which he sets forth. It is not said that there was an invitation to alight, and on the pursuer's statement he was not in the act of alighting; he had only risen from his seat in order to take his travelling bag from the rack, as he might have done at any other place in the course of the journey.

In the ordinary case of an accident resulting from a supposed invitation to alight, the passenger is led to believe that the train has come to rest, and if it is started when he is in the act of alighting he is liable to be thrown down and injured by the relative movement of train and platform for which he is not prepared. But a prudent passenger is supposed to be able to take care of himself when within the carriage in which he is travelling, and if he is unable to do so I can see no other solution of the difficulty except that he may stay at home, because if a train is stopped whether in transit or at the arrival terminus it must sometimes be necessary that it should be started again, and then all the passengers are more or less exposed to be jostled or shaken by the start and the reaction of the carriages against the springs by which they are coupled together.

In these circumstances I have looked carefully into the pursuer's averment of fault to discover, if possible, what is the wrong of which he complains. But the only fault alleged is that the engine-driver was in fault in starting the train without any warning having been given after the train had come to a stop at the arrival platform. I do not think that the action of the engine-driver thus described was necessarily, or even probably, faulty. It is quite consistent with the pursuer's statement that the train had stopped short of the place where it was intended that passengers should alight, and that a further movement of the train was necessary to bring it to its proper position alongside of the platform. The pursuer's statement does not negative that supposition, and therefore it is quite consistent with the case as stated that the engine-driver in starting the train was only performing his accustomed duty of bringing the train up to its place of discharge.

It is, no doubt, a very great misfortune to the pursuer that he should sustain this serious injury, but I cannot find in the record any averments of fact leading to the conclusion that the Railway Company had failed in its obligation to use reasonable care and skill in carrying the pursuer to his destination.

LORD KINNEAR—I am of the same opinion. I am reluctant to criticise a record which has been made up in the Sheriff Court, or even in this Court, in actions of this kind too rigorously, if the averments disclose a substantial ground of action although the averments may not be very skilfully framed. But there is nothing to suggest that the deficiencies of the present record are due to any want of skill on the part of the framer, or to anything but the unsubstantial character of the case itself. The averment of what actually happened seems to me to come to nothing more than this—that the train stopped and went on again. There is no averment that anything was said or done by officers of the company to induce the pursuer to believe that he was in safety to alight, or that he did in fact believe it. All that is said is that when the train stopped the pursuer stood up to take his bag off the rack. There is nothing in that to show that he had any reason to suppose that the train had come to a final stoppage, or that he had even adverted to the contingency of its being set in motion. He may or may not have been prudent in his action, but for all that appears from his statement the moving of the train may have been perfectly right, and may also have been just such an event as a prudent passenger taking care for his own safety would have anticipated. I therefore agree that there is no issuable matter in this record.

LORD PEARSON—I think it important to keep in view that there is no question here as to the stoppage of a train at a platform regarded as an invitation to alight. The case has to do with a passenger still within his compartment and engaged in taking down his hand-luggage from the rack. It is said that he was justified in assuming without anything more that when the train stopped it had stopped finally. I observe that there is no specific averment as to duty on the part of the driver, but the averment of fault on the part of the defenders is that the driver was culpably negligent in starting the train suddenly and unexpectedly after it had stopped at the terminal platform. I cannot hold that in the circumstances averred that is a sufficient averment of fault to infer liability against the defenders.

The LORD PRESIDENT was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer (Respondent)—Orr, K.C.—A. M. Anderson. Agent—C. Strang Watson, Solicitor.

Counsel for Defenders (Reclaimers)—Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—John C. Brodie & Sons, W.S.

Tuesday, June 18.

SECOND DIVISION.

[Lord Dundas, Ordinary.

DRYDEN AND OTHERS *v.* M'GIBBON. M'GIBBON *v.* DRYDEN.

Husband and Wife—Wife's Separate Estate — Earnings — Wages — Hotel Business Managed Solely by Wife.

The Married Women's Property Act 1877, by section 3, excludes the *jus mariti* and right of administration of the husband "from the wages and

earnings of any married woman, acquired or gained by her after the commencement of this Act, in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name. . . ."

A compositor named M'Gibbon, and his wife, shortly after their marriage, rented a house of two rooms and kitchen and took in lodgers, subsequently becoming tenants of the remainder of the flat, and reviving the business of a temperance hotel which had formerly been carried on there. At the time of the marriage the wife had no money of her own, and at first the enterprise was dependent upon the husband's wages. The husband continued to work as a compositor, taking no part whatever in the management of the hotel, which was carried on entirely by the wife. The husband's wages and the profits of the hotel were slumped together, and whatever remained after paying the expenses of living was laid aside. Out of this the flat was ultimately purchased, the disposition being taken in name of the wife. Tradesmen's accounts in connection with the hotel were rendered to, and receipts for rent, &c., granted by the husband; his name appeared on a plate on the door and in the directory; and upon the outside of the building was a placard—"M'Gibbon's Temperance Hotel." On a business card there occurred the words, "Proprietrix, Mrs M'Gibbon," and policies of insurance over the flat and furniture were taken in her name. The wife having died her representatives claimed a proportion of the value of the flat, and of a sum of money left by the husband, as representing her "wages and earnings" under section 3 of the Married Women's Property (Scotland) Act 1877. The Court refused to entertain the claim, *holding* that the section was only applicable where the "employment" was under some person other than the husband, and the "trade" or "occupation" entirely removed from his participation and control, and where "the business which she carries on under her own name" was one carried on entirely separately from him.

M'Ginty v. *M'Alpine*, June 28, 1892, 19 R. 935, 29 S.L.R. 825, *followed; Morrison* v. *Tawse's Executrix*, December 18, 1888, 16 R. 247, 26 S.L.R. 160, *distinguished.*

Husband and Wife—Donation—Remuneratory Donation—Proof.

"The remuneratory character of a donation *inter virum et uxorem* may be inferred from the circumstances in which it is made or given without there being any express indication, verbal or written, that it was intended to be remuneratory. But in such cases the circumstances require to be distinctly proved, and to be such as to lead directly to the inference that the donation was intended as an equivalent for something proved to have been done or given by the donee to the donor."

Countess of Oxenford v. *The Viscount*, 1664, M. 6136; *Chisholm* v. *Brae*, 1669, M. 6137, *followed.*

A husband purchased the house in which for some nineteen months he and his wife had resided, and carried on the business of an hotel. The destination in the disposition was in favour of the wife. At the date of the purchase the price of the house much exceeded the profits made by the hotel. The husband subsequently executed a deed revoking the donation contained in the destination. *Held* that, in the absence of proof of anything said or written by him which indicated that he intended the donation to be remuneratory, no such inference could be drawn from the mere fact that the wife had entirely managed the hotel and spent much time and trouble upon it.

In the first of these actions Henry Dryden and others, the heirs *in mobilibus* of Mrs Mary M'Gibbon, who died intestate and without issue on 24th December 1904, raised an action against John M'Gibbon, as executor of his wife Mrs Mary M'Gibbon, and Peter Dryden, and the Law Guarantee and Trust Society, Limited, for any interest they might have. It concluded for (1) reduction of a pretended discharge and renunciation granted by them in favour of John M'Gibbon, and (2) for count, reckoning, and payment against the said John M'Gibbon as executor of his wife in order that the balance due by him to the pursuers as her heirs *in mobilibus* might be ascertained and payment made. John M'Gibbon having died on 30th January 1906, after the raising of the action, his executor George M'Gibbon was sisted in his place.

The second action was brought by John M'Gibbon (his executor subsequently coming into his place) against Peter Dryden, the heir in heritage of Mrs M'Gibbon, for declarator that the dwelling-house, being the third storey of 142 High Street, Edinburgh, was purchased with funds belonging to John M'Gibbon, and that his taking the disposition in name of his wife constituted a donation *inter virum et uxorem*, which was accordingly revocable, and had in fact been revoked by him. [If the gift was revocable it was not disputed that it had been revoked.]

In the first action decree was by consent of the defender pronounced in terms of the first, the reductive, conclusion of the summons.

Thereafter a proof was taken before the Lord Ordinary (DUNDAS), which was held applicable to both actions.

The *facts* and the *contentions* of the parties are stated in the opinion (*infra*) of the Lord Ordinary, who, on 27th June, pronounced an interlocutor in the first action assoilzieing the defenders from the remaining conclusion of the summons, and in the second action an interlocutor in favour of the pursuer, in terms of the declaratory conclusions of the summons.

Opinion.—"This action was raised on 14th November 1905 by the next-of-kin of the deceased Mrs Mary Jane Dryden or M'Gibbon, and the compearing defender was her husband, the now deceased John M'Gibbon. The conclusions are for reduction of a discharge and renunciation by the pursuers in favour of the defender, which has been reduced of consent by my interlocutor of 30th January 1906, and also for count, reckoning, and payment in respect of the defenders' intromissions as his wife's executor with her moveable estate.

"I have also to dispose now of an action which was raised on 15th December 1905 by the said John M'Gibbon, and which is insisted in by his brother and heir-at-law, against Peter Dryden, the heir-at-law of his sister the said Mrs M'Gibbon. The history of the two cases arises out of the same facts, and the proof which has been led is applicable to both actions. The difficulty as regards the matter of evidence is greatly increased by the fact that both Mr and Mrs M'Gibbon are now dead. The story is a somewhat tangled one, but I shall endeavour to recapitulate succinctly the material facts to which it is necessary to advert.

"John M'Gibbon and his wife were married on 28th November 1890. Prior to the marriage Mrs M'Gibbon had earned about ten or twelve shillings a-week, but at its date she had no saved earnings. She had, however, some furniture in a small house in Drummond Street where she had resided and where the spouses lived together after the marriage till Whitsunday 1891. The husband was a compositor, earning wages of not less than £2 per week. At Whitsunday 1891 the M'Gibbons removed to a house of three rooms and a kitchen in St Mary Street, where they took in lodgers. There is some evidence to show that Mrs M'Gibbon there acquired a certain amount of additional furniture from one of her lodgers. In November 1894 the couple became tenants at 142 High Street of two rooms and a kitchen; there was no written lease or missives of lease; the let was arranged by Mrs M'Gibbon with the factor Mr Clephane, who says that he looked to her for the rent, but the husband's name was put in the valuation roll—upon the wife's instruction, as Mr Clephane depones—in order that the vote in respect of the premises should not be lost. At Whitsunday 1895 the tenancy became extended to the whole of the flat at a rent of £26 per annum. This flat had formerly been used as a temperance hotel, and the business was revived at and from Whitsunday 1895. It is clear upon the evidence that Mrs M'Gibbon did in fact manage this business throughout, with slight (if any) practical assistance by her husband, he being engaged in his business upon the night shift and not available for work during the day. The business was from the first successful upon a modest scale, and continued to be so, at all events until the end of 1903. It appears that Mrs M'Gibbon, who died on 24th December 1904, had fallen into a habit of excessive drinking for some time prior to her death. The receipts for rent were granted in name of the husband. Such accounts as are produced, rendered by tradesmen and others, are in his name. His name also appeared upon a brass plate on the door of the premises; the plate had been brought from the house in St Mary Street. Upon the street side of the building the words 'M'Gibbon's Temperance Hotel,' or 'Temperance Hotel,' were painted. The pursuers produce and found upon a business card, No. 38 of process, on which the words 'Proprietrix, Mrs M'Gibbon,' occur, and about which some of the witnesses give evidence more or less vague. It appears that there was also a card, of which No. 73 of process is a type, upon which these words do not occur, but only 'M'Gibbon's (late Fuller's) Commercial and Temperance Hotel.' It is not, I think, clear whether or not cards such as No. 73 were in existence or use contemporaneously with those of which No. 38 is an example. In the Edinburgh Directories from 1896-97 onwards Mr M'Gibbon's name is in the list of hotelkeepers. A fire policy of insurance over the flat dated 21st January 1897 is in the wife's name. A fire policy of insurance over furniture, originally taken out in Mr M'Gibbon's name, was in June 1900 transferred to that of his wife.

"In January 1897 an important event occurred, viz., the purchase of the flat at 142 High Street. It seems clear that this transaction was wholly carried out by Mrs M'Gibbon—both with the factor of the proprietor, Mr Clephane, and with the lawyer, Mr Wakelin. The destination in the disposition gives in effect a liferent to Mr M'Gibbon on his wife's death and the fee to his wife. I think that it is unfortunate that Mr M'Gibbon's own views were not ascertained at the time. But it seems that he signed the deed without demur—a fact strongly founded upon by the pursuers, and also by the defender in the second action, to which I have made reference. At the time of the purchase additional furniture appears to have been bought, which must, I think, have been paid for out of the profits of the hotel business. The price of the premises was £475. A bond for £200 over them was obtained, which was signed by both Mr and Mrs M'Gibbon. It appears that at this time there were two bank accounts, and two only, in the name of the spouses or either of them. Copies of these are Nos. 28 and 29 of process respectively. Both were with the Savings Bank. No. 28 was in name of the wife and was headed 'Own earnings.' No. 29 was in the joint names of the husband and wife. I should say here that it is, in my opinion, clearly proved by witnesses upon both sides of the case, that Mr M'Gibbon was in the habit, during the entire period of the spouses' residence in High Street, of handing over to his wife substantially the whole of his wages weekly. These she kept, along with the profits of the business so far as not banked, in a locked box in a locked room in the house. As one of the witnesses tersely phrases it, 'She was the bank.' One must now see how the balance of the purchase price, £275, was paid, and how the

sum in the bond, £200, was paid off. As regards the first of these, it is pretty clear that the money was paid by Mrs M'Gibbon to the extent of £80 from the account No. 28 of process, and to the extent of £57, 10s. 1d. from the account No. 29 of process, making together the sum of £137, 10s. 1d., and that the balance, viz., £137, 9s. 11d,, was paid by her in cash. This cash must, in my opinion, be held to have come from the cash-box above-mentioned, in which it is proved that Mrs M'Gibbon was in the habit of keeping very considerable sums of money. There is no other feasible suggestion of a source from which the sum can have been raised. If this is the correct view, then I take it that this cash balance was paid out of the profits of the hotel business and the wages of the husband. The £200 due under the bond appears to have been paid by three instalments, viz.—(1) On 10th May 1899 a payment of £50. This, to the extent of £25, came apparently from account No. 29 of process. The balance was paid in cash, presumably from the cash-box. (2) On 14th May 1900, a payment of £50. The source from which this money came is not, I think, clearly proved. (3) On 1st July 1902, a payment of £100. This sum apparently came to the extent of £93, 5s. 2d. from account No. 29 of process, and the small balance was paid in cash. In June 1900 the account No. 28 of process was exhausted and ended by the withdrawal of its then existing balance of £192, 15s. 7d. At the same time there began a series of deposit-receipts with the Royal Bank of Scotland (Hunter Square Branch), which rose steadily from £350 as at 22nd June 1900 up to £750 as at 29th December 1903. These deposit-receipts stood in name of Mrs M'Gibbon, and at her death on 24th December 1904 the amount at credit was £744, 17s. 6d.

"In these circumstances the pursuers aver 'that the said flat was purchased, and the said bond paid, by the deceased Mrs Mary Jane Dryden or M'Gibbon with her own money, and that the sums placed on deposit-receipt with the Royal Bank of Scotland were also her own money. Said money was earned by her before marriage, or in the said hotel business.' In my opinion, the pursuers' case fails entirely. It is, I think, established by the evidence that Mrs M'Gibbon had at the date of her marriage no saved earnings. As regards the hotel business, the case seems to me equally to fail. After Mrs M'Gibbon's death an inventory of her estate was prepared in Mr Wakelin's office, and given in for the husband's confirmation as her executor. That inventory contained the sum in deposit-receipt, but appended was a '*Note.*—This money is claimed by the husband of the deceased as forming the joint savings of himself and his wife, or otherwise as money belonging to himself.' It appear that Mr M'Gibbon had made statements to Mr Wakelin, and to those in his office, that he considered the money to be his own, as coming from the hotel business, which was in fact largely contributed to by his own earnings. The note was worded in cautious terms. But later on—after a more definite investigation into the facts—a corrective inventory was lodged, omitting the money upon deposit-receipt; and the duty which had been paid in respect thereof was recovered by Mr Wakelin from the Inland Revenue authorities. Mr M'Gibbon appears to me to have been singularly careless about his money matters, whether from exuberant trust and confidence in his wife as their manager, or from some other cause or causes. It seems that he was aware that there was at her death money on deposit-receipt, but that he was quite ignorant as to its amount. The pursuers' argument was briefly stated to the following effect. The deposited money, they said, belonged wholly to the wife, because it was made by her out of the profits of the hotel business; and that business was a separate business belonging to her. This last fact, it was urged, was evidenced by her sole management of the hotel, coupled with the terms of the disposition and of the bond. The pursuers relied also upon certain very vague statements said to have been made by Mrs M'Gibbon to some of the witnesses; upon the card, No. 38 of process; and some other small items of evidence. Now, I think that the pursuers have entirely failed to prove the crucial fact upon which their argument depends, viz., that the business belonged to Mrs M'Gibbon. The presumption, in my opinion, where a wife lives in a house with her husband, and is the active manager of a business carried on there, is that she is managing it as the agent of her husband. The Married Women's Property (Scotland) Act 1877, section 3, protects, as against her husband, the wages or earnings of a married woman gained by her 'in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name.' It has been decided, to quote the words of Lord President Robertson in *M'Ginty* v. *M'Alpine*, 1892, 19 R. 935, 939, that in order to come under that section 'the wife must have some other "employer" than the husband, or the "occupation or trade" must not be simply the occupation or trade of her husband if it is to yield "earnings" in the sense of the section.' It seems clear that Mrs M'Gibbon had no employer other than her husband; nor do I think that it can be successfully maintained that she carried on the hotel business under her own name within the meaning of the Act. I have referred to the evidence upon this matter; and I again emphasise the fact that the husband's wages were substantially contributed to the business of the hotel. The pursuers' case, then, as regards the money upon deposit-receipt, appears to me to fail. Their strongest point lies in the fact that under the title the wife was fiar of the house. But that fact is not conclusive, and is not *per se* sufficient to outweigh the presumption of her agency in the conduct of the business. This topic, which is important in the first action, enters vitally into the subject-matter of the second case, and may appropriately be here exhausted. There is no evidence to show with what idea, or

with what knowledge, Mr M'Gibbon signed the disposition. It appears that he was much surprised when he was informed by the lawyers, after his wife's death, that he was not in a position to sell the house. When they so informed him he was already in Court as defender in the first action. As pursuer in the second action he took up the position that the premises were purchased with his money, and that the destination in the title was of the nature of a gift by him to his wife, which he was entitled to revoke, and which he bore to revoke by deed of revocation, dated 5th December 1905. I am satisfied, for the reasons above expressed, that the premises were purchased and the bond paid off with the husband's money; and I can see nothing which should prevent him, if the facts of the matter are as I have related them, from validly revoking the gift—unless indeed it was *donatio remuneratoria*—a view with which I shall deal immediately. The pursuers' counsel insisted that Mr M'Gibbon's word is unreliable. It seems to be the case that he wrote and spoke falsely and deceitfully in connection with the discharge which he obtained from the pursuers, and which has since been reduced of consent. But that does not seem to me to alter or affect the fact that he did revoke the gift. Nor do I think that the facts bring this case within the region of a remuneratory and therefore irrevocable donation. There is no evidence at all that he intended it to be so. The presumption, and such evidence as there is, lie in the opposite direction.

"The result of the whole matter is, in my opinion, that in the first action the defender is entitled to absolvitor; and that in the second action I ought to find, declare, and decern in terms of the conclusions of the summons."

The unsuccessful parties reclaimed, and argued—1. Half of the total savings of the M'Gibbons were attributable to the husband's trade as compositor, half to the hotel business. To the latter the wife's representatives were entitled, whether now in the form of heritable (the hotel) or moveable property, inasmuch as the money made by the hotel fell under section 3 of the Married Women's Property Act 1877 and became the private property of the wife. The hotel was a "business which she carried on under her own name"—*Morrison* v. *Tawse's Executrix*, December 18, 1888, 16 R. 247, 26 S.L.R. 160. It was also a "trade" or "occupation" in which she was engaged. *M'Ginty* v. *M'Alpine*, June 28, 1892, 19 R. 935, 29 S.L.R. 825, was distinguishable, because in that case there was only one business in which both husband and wife were engaged. Her claim also fell to be sustained under section 1 (1) of the Married Women's Property (Scotland) Act 1881. *Cf.* also *Ferguson's Trustee* v. *Willis, Nelson, & Company*, December 11, 1883, 11 R. 261, at 266, 21 S.L.R. 170. 2. They were at any rate, *separatim*, entitled to the hotel, as the disposition in the wife's favour amounted to a remuneratory donation and was accordingly irrevocable—Fraser, Husband and Wife, vol. ii, pp. 926, 940; *Stewart* v. *Stewart*, February 25, 1904, 11 S.L.T. 721. Where a husband has received services from his wife, and recognised this by gift, the gift became *ipso facto* remuneratory. There was no necessity for him to express any intention—*Countess of Oxenford* v. *The Viscount*, 1664, M. 6136; *Chisholm* v. *Brae*, 1669, M. 6137. In the circumstances the onus of proof lay on the other side; see *Loudon* v. *Young*, December 6, 1856, 19 D. 140.

Argued for the respondent—(The Court having intimated that they required no argument upon the first point)—The appellants had failed to prove that the donation was remuneratory, the *onus* being on them. If the mere fact of services rendered by a wife to a husband and a subsequent gift by him to her were *per se* sufficient, then practically all gifts by a husband to his wife would be remuneratory. There must be proof of express intention. As a matter of fact it was obvious that the husband's intention was to make a testamentary provision for his widow. Compare *Craig* v. *Galloway*, June 22, 1860, 22 D. 1211, 4 Macq. 267.

At advising—

LORD JUSTICE-CLERK—If the purpose of the Married Women's Property Act was, as I am satisfied it was, to protect to the wife the proceeds of business conducted by herself and on her own credit, unassociated with her husband, then in this case I have no hesitation in holding that the decision of the Lord Ordinary in regard to the business of keeping lodgers, followed by temperance hotel keeping, carried on by the late Mrs M'Gibbon, is right. When that business was begun there were no funds by which the outlays required for it could be met except the £2 or £2, 5s. a-week which were the earnings of the husband by his own labour. These, his wages, with the exception of trifling sums in the character of pocket money, passed into the wife's hands and were in no way kept distinct, but went into the hotel business without any distinction being made between them and funds, if any, provided by the wife. Of proof that she did provide any I look in vain in these proceedings. The circumstances founded on in support of this contention certainly do not bear it out, and the other circumstances pointed out by the Lord Ordinary substantially negative it. That Mrs M'Gibbon managed the business does not appear at all to affect the question. A woman living with her husband and managing a business into which only his money is put, is presumably his manager, and is not in right of the business she is managing. The Act excludes the case of a woman employed by her husband and not carrying on a business under her own name. In this case I hold that Mrs M'Gibbon was in that category.

The fact that the title to the house was taken in Mrs M'Gibbon's name is not conclusive, and I see no ground for holding

that the gift was a *donatio remuneratoria*, and hold that it was revocable.

I do not enter into detail, being satisfied with the grounds for the opinion I have expressed as they are given in the opinion of Lord Ardwall, which I have had an opportunity of perusing.

LORD ARDWALL—The two actions which have been brought under review of the Court on reclaiming-notes against the interlocutors of Lord Dundas, Ordinary, arise out of disputes between the representatives of the deceased Mrs Mary Jane Dryden or M'Gibbon on the one hand, and the representatives of her husband, the now deceased John M'Gibbon, on the other.

The first action, which is at the instance of the heirs *in mobilibus* of Mrs M'Gibbon, who died intestate without issue on 24th December 1904, concludes, in the first place, for reduction of a pretended discharge and renunciation granted by them in favour of the said John M'Gibbon. Decree was pronounced in terms of that conclusion by the Lord Ordinary on 30th January 1906, in terms of a minute for the defender. The remaining conclusions of the summons are for count, reckoning, and payment against the said John M'Gibbon as executor of his wife, in order that the balance due by him to the pursuers as her heirs *in mobilibus* may appear and be ascertained, and payment thereof made to them.

John M'Gibbon having died on 30th January 1906, his executor George M'Gibbon was sisted in his place. The other action was originally brought by the deceased John M'Gibbon against Peter Dryden, the heir in heritage of Mrs M'Gibbon, for declarator that the dwelling-house, being the third storey of 142 High Street, Edinburgh, was purchased with funds belonging to Mr M'Gibbon; that his taking the disposition in name of his wife constituted a donation *inter virum et uxorem* which had been revoked by him, and thereafter the summons concludes as usual for a conveyance or adjudication of the said subjects in favour of Mr M'Gibbon.

A proof was taken before the Lord Ordinary, which has been held applicable, of consent of parties, to both actions.

The question to be decided in the first action, and which partly entered into the case made for the defenders in the second action, is whether the savings of the spouses, which were represented at the death of Mrs M'Gibbon by a deposit-receipt for £744, 17s. 6d. in her name by the Royal Bank of Scotland, and were also represented to a greater or less degree by the house No. 142 High Street, which was purchased out of such savings, are to be held to be, to the extent of one-half thereof, the property of Mrs M'Gibbon.

The Lord Ordinary has gone with great care into the details and history of the case, and I need not recapitulate what he has already so well said; but, taking the result of the evidence as stated by him, and which in my opinion is correctly stated, I shall proceed to consider the question whether these savings are to be regarded as having to any extent belonged to Mrs M'Gibbon at the time of her death in respect of the provisions of sec. 3 of 40 and 41 Vict. cap. 29 (The Married Women's Property (Scotland) Act 1877). That section provides that "the *jus mariti* and right of administration of the husband shall be excluded from the wages and earnings of any married woman acquired or gained by her after the commencement of this Act in any employment, occupation, or trade in which she is engaged, or in any business which she carries on under her own name." I am of opinion that these savings are not the property of Mrs M'Gibbon in respect of the provisions of this section.

Mrs M'Gibbon had at the date of the marriage no saved earnings. Mr M'Gibbon was at that time a compositor receiving about £2 a-week in wages, which were afterwards raised to £2, 5s., and he was earning these wages up to the time of Mrs M'Gibbon's death. It is therefore certain that at and after its initiation the business of the small temperance hotel which was carried on in the house No. 142 High Street depended almost entirely in its early stages on the wages of Mr M'Gibbon. As was pointed out by the Lord Ordinary, the spouses went to live at 142 High Street in a house of two rooms and a kitchen, but at Whitsunday 1895 the tenancy became extended to the whole of the flat, which had formerly been used as a temperance hotel, and that business was revived there from and after Whitsunday 1895.

Dealing with the first question raised under the Act, namely, whether the business was carried on under Mrs M'Gibbon's own name, I agree with the Lord Ordinary that it was not so carried on. Receipts for the rent were granted in name of Mr M'Gibbon, the accounts produced which were rendered by tradesmen and others who did work in the house are in his name; his name also appeared on a brass plate on the door of the premises, and that plate had been brought from a house where they had formerly lived in St Mary Street, and upon the street side of the building the words "M'Gibbon's Temperance Hotel" were painted. In the Edinburgh directories for the year 1896–97 and onwards Mr M'Gibbon's name is in the list of hotel-keepers. The only evidence on the other side is a business card in which the words "Proprietrix, Mrs M'Gibbon," appear. The evidence about this card is vague, and in no view can I regard it as amounting to very much, as the word "proprietor" or "proprietrix" in connection with a hotel are frequently used as equivalent to nothing more than "manager" or "manageress." It is further to be noticed that on another card, of which No. 73 of process is a sample, these words do not occur, but only "M'Gibbon's (late Fuller's) Commercial and Temperance Hotel." Further, a fire policy of insurance over the flat was in Mrs M'Gibbon's name, but this is quite accounted for by the fact that at that date a disposition had been taken in her name under circumstances to which I shall presently allude.

A fire policy of insurance over furniture was originally taken out in Mr M'Gibbon's name, but in June 1900 was transferred to that of his wife.

In these circumstances I do not think it can be held to be proved that the business was a business carried on by the wife under her own name.

Apart from the absence of evidence, I think that the statute, when it speaks of a business carried on under a wife's own name, must be held to imply that the business was carried on by the wife entirely separate from her husband. Now that is not the case here. The house in which the temperance hotel was carried on was the matrimonial home of Mr and Mrs M'Gibbon, and they both constantly resided there together; and I agree with the Lord Ordinary's opinion that where a wife lives in a house with her husband and is the active manager of a business carried on there, the presumption is that she is managing it as the agent of her husband.

But it was further argued that whether the earnings of the hotel were to be held to be earnings of a business carried on under Mrs M'Gibbon's own name or not, they were in any view her earnings acquired "in an employment, occupation, or trade in which she was engaged." On this matter, along with the Lord Ordinary, I follow the opinion of Lord President Robertson in *M'Ginty* v. *M'Alpine*, 1892, 19 R. 935-939. He there lays down that in order to come under the 3rd section of the Act of 1877 "the wife must have some other 'employer' than the husband, or the 'occupation or trade' must not be simply the occupation or trade of her husband if it is to yield earnings in the sense of the section." In other words, I hold that not only must the employment be under some other person than her husband, but that the trade or occupation must not be one which is carried on jointly or along with her husband, but must be entirely removed from his participation and control. Now, in the present case I think it is proved that the hotel business was started and all along more or less carried on by means of the husband's wages, which were contributed to the common purse which was kept by Mrs M'Gibbon, and into which her husband's wages and the proceeds of the hotel business were regularly put, subject to deductions for personal and current expenses. As it turned out, the sums thus saved were dealt with by Mrs M'Gibbon just as she pleased, one of her objects apparently being to secure a substantial sum for her own future benefit. I need hardly say that her treating practically the whole profits of the hotel as "her own earnings" in a savings bank book, and putting the general savings into a deposit-receipt in her own name, does not affect the real ownership of the money thus dealt with. The case of *Morrison* v. *Tawse's Executors*, 16 R. 247, was strongly relied on by the pursuers in the first action, but I am of opinion that that case differed from the present in several particulars. There the wife had brought her husband a little money, and a part of it was spent in building a washing-house which was attached to the house in which they lived, and the evidence showed that her husband allowed her to follow her occupation in that place and thereby to gain earnings which were proved to amount to 24s. a week, and sometimes to as much as 28s.; it was possible, accordingly, to hold that the wife's business was carried on in separate premises from those occupied by her husband. This money was deposited along with the balance of her husband's earnings in a bank in the joint names of the spouses, payable to either and the survivor. I am bound to say I consider that the judgment in that case, which was strongly dissented from by Lord Young, is a somewhat narrow one; and I prefer the opinions expressed in *M'Ginty's* case as setting forth with greater accuracy the application of the Act to cases of this sort than the opinion of Lord Lee in *Morrison's* case.

As to the general policy of the Act in its application to cases of this sort, I think it would be very mischievous were claims such as are made here to be open to the heirs of a wife on her decease in all cases where with her husband's permission and consent she kept a shop in the house in which they lived, or in the case of a small farm took entire charge of the poultry yard and its proceeds, or in the case of an inn took the whole charge and management of the visitors' department, leaving the husband to attend to the stabling and possibly the bar business of the same establishment; and it would be still more inconvenient if in every case where a wife took in sewing or washing to the house occupied by herself and her husband that was to found a claim on the part of her relatives on her decease for a share of the common savings of the spouses. I do not think that the Married Women's Property Act was intended to give rise to such claims at all, but was intended to protect from the interference of her spouse the wages or earnings of any industrious woman who might be forced into supporting herself by an idle or improvident husband. Were the Married Women's Property Acts held to be capable of giving rise to actions of the nature above indicated, such as I consider the present to be, it would have very much the effect of leading to a revival of the inconvenient and vexatious class of actions which arose out of the doctrine of *communio bonorum* and were put an end to by the sixth section of the Intestate Moveable Succession Act 1855, which provided that in the case of a wife's predecease her next-of-kin, executors, or other representatives, should have no right to any share of the goods in communion.

On these grounds, along with those stated by the Lord Ordinary, I propose that his decision in the first action should be affirmed.

With regard to the second action, for declarator and adjudication as regards the house No. 142 High Street, I need not deal with the defender's claim so far as founded on the price of the house being provided to a greater or less extent from funds belonging to

the wife, for although it is proved that the price was paid *pro tanto* out of the profits drawn from the hotel business, for the reasons I have already stated, that founds no claim on the part of Mrs M'Gibbon's heir in heritage or other representatives.

But it was maintained, separately altogether from that ground of defence, that assuming the house to have been bought with Mr M'Gibbon's money, the donation made by him in taking the title in his wife's name, or allowing it to be so taken, was not revocable, in respect that it was a remuneratory donation, being granted in respect of the services rendered by Mrs M'Gibbon to her husband in the initiation and carrying on of the hotel business. Lord Fraser in his work on Husband and Wife, vol. ii, p. 926, thus defines a donation *inter virum et uxorem*—"A donation is something valuable given by one spouse to the other without receiving anything in return for it, and without being under any natural or civil obligation to grant it"; and it was maintained, in the first place for the defender, that the donation of the house does not strictly fall under this definition at all, and therefore not being a donation is not revocable. I cannot assent to this argument. I think that the true question is whether this donation of the house does or does not fall to be held to be a remuneratory donation. The general rule applicable to such donations is thus stated in the case of *Brownlie* v. *Stevenson*, Elch. *v.* "Presumption," No. 5 (1735): "Remuneratory donations betwixt husband and wife are not revocable by the donor nor quarrellable by his creditors as *in fraudem creditorum*"; and Lord Fraser states the rule thus—"Where an equivalent has been given there is no revocation." This doctrine is supported by references to Bankton and Erskine, and to the Digest and several old cases. The doctrine was recently given effect to in the Outer House by Lord Low in the case of *Stewart*, 11 S.L.T. 721 (1904), where it was held that the gift of a large sum paid over by a husband to his wife on the sale of a restaurant business, and which was stated at the time to be in respect of her services in building up and carrying on the business, was not revocable; and it was also given effect to in a recent judgment pronounced by myself as Lord Ordinary in the case of *Steven* v. *Steven* (not reported), where it was proved that a wife had advanced several sums acquired from her own father and other relatives to her husband for use in his business; and although no documents of debt passed between them relative to such sums, I held that the taking of the title to a cottage and ground at Duddingston in the wife's name, the price being paid by the husband, was a remuneratory donation, he having stated to several members of the family that it was intended as an equivalent for the sums which she had advanced to him.

It was argued for the defender in the declarator and adjudication that in these two last-cited cases, as well as in all others where a donation had been held to be remuneratory, there were expressions used either verbally or in writing by the husband to the effect that the donation was made in respect of an equivalent then and there mentioned, but counsel for the pursuer quoted two cases, namely, *Countess of Oxenford* v. *The Viscount*, M. 6136 (1664), and *Chisholm* v. *Brae*, M. 6137 (1669), in both of which the Court inferred from the circumstances that the donation was a remuneratory donation, and was intended to be so, notwithstanding that in the latter case the deed expressly bore in the narrative to be granted for "love and favour."

I am of opinion, following these two last-cited cases, that the law applicable to cases of alleged remuneratory donation is that the remuneratory character of a donation may be inferred from the circumstances in which it is made or given without there being any express indication, verbal or written, that it was intended to be remuneratory. But in such cases the circumstances require to be distinctly proved, and to be such as to lead directly to the inference that the donation was intended as an equivalent for something proved to have been done or given by the donee to the donor.

In the present case there is no evidence of anything said or written by the donor to the effect that the donation of the house was intended to be remuneratory, and I do not think that the circumstances are such as to entitle the Court to infer that it was *de facto* remuneratory. At the time the disposition of the house was granted in January 1897, the hotel business which was carried on there had only existed for about nineteen months, namely from Whitsunday 1895, and, as already pointed out, during that period it must have been started and kept going principally by the earnings of the husband himself. It is quite true that Mrs M'Gibbon practically managed the hotel business and spent a good deal of time and trouble upon it, but the fact of her having done so for nineteen months can hardly be regarded as a circumstance leading directly to the inference that the taking of the disposition of the house in her name was intended to be an equivalent to her for her services. It falls, moreover, to be noticed that the price of the house much exceeded the profits of the hotel up to the date of the alleged donation, and that the said price was paid out of a fund produced by the husband's wages and the earnings of the hotel put together, along with money raised by a bond for £200, in which Mr M'Gibbon was the principal obligant. I think it is the reasonable inference from these facts that Mr M'Gibbon intended what he did to be a *mortis causa* provision in his wife's favour, and although the terms of the disposition militate somewhat against that view, I do not think it can be held that Mr M'Gibbon fully knew or understood the effect of these, which, I may add, were inserted entirely on the instructions of Mrs M'Gibbon. A very different case might have been raised if the donation of the house had been carried out after many years' hard work in connection with the hotel on Mrs M'Gibbon's part, and

after a large sum had been saved out of the earnings from the hotel business, but I think that the circumstances as they existed at the date of the disposition itself practically exclude the idea of its being of the character of a remuneratory donation.

I therefore am of opinion that the Lord Ordinary's interlocutor in the second action should also be adhered to.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court adhered.

Counsel for the Reclaimers—M'Lennan, K.C. — Hamilton. Agent — Andrew H. Hogg, S.S.C.

Counsel for the Respondent — Wilson, K.C.—Constable—R. S. Brown. Agent—Henry Wakelin, Solicitor.

Thursday, June 20.

FIRST DIVISION.

(SINGLE BILLS.)

[Lord Mackenzie, Ordinary.

MOFFAT MAGISTRATES *v.* JARDINE.

Process—Reclaiming Note—Competency—"Whole Subject Matter of the Cause"—Decree of Declarator in Action of Declarator and Interdict—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 53.

In an action of declarator and interdict the Lord Ordinary on 28th May 1907 pronounced an interlocutor in which he granted decree of declarator but "superseded in the meantime further consideration of the conclusion for interdict." A reclaiming note was boxed on 17th June 1907.

Held that as the interlocutor did not dispose of the whole subject-matter of the cause it could only be reclaimed against within ten days of its date, and note *refused.*

Kirkwood v. *Park*, July 14, 1874, 1 R. 1190, *distinguished.*

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 53, enacts—"It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause. . . ."

On 28th January 1907 Mrs Murray Jardine, wife of Arthur Murray Jardine, Esquire, of Granton in the county of Dumfries, and infeft therein as trustee under a disposition and conveyance in trust, raised an action, with the consent of her husband, against the Provost, Magistrates, and Councillors of the burgh of Moffat, in which she sought declarator that the defenders were not entitled to supply water taken from the Granton estate under a certain disposition therein mentioned, except to houses within the burgh. There was a corresponding conclusion for interdict.

On 28th May 1907 the Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—". . . Finds and declares in terms of the declaratory conclusion of the summons, and decerns: Supersedes in the meantime further consideration of the conclusion for interdict: Finds the pursuers entitled to expenses: Allows an account to be lodged, and remits the same to the Auditor to tax and report: Grants leave to reclaim."

The defenders reclaimed.

The reclaiming note was boxed on 17th June.

On the case appearing in the Single Bills counsel for the respondents objected to the note as not having been timeously presented, and argued—The Lord Ordinary, in order to give the burgh an opportunity of coming to some arrangement as to its water supply, had not disposed of the conclusion for interdict. The interlocutor therefore was not a final one and should have been reclaimed against within ten days.

Argued for reclaimers — Although the conclusion for interdict had meantime been superseded, the interlocutor really disposed of the whole subject-matter of the cause. That was clear from the opinion of the Lord Ordinary. [LORD KINNEAR—You cannot reclaim against his opinion.] What remained was merely executorial. That being so, this was a final interlocutor which could be reclaimed against within twenty-one days—Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 53; *Kirkwood* v. *Park*, July 14, 1874, 1 R. 1190; *Caledonian Railway Company* v. *Corporation of Glasgow*, May 17, 1900, 2 F. 871, 37 S.L.R. 672.

LORD M'LAREN—It is perfectly clear that this reclaiming-note has not been presented within the statutory time. It was maintained that the whole subject-matter of the cause had been disposed of by the Lord Ordinary. Now there are conclusions for declarator and also for interdict. The conclusion for interdict has not been disposed of in any definite way. The Lord Ordinary after granting the declarator asked for superseded consideration of the conclusion for interdict, either that the parties might have a chance of coming to an arrangement, or because he thought it might be unfair to grant interdict without allowing time for making new arrangements consequential on his decision. In either case the conclusion for interdict is undisposed of, and in these circumstances it is vain to contend that this is a final interlocutor.

LORD KINNEAR—I am of the same opinion. I think the case of *Kirkwood* is altogether inapplicable, and for the reasons given in the opinions of the Lord President and of Lord Deas in that case. The interlocutor there reclaimed against ordained the defen-