every provision it contains might have been embodied in a deed by Mrs Mackie alone. It provides for her survivance, not for her husband's. The funds which are dealt with are those remaining not at his death but at hers, and the clause designed to prevent the legatees interfering with the management of the estate applies only to Mrs Mackie's survivance. I accordingly read the document as in essence a will by Mrs Mackie, assented to by her husband, expressing her testamentary intentions at its date, but which she could revoke and did revoke.

Further, I think the document contains words which effectually preserved Mrs Mackie's right under the deed of revocation of 1855. I refer to these words "without prejudice to the said Elizabeth Todd or Mackie's power and rights under the said deed" (the deed of revocation, etc.) "should she be the survivor." It seems to me that these words are apt to retain for Mrs Mackie the right which she assumed she had, and that the reclaimers are unable to assign to them, on their view of Mrs Mackie's restricted rights, any intelligible meaning.

But, thirdly, I agree in thinking that, in any view, Mrs Mackie was entitled to treat the benefit conferred by her under the document of 1879 on Dr Mackie's relatives as a donation by a wife to a husband, and therefore revocable. The Lord Ordinary does not proceed expressly on this ground, although he speaks of the codicil as "purely gratuitous," and thinks she was "entitled to change her mind as she subsequently did." In my opinion she was entitled to treat what she had done as a donation to her husband, and to revoke it, as I think she effectually did.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for Mrs Mackie's Trustees—Shiell. Agents—Henderson & Munro, W.S.

Counsel for the Reclaimers—Sandeman, K.C.—Wilton. Agents—Davidson & Syme, W.S.

Counsel for the Respondents, Mrs Menzies and Mrs Brown—Horne, K.C.—C. H. Brown. Agent—Henry Smith, W.S.

Counsel for the Respondents, Mrs Robertson and Others—Chree, K.C.—Maitland. Agents—Henderson & Munro, W.S.

Friday, February 20.

SECOND DIVISION.

[Lord Dewar, Ordinary.

HUTCHISON *v.* HUTCHISON.

Marriage Contract—Estate Conveyed—Provision to Wife—Obligation to Pay—"As soon as he is able."

By an antenuptial marriage contract a husband bound himself to secure, to the satisfaction of the trustees therein named, the provision of an annuity of £300 to his wife in the event of her surviving him, "as soon as he is able to do so." In an action at the instance of the wife for implement of this obligation it was proved that the husband had at his disposal at the date of the action a mortgage of £2000 and investments amounting to about £1270, and that he had an income independent of that capital sufficient for his maintenance. These sums, however, had been diminished by the expenses of an action of divorce at his wife's instance in which he had been successful. The husband, who was about sixty years of age, maintained that he required the money for the purpose of resuming business. *Held* (*rev.* judgment of Lord Dewar, Ordinary) that to the extent of the mortgage for £2000 the defender was able and bound to implement the obligation. *Question*, if any, further.

Mrs Elizabeth Annabella Turnbull or Hutchison, residing at Royal Circus, Edinburgh, *pursuer*, brought an action against William Marshall Hutchison, sometime commission agent in Glasgow, and residing in Oban, *defender*, in which she sought, *inter alia*, to have the defender ordained to implement an antenuptial contract of marriage dated 13th June 1876 between him and the pursuer, by placing in the hands of the trustees acting under the antenuptial contract £5000, or such other sum as should be sufficient to secure to the satisfaction of the trustees a free yearly annuity of £300, which the defender by the antenuptial contract bound himself and his heirs, executors, and successors to pay to the pursuer after his death. Under the antenuptial contract the defender bound himself to secure these provisions to the satisfaction of the marriage-contract trustees "as soon as he is able to do so."

The pursuer pleaded, *inter alia*—"(2) The defender having come under the obligations set forth under the second conclusion of the summons, and these being still unimplemented, should be ordained to implement the same in terms of the second conclusion of the summons."

The defender pleaded, *inter alia*—"(6) There being no obligation on the defender to implement the obligations undertaken by him under his marriage contract at the present time, the defender should be assoilzied. (8) The defender having implemented so far as in his power the obligations undertaken by him in said antenuptial contract

of marriage in favour of the pursuer is entitled to decree of absolvitor."

The *facts* of the case and the import of the evidence appear from the opinion of the Lord Ordinary (DEWAR) who, after a proof, on 4th December 1912, assoilzied the defender from the conclusion of the summons.

Opinion.—"This is an action at the instance of Mrs Hutchison, 19 Royal Circus, Edinburgh, against her husband. . . . The only question which remains is whether, in the circumstances which the proof has disclosed, the defender is now bound to implement an obligation undertaken by him in his antenuptial marriage contract, dated 13th June 1876. By the said contract the defender bound himself, his heirs, executors, and successors, to pay to the pursuer, should she survive him, a free yearly annuity of £300, and to pay her an allowance of £50 for mournings. And he further bound and obliged himself to secure these provisions to the satisfaction of the marriage-contract trustees 'as soon as he is able to do so.' The pursuer avers that, although the defender has been able throughout the period of the marriage, and is now able to set aside money to secure the provisions, he has refused to do so, and she believes that it is his intention to leave the country and defeat her rights. The defence is that the defender is not in a position to place funds in the hands of the marriage-contract trustees, and that he has not until quite recently been asked to do so. He denies that it is his intention to leave the country or defeat the pursuer's rights, and explains that he has already placed money in trust which will secure to the pursuer an annual income of about £160, and that he is unable at the present time to do more.

"The proof largely consisted of a detailed history of the married life—much of it, I am afraid, not very relevant to the question at issue. The pursuer and her daughter (who, together with two sisters, has brought an action of a similar nature against the defender) were the chief witnesses, but they did not profess to know anything at all about the defender's financial position. All they knew was that an old lady, a Mrs Moore, who resided in family with them, gave the defender money from time to time when she was alive, and left him the liferent of the residue of her estate when she died. The defender did not dispute this, nor did his account of the family life differ materially from theirs.

"Parties were married at Kilmadock on 14th June 1876. There have been seven children born of the marriage—five daughters (all of whom are married) and two sons—the eldest in Rhodesia earning his own living, and the youngest being educated at Oxford and maintained by the defender.

"Soon after the marriage the pursuer and defender went to Manchester, where he represented his brother's firm at a salary of £320 per annum. The pursuer had an income of £200 a-year from her father until he died in 1878, when she received £400 from his estate for two years, then £720 until 1896, when it fell to £200, and in another three or four years ceased altogether. In the meantime the defender had started business on his own account, and for a time did quite well. For a number of years they lived happily together, united their incomes (which appear to have been about £2000 a-year), and spent it in maintaining a fairly large establishment and giving their children a good education. The defender had both successes and failures in business, but it is not necessary to follow his business fortunes to discover the state of his funds, because the pursuer admits that he never had any capital of his own, and she does not suggest that he made money in business. Her case is that he obtained ample funds from Mrs Moore, and is now able and bound to place money in the hands of the marriage-contract trustees.

"Mrs Moore went to reside with the family in 1883, and remained until her death in 1902. There is really no conflict of evidence regarding the relationship between the lady and the defender. The defender admits that she contributed generously towards the upkeep of the establishment, and occasionally assisted him with loans in business. But there is no evidence to show that this money is still in his hands and available for the purpose for which the pursuer has brought this action. Considering the time which has elapsed, the defender gave a very clear, and I think truthful, account of his whole transactions with her, and I think he has explained in a satisfactory manner how the money which he got from Mrs Moore, or indeed from any other source, has been used. It is certainly not proved that he has manifested any intention to leave the country or to defeat the pursuer's rights.

"Of course it is possible that if parties had lived less luxuriously during the years of their prosperity he might have been able to place a sum in the hands of the marriage-contract trustees. Mr M'Lennan argued that it was his duty to do so; while Mr Watt maintained that the apparent extravagance was really true economy in disguise, resulting in successful marriages for all five daughters. Fortunately it is not necessary to decide this interesting point, because the pursuer gave her full consent and concurrence to all that was done, and never made any demand such as she now makes until after they had quarrelled and separated in the year 1905. The question appears to me to be, not what could or should have been done twenty or thirty years ago, but whether it is proved that the defender is now 'able' within the meaning of the marriage contract to place funds in the hands of the marriage-contract trustees

"The defender's net income is about £480 per annum; £69 of that is derived from investments amounting to £1276, which are in his own name. The balance comes from his life-interest in trust funds (chiefly the residue of Mrs Moore's estate) which are beyond his control. From this income he gives the pursuer £2 per week, he retains £3 for his own use, and the balance is required to maintain his son at Oxford. Mr M'Lennan did not maintain that any

funds were available from surplus income, but he argued that the defender ought to be ordained to place the £1276 in the hands of the marriage-contract trustees. I do not agree. I am satisfied that this is the only free sum which the defender has. He may require it at any moment to start in business, or assist any member of his family who may require assistance, or to meet other pressing obligations—for example, his wife and three of his daughters have at present three actions against him impending in this Court, and they threaten others, and his liabilities from this source must already be considerable. I think the indefinite phrase used in the marriage contract 'when he is able' is intended to give the defender a certain amount of latitude. He cannot be called upon, without regard to circumstances, to place any money which he may possess in the hands of the trustees. He may require free funds to carry on business, or maintain his family and advance them in life, or meet other pressing obligations. He is not, I think, required to place such funds beyond his control. It is only when he has capital not reasonably necessary for such purposes that he can be called upon to pay it over. He has not, in my opinion, such capital in his possession now. If it had been proved that he was dissipating the money, or attempting to defeat the pursuer's rights, the case would have been very different, but although that is suggested on record no attempt was made to prove it, and I am satisfied, on the evidence, that it is not true in fact. Although he has not placed money in the hands of the marriage-contract trustees, he has made substantial provisions for the pursuer from time to time, all as set forth in answer 5. [Answer 5 stated, *inter alia*—"Explained that the defender from time to time, as his financial position allowed, made provision for securing the provisions in favour of the pursuer in said antenuptial contract of marriage. In particular, the following settlements herewith produced are referred to—(1) settlement dated 12th March 1912, of £2000 mortgage on Cairngall, Stroud; (2) settlement dated 16th July 1885, of thirty £10 preference shares of the Globe Telegraph & Trust Company, Limited; (3) settlement dated 31st December 1884, of £200 North British Railway No. 2 preference stock; (4) settlement dated 30th April 1884, of £300 new eighty-four convertible preference Caledonian Railway stock; (5) settlement dated 26th February 1884 of £400 North British Railway No. 2 preference stock; (6) settlement dated 28th January 1884 £300 Great North of Scotland Railway debenture stock. The pursuer is entitled to the liferent of the whole of said sums on the death of the defender. Of the said sums the pursuer provided the whole amount contained in settlement No 1, and half the amount in each case contained in settlements Nos 2, 4, 5, and 6. Explained further that the defender's investments, over and above the trust funds of which he has the liferent, amount to about £1276, and that he is in the circumstances quite unable to make any further provision for the pursuer."]

"On the whole matter I am of opinion that the defender should be assoilzied from the conclusions of the action."

The pursuer reclaimed, and argued—The defender was well able to implement the obligation in the marriage contract. His ability to do so must be judged of as at the time when the action was raised. The £2000 which he had settled by the trust indenture in favour of himself and his solicitor could not be regarded as fulfilment of his obligation. That settlement was not irrevocable and was made after this action was raised. It could not therefore be regarded, because it was a rule of the law of Scotland that *nihil innovandum pendente lite—Grahame* v. *Magistrates of Kirkcaldy*, July 26, 1882, 9 R (H.L.) 91, *per* Lord Watson at p. 94, 19 S.L.R. 893. The defender's liferent income was amply sufficient for his own support. The phrase in the marriage contract "as soon as he is able" meant reasonably able and not "as soon as convenient"—*MacKinnon's Trustees* v. *Dunlop*, 1913 S.C. 232, 50 S.L.R. 193; *Fair* v. *Hunter*, November 5, 1861, 24 D. 1; *Shaw* v. *Kay*, 1904, 12 S.L.T. 6 and 262; *Crawshaw* v. *Hornstedt*, 1887, 3 T.L.R. 426; *Davis* v. *Smith*, 1801, 4 Esp. 34.

Argued for the defender—The defender had sufficiently implemented his obligation. There was no stipulation in the marriage contract that any sum was to be conveyed to the trustees or invested in their names. The English trust was irrevocable till the death of the wife—*Godfrey* v. *Poole*, 1888, 13 A.C. 497. As to the meaning to be attached to the words of the obligation in the present case the English cases cited by the pursuer were not in point, because they dealt with obligations which had prescribed under the statute of limitations. The defender was not reasonably able to pay, because he had not sufficient free money, more especially as his free capital had been encroached on in the action of divorce which he had successfully defended.

LORD SALVESEN—We have had a very able argument in this case on both sides of the bar. The main issue between the parties is whether the pursuer is now entitled to enforce an obligation contained in the marriage contract between the parties. Under the contract the defender undertook to pay to the pursuer, in case she should survive him, a free yearly annuity of £300, and he further bound himself to secure the foresaid provision in favour of his said intended spouse to the satisfaction of the trustees named in the contract as soon as he was able to do so. It is this latter obligation which the pursuer now seeks to enforce.

The history of the married life of these parties is described in detail by the Lord Ordinary. For many years they lived in a position of comfort, not to say luxury, and no call was made on the defender to implement his obligation, although there were times when he had ample funds at his disposal. But a considerable time before this action was raised, owing to discords which had arisen between the spouses, the wife

did take steps to induce the husband to fulfil his obligation, and solicitors acting on behalf of the then surviving trustee under the marriage contract, who was a brother of the defender, repeatedly wrote to him urging him to fulfil his obligation. I need only refer to certain letters which preceded this action by at least six months, in which Messrs Burn & Berridge put forward certain proposals for the settlement of outstanding disputes, and in particular referred to the fact that Mr Hutchison, the trustee, had been asked to take steps to secure the due fulfilment of the defender's obligation under the marriage contract. On 25th February the defender's solicitors, Messrs Grundy & Company, wrote with regard to this matter that the defender was not prepared to do anything. I may say these letters were the last of a series in which from time to time the defender had been urged to carry out his obligation.

In these circumstances it seems to me that the pursuer was undoubtedly justified in raising the present action so far as the second conclusion is concerned. Indeed, if implement of the obligation was to be obtained it could only be by an action. Negotiations and pressure had failed, and the trustee was in this position, that he had no funds and declined to litigate. It was thus left to the beneficiary under the contract to vindicate the rights which the contract conferred upon her, and this action was accordingly raised.

The history of the procedure is significant. The position taken up by the defender on record was that he was not able to implement the obligation, and that therefore he declined to do so. But a week before the diet of proof he tendered an amendment in which he tabled various documents that he had then recently executed, and which he said constituted fulfilment of any obligation he had undertaken. Amongst these was a trust indenture in favour of himself and his solicitor, which narrates the obligation contained in the marriage contract above referred to, and settles a mortgage for £2000 which he had obtained as the equivalent of the purchase price of a house that had formerly belonged to him, and he settles that as security for the obligation to pay his widow an annuity of £300.

The defender maintained before us—and this was indeed his leading contention—that the pursuer ought to be satisfied with this trust which he created at his own hand while the litigation was in progress, and that she was entitled to no more. I am unable to take that view. The evidence is entirely a blank as to whether this document was ever delivered so as to become a binding deed, and there is no evidence that even though it had been delivered it was according to the law of England irrevocable so far as securing the due payment of the pursuer's annuity. But even assuming that it was delivered and irrevocable, it is not a fulfilment of the obligation that he undertook, because that obligation is to secure his wife's annuity to the satisfaction of the trustees appointed by the marriage contract. There are two trustees now who have been appointed at the instance of the wife, because the gentleman who held office at the date when this action was raised subsequently died, and it is the defender's duty to secure to their satisfaction the annuity which he contracted to pay to his wife on his decease. It may be that if this mortgage is assigned to the trustees they may think it a sufficient security for the payment of the annuity, looking to the age which these spouses have attained, and to the fact that according to the evidence for the pursuer this annuity for £300 could be secured by a present payment of £1400 to an insurance company. But at all events I am clear of one thing, and that is, that the defender's offer is not one which the pursuer is bound to accept; it is not a fulfilment of his contractual obligation. Mr Black has said that if we are of opinion that this £2000 mortgage should be put under the control of the trustees—if they desire to have the control of it—he is willing to get it assigned or in some other way to have it made over, and I think that is a very reasonable and proper attitude to take.

It remains to consider whether the pursuer has proved that to any further extent there are available funds which the defender could place at the disposal of the marriage-contract trustees for the purpose of securing the obligation which he undertook to his wife. We are not concerned with the obligations that he undertook to his daughters, which have been disposed of in other actions. The position of matters on the proof is this, that the defender admitted that at the commencement of the litigation he had investments to the value of £1276. *Prima facie* his ability to perform his obligation is to be judged of at the date when the action was brought. On the other hand, it may well be that if he satisfies the Court that his ability to pay has been impaired by subsequent events for which he is not to blame, and especially because of the expenses of an unfounded action of divorce raised at the instance of this pursuer which he has had to bear, we ought to take that into consideration in judging of the amount of security which the defender is able to place at the disposal of the trustees, but this does not apply to the expenses which he has incurred in litigating this action, or any other expenses which he has brought upon himself.

At this moment we are not in a position to judge how much of that £1276 now remains available, or how much of it has been consumed in the expenses of the litigation in which the defender succeeded and which he is entitled to provide out of it in the first instance; and I propose to your Lordships that we should not finally decide that question, because, after all, the matter depends upon the view which the trustees may take of the amount that will satisfy them. The obligation is to be performed to their satisfaction, and not to the satisfaction of the Court, and now that the main questions of fact and law are determined the matter will then be for private negotiation between the trustees and the defender,

and I hope that they will be able to adjust matters without further recourse to the Court. All I say at present is that so far as the £1276 have been expended in consequence of litigations in which the defender has been successful, and which have been forced upon him by the pursuer and her family, the expenses of such litigations would be a good deduction from the amount of his means available for the purpose of fulfilling the obligation.

The only other matter with which I shall deal is the Lord Ordinary's ground of judgment. It was only faintly supported by the learned counsel for the defender, and appears to me to be untenable. This defender is in the fortunate position of having a liferent from an estate which originally belonged to the pursuer's aunt, and which yields him an income of £526, 15s. 5d. on his own showing, and he has, besides, an income of £69 from his miscellaneous investments. That, no doubt, includes the £100 which he derives annually from the mortgage that is the subject of the assignment to himself and his solicitor. From the total sum he proposes to deduct two sums of £50 and £36, which he says he is under obligation to pay in terms of a trust to a Mr Harris and a Mrs MacAdam. I shall assume that he is under obligation to pay these sums, although I do not think the fact is sufficiently established; but that still leaves him with an income of £516, because I think the income tax, even if it has not been twice deducted, which is open to question as regards some of the items, is not a deduction which we are entitled to take into account, although no doubt it is part of his necessary expenses. Now at the date when this action was raised he was allowing his wife £2 per week, and he was also paying for the board and education of his youngest son, who was then at Oxford. Fortunately he has been relieved of the necessity of maintaining the son, and that is an element we are entitled to take into account, just as the litigation by which he has lost his money is being taken into account on the other side. But he is left with an income of £312, or just about three times the income that he is allowing to his wife.

Can it be said that a man who is in that position, and who holds capital to the extent of over £3000 as at the date when this action was raised, and between £2000 and £3000 now, is not able to implement to any extent the obligations that he undertook in his marriage contract? I am clear that he is perfectly able to do so. He has an income independent altogether of that capital which is sufficient for his maintenance, and which cannot be taken from him, because it is paid to him out of trust funds which are under the control of other persons. And what is more, he is not liable to lose any part of the income of the fund which he may be bound to assign to the marriage-contract trustees, because that, in terms of the marriage contract, falls to be paid over to him during the subsistence of the marriage; so that so far as his income is concerned he will not be a penny the worse by the transference of the property to the marriage-contract trustees instead of to the self-constituted trustees whom he appointed by the deed to which I have referred, for no other purpose, as I believe, than to evade or attempt to evade the obligation which he had undertaken. To say that a man in that position is not able to fulfil his obligation because he may wish to employ his money in his business, from which he retired sixteen or twenty years ago, or may want it for other obligations that we do not know anything about, and therefore is entitled to retain it in his hands and not apply it in fulfilment of his contractual obligation is, I consider, entirely out of the question, and I absolutely disagree with the Lord Ordinary's view upon that matter.

These observations dispose of this case. What I should propose to your Lordships is that we should recal the interlocutor reclaimed against, and that we should pronounce findings that the defender is bound to secure the annuity of £300 provided in favour of his wife by the antenuptial contract of marriage to the satisfaction of the trustees in so far as he is able to do so; that to the extent of the sum of £2000 due to him on mortgage he is able to implement that obligation; that *quoad ultra*, and without deciding whether further funds can be made available by him, we should allow the defender an opportunity of finding security to the satisfaction of the trustees, who are the proper parties now to negotiate with him; and that we should continue the cause so that the trustees may apply, if need be, for an order to enforce the findings which I propose that the Court should make. Our interlocutor will leave the question open with regard to the remainder of the capital which is at the disposal of the defender. I do not say at present whether, even if it could be shown that he had an available surplus of £1000 (apart from the mortgage), we would, on the application of the trustees, order that that should be transferred to them in security of this provision. My present impression is that it would be more in the interests of all parties that the defender should have the means of satisfying any expenses which may be due to his wife in connection with this litigation out of ready money, than that an attempt should be made to recover it from the income which is *prima facie* necessary for his reasonable maintenance. For my own part I do not wish to foreclose the question between the trustees and the defender on this point, as they are in the first instance the parties by whom the matter must be decided.

Lord Guthrie—I concur in the course proposed. The Lord Ordinary correctly states the question we have to decide—"The question appears to me to be, not what could or should have been done twenty or thirty years ago, but whether it is proved that the defender is now 'able' within the meaning of the marriage contract to place funds in the hands of the marriage-contract trustees." Where the Lord Ordinary seems to go wrong is in dealing with the case as

if the whole question related only to the invested funds amounting to £1276. He considers two questions in regard to that sum—first, the date at which we are to take this matter, and second, what elements enter into the ability or inability. I agree with your Lordship in thinking, that while *prima facie* the date to be taken is the date of the action, we must allow a diminution in respect of the pursuer's unfounded and unsuccessful proceedings. As to the question of ability, it appears that none of the three elements to which the Lord Ordinary calls attention as pointing to inability can now be insisted in. The Oxford son is no longer a burden; the suggestion about the possibility of this man of sixty, who has been out of business for sixteen years, taking up business again was not insisted in; and the Lord Ordinary's suggestion about the defender having to maintain his family also disappears, because the daughters are all well married and perfectly able to maintain themselves. I agree that we are not in a position to deal just now with the question whether there may not be a part of the £1276 which would be available under the obligation in the deed in question, and I reserve my opinion as to that.

The real question is one upon which the Lord Ordinary only incidentally touches—namely, the £2000 mortgage. The only reference he makes to it is where he says—"Although he has not placed money in the hands of the marriage-contract trustees, he has made substantial provisions for the pursuer from time to time, all as set forth in Answer 5." But then what is to be done is to be satisfactory not to the Court but to the trustees. The position the trustees may take up in regard to the £2000 mortgage is unknown. I agree with the course which Lord Salvesen has proposed as the right one in the circumstances.

LORD JUSTICE-CLERK—The defender does not take up the position that he is not bound to fulfil the obligation contained in the marriage contract, which is, that when he is able he shall secure to his wife the provision stated for her in the marriage contract. He does not say that he is not going to do that; his case is that he has done it. His case is that he has placed in the hands of himself and his English solicitor as trustees a sum of money for that purpose, and that with that the pursuer ought to be satisfied. But it is not a question of the pursuer being satisfied; it is a question of the trustees under the marriage contract being satisfied. The trustees are practically asked to be satisfied with the £2000 mortgage, of the delivery of which there is no evidence, and I think the proper course is for the trustees to say whether they are satisfied. If they are satisfied no more need be said; if they are not satisfied they can come here and say so.

I reject the Lord Ordinary's idea that a man who is under obligation to secure a provision for his wife when he is able to do so is entitled, in answer to a demand for the fulfilment of the obligation, to say that he is going into business and may need his money for that business. I do not think that is a good answer. Indeed, the defender seems to me never to have suggested it. His case, as I have said, is that the trustees ought to be satisfied with the security he has provided for his wife's annuity. I can see no ground for holding that he is entitled to maintain that view.

Therefore I agree entirely with what your Lordships have said, and I think the course Lord Salvesen has proposed is the proper course to follow in this case.

LORD DUNDAS was sitting in the Extra Division.

The Court *recalled* the interlocutor of the Lord Ordinary, *found* that the defender was bound to secure the annuity provided to the pursuer by the marriage-contract to the satisfaction of the trustees in so far as he was able to do so; that to the extent of £2000 due to him on mortgage he was able to do so; *quoad ultra allowed* the defender an opportunity of finding security to the satisfaction of the trustees, and *continued* the cause.

Counsel for the Pursuer and Reclaimer—Maclennan, K.C. — Carmont. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for the Defender and Respondent —G. Watt, K.C.—Black. Agents — Macandrew, Wright, & Murray, W.S.

Friday, February 20.

EXTRA DIVISION.

[Sheriff Court at Fort-William.

SECKER *v.* CAMERON.

Property—March Fence—Trespass—Sheep —Act 1661, *cap.* 41.

Circumstances in which the Court *held* that the pursuer had shown that there would be sufficient mutual advantage to entitle him under the Act 1661, cap. 41, to call upon the defender to concur in erecting and maintaining a fence between their respective sheep pastures.

The Act 1661, cap. 41, *inter alia*, enacts—"That where enclosures fall to be upon the border of any person's inheritance, the next adjacent heritor shall be at equal pains and charges in building, ditching, and planting that dyke which parteth their inheritance."

Mrs Constance Linda Lucy or Secker and Miss Joyce Alianore Lucy, the proprietrices *pro indiviso* of the lands of Callart and others, *pursuers*, brought an action against Donald Walter Cameron, of Lochiel, proprietor, *inter alia*, of the lands of Ballachulish, *defender*, to have it found and declared, *inter alia*, that the defender was bound to concur with the pursuers in erecting a march dyke or fence between their said lands and to pay one-half of the expense thereof.

The defender pleaded, *inter alia*—"(3) The fence proposed would not be to the mutual advantage of both the estates and is unneces-