*, because no other court has the power of transferring or ordering the transference of estate from one of the contending parties to the other. Here the parties are disputing as to which of them has right to the sums contained in certain heritable bonds—that is, to heritable estate—for although by statute such bonds are declared to be moveable *quoad* succession, they remain for other purposes real estate, and are attachable only by real action or diligence. The question at issue is as to the ownership of the proceeds of such a bond, and also incidentally as to which of the parties is entitled to give a good discharge to the debtor, and I think it is perfectly clear that the Court of Session has jurisdiction to hear and determine these disputes.

The Lord Ordinary says there is no controversy as to the merits in regard to the first two bonds, and I agree with him. With reference to the sum contained in the third bond, he has allowed a proof, and as parties dispute the source from which the sum contained in it was derived, it follows that a proof will be necessary.

LORD KINNEAR and LORD PEARSON concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer (Respondent)—M'Clure, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender (Reclaimer)—Macmillan—J. Macdonald. Agent—T. M. Pole, Solicitor.

HIGH COURT OF JUSTICIARY.

Thursday, May 9.

CIRCUIT COURT AT GLASGOW.

(Before Lord Salvesen.)

H. M. ADVOCATE *v.* KENNEDY.

Justiciary Cases—Evidence—Notice—Malice—Competency of Adducing without Notice Evidence of Panel's Conduct Six Months prior to Alleged Crime—Criminal Procedure (Scotland) Act 1887 (50 *and* 51 *Vict. cap.* 35), *sec.* 8.

In the course of a trial for murder counsel for the accused objected to evidence being adduced as to threats and acts of violence towards the deceased by the accused of date more than fourteen days before the crime charged, on the ground that no notice was given in the indictment or otherwise of such evidence going to be produced. *Held* (*per* Lord Salvesen) that the evidence could be competently adduced, and *observed* (1) that the weight to be given to such evidence in consequence of the interval between the crime and the alleged threats and acts of violence was a question for the jury; and (2) that the Court would not allow such evidence to be led where from its remoteness it could not reasonably be held to have any connection with the crime charged.

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), sec. 8, enacts—"It shall not be necessary in any indictment to allege that any act of commission or omission therein charged was done or omitted to be done . . . maliciously . . . or to use any similar words or expressions qualifying any act charged, but such qualifying allegation shall be implied in every case in which, according to the existing law and practice, its insertion would be necessary in order to make the indictment relevant."

At a Circuit Court held in Glasgow on May 9, 1907, Charles Kennedy came up for trial on a charge of murder, to which he pleaded not guilty.

The indictment was—"Charles Kennedy . . . you are indicted . . . and the charge against you is, that on 9th March 1907 in the house occupied by you in Meadowhead Road, Craigneuk, Wishaw, you did assault Christina Loudon or Kennedy, your wife, and did apply a lighted newspaper to the clothing then worn by her and set fire to the same, whereby she was severely burned on the legs and body and died on said date, and you did thus murder her."

In the course of the trial the Advocate-Depute proposed to question a witness as to previous threats and acts of violence by the accused towards the deceased.

Counsel for the panel objected, and argued that the line of evidence proposed was incompetent as the accused had received no notice. Acts of the accused and statements made by him more than fourteen days before the alleged crime could not be proved without notice—Macdonald's Criminal Law, 3rd ed., p. 469; *Robertson*, March 24, 1842, 1 Broun 152, at 173. No notice had here been given, and the indictment contained nothing to give the defender warning of the evidence proposed. It should be disallowed.

The Advocate-Depute maintained that the evidence objected to was competent. Under the Criminal Procedure (Scotland) Act 1887, section 8, it was unnecessary, and indeed incompetent, to insert the word "maliciously" in the indictment, and the accused's objection simply came to an objection to the omission of that word.

LORD SALVESEN—I have no hesitation in repelling the objection. Since the passing of the Criminal Procedure Act of 1887 there is no absolute rule limiting the evidence of facts and statements relevant to show previous malice on the part of the accused to a period of fourteen days previous to the date of the crime charged. It is no longer necessary to libel malice in the indictment, and the practice for many years has been in favour of allowing without notice evidence of any facts which have a bearing on the motive of the