Thursday, July 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

DAWSON *v.* CAMPBELL.

Sheriff—Proof—Dictation—Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 10.

This case was appealed from the Sheriff Court at Glasgow to the Second Division. When the case was called for hearing the Court at once drew attention to the length of the proof, and to the fact that it was wholly taken down in question and answer.

After the following authorities had been referred to—Dove Wilson on Sheriff Court Practice, p. 176; *Merry & Cuninghame*, January 11, 1895, 22 R. 247—the Lord Justice-Clerk observed:—"We will not take up the case just now, but remit to the Sheriff-Substitute to say if he dictated the proof, and if not, why not?"

LORD YOUNG and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The case was allowed to stand over, no order being pronounced.

Counsel for the Pursuer—Dundas—W. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Defender—J. C. Thomson—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Friday, July 12.

FIRST DIVISION.

[Lord Low, Ordinary.

HENDERSON *v.* DAWSON.

Husband and Wife—Contract—Personal Obligation by Wife—In rem versum.

H having been employed by D to execute repairs on buildings belonging to him, and having failed to obtain payment of his account, raised an action against D for the amount, and recorded a notice of inhibition. Prior to the recording of the notice of inhibition D had concluded a bargain for sale of the subjects, but had not granted a formal disposition to the purchaser. D's wife, who held a postponed bond over the subjects, being anxious to prevent the execution of the inhibition, as she was afraid it might interfere with the sale being carried through, wrote to H in these terms:—"Having a bond over the . . . property, it is, and always has been, my intention to see you paid as soon as the money is handed over to me. . . . I have instructed Messrs C. & F. to retain sufficient money to settle your account." On receipt of this letter H instructed his agents not to proceed with the action and inhibition, and the sale having subsequently been carried through, D's wife obtained payment of the greater part of the sum due under her bond.

Held (1) that the letter constituted an unqualified obligation by D's wife to pay H's account out of the proceeds of her bond; and (2) that this obligation, having been undertaken by her in reference to and with the intention of benefiting her separate estate, was binding upon her although she was a married woman.

Stamp—Promissory-Note—Stamp Act 1870 (33 *and* 34 *Vict. cap.* 97), *sec.* 49.

A wrote to B—"It is my intention to see you paid as soon as the money" due under a particular bond "is handed over to me. I have instructed C. & F. to retain sufficient money to settle your account."

Held that the letter, being entirely indefinite as to the sum to be paid, was not a promissory-note in the sense of the Stamp Act.

Michael Dawson was the proprietor of a property in Argyle Street, Glasgow, which he had purchased in 1892 for the sum of £14,600. The property was subject to bonds for £9500, £3900, and £2500, the last bond, which was postponed to the other two, being in favour of Mr Dawson's wife. The property was greatly out of repair when Mr Dawson bought it, and he accordingly made extensive alterations and repairs, with the view of enhancing its value as a letting or selling subject. These repairs were executed by Mr Matthew Henderson, whose account amounted to £349, 6s. 6d. Mr Dawson having failed to pay this account, Mr Henderson raised an action against him for the amount on 16th October 1893, and on the same day recorded a notice of inhibition.

Previous to this date Mr Dawson had been negotiating for the sale of the subjects, and on the 14th October 1893 he had completed a bargain for a sale of the subjects to a Mr Lawson at the price of £16,000. In these circumstances Mrs Dawson wrote the following letter to Mr Henderson, with the object of inducing him to refrain from executing the inhibition:—"Langside, 24/10/93. Dear Sir,—Having a bond for £2500 over the Argyle Street property, it is, and always has been, my intention to see you paid as scon as the money is handed over to me, although I hope you will receive payment from my husband's estate, or at least, that the deficiency I may have to make up will not be very great. I have instructed Messrs Caldwell & Fyfe to retain sufficient money to settle your account." On the same date Mrs Dawson wrote a letter to her husband's agents, Messrs Wilson, Caldwell, & Fyfe, containing the following instructions:—"Please retain from the £2500 due to me on 11th November sufficient money to settle the balance owing to Mr Henderson."

Mr Henderson accordingly instructed his agents not to proceed with the action or

inhibition. The price of the property was paid over in January 1894, and Mrs Dawson received payment of £2378, being the balance remaining after payment of the prior bondholders, certain unpaid taxes, and other expenses.

Mr Dawson had in the meantime been sequestrated, and Mr Henderson lodged a claim. He also called upon Mrs Dawson to pay his account, and on her refusal to do so, on 24th January 1894 raised an action against her, concluding for payment of the sum of £349, 6s. 6d., being the amount of his account, and offered to assign to her his claim on Mr Dawson's sequestrated estate.

The pursuer averred that the defender had the real interest in the property, the value of which had been enhanced by the alterations and repairs; that, induced by her letter of the 24th October, he had withdrawn his inhibition; and that by that letter, and other correspondence and communings, the defender had undertaken to pay his account. He maintained that she was not entitled to resile from her undertaking, especially as she had induced him to give up his inhibition and action, which had facilitated the sale of the subjects.

He pleaded—"(2) The work executed by the pursuer having been ordered by the defender's husband for her behoof and on her instructions, *et separatim*, being *in rem versum* of her separate estate, she is liable for the expense of same. (3) The defender having entered into an arrangement with the pursuer, as condescended on, under which she became liable to him for the debt sued for, the pursuer is entitled to decree. (4) The pursuer having withdrawn the inhibition and proceedings which he had taken at the request of the defender, and on the faith of the said arrangement, the defender is barred thereby, and by her actings in the premises, from pleading the alleged invalidity of the letters."

The defender averred that she had been in no way benefited by the transaction; that the price of the subjects had not been enhanced by the alterations made by the pursuer; and that she had not received the full value of her bond.

She pleaded—"(3) On a sound construction, the said letters of 24th October do not import any obligation on the defender; alternatively, they import an obligation only to make up any deficiency ascertained after discussion of Mr Dawson's estate. (6) The said letters having been written by the defender, and the alleged agreement having been entered into by her during her marriage, and under the influence of her husband, with reference to a debt already due by her husband, and not being *in rem versum* of her, the said arrangement is void and null."

Proof was allowed. In addition to the facts already narrated, it appeared that the letter of 24th October 1893 had been written by Mrs Dawson on the suggestion of her husband's agent, who advised her that the inhibition, of which Henderson had given notice, might create some difficulty in carrying out the sale of the property.

Mrs Dawson stated that she wrote the letter in the belief that the inhibition would prevent the sale being carried through, and that, if she had known that it could not have this effect, she would not have written it.

On 16th February 1895 the Lord Ordinary (Low) decerned against the defender in terms of the conclusions of the summons.

"*Opinion.*—The sum sued for in this action is the amount due to the pursuer for alterations made by him upon a property belonging to Mr Dawson, and upon Mr Dawson's instructions.

"Mr Dawson is bankrupt, and the pursuer avers that Mrs Dawson became bound to pay his account, and that the obligation is enforceable because it was truly *in rem versum* of her.

"Mrs Dawson's interest in the property was that she held a postponed bond over it for £2500. The property had been bought by Mr Dawson at the price of £14,600. The burdens upon it were—1st, a bond for £9500; 2nd, a bond for £3900; and 3rd, Mrs Dawson's bond for £2500. Those bonds together amounted to £1300 more than the price which Mr Dawson had paid for the property. The purchase had been made after the property had been several times unsuccessfully exposed for sale, and there was no reason to believe that the price paid by Mr Dawson was below the market value. It was, therefore, Mrs Dawson who was wholly or mainly interested in the reversion of the property beyond what was required to pay the two prior bonds.

"It is said, and, I think, is the fact, that the alterations materially increased the value of the property, and conduced in the first instance to an advantageous lease being obtained for certain of the premises, and finally to an advantageous sale of the whole property. The price (£16,000) ultimately obtained for the property was not sufficient, after settling with the prior bondholders, for the capital sum due to them and arrears of interest, and paying expenses, to pay the full amount in Mrs Dawson's bond (the deficiency being apparently between one and two hundred pounds); but if the alterations had not been made, there is evidence that the property would not have been sold at so large a price as was actually obtained.

"The first question is, whether Mrs Dawson ever came under an obligation to pay the pursuer's account? . . .

"The pursuer . . . maintains that Mrs Dawson came under a direct obligation to pay his account in October 1893. In that month a Mr Lawson made an offer to purchase the property at the price of £16,000. After some negotiations Mr Dawson accepted the offer, and a contract of sale was concluded on 14th October. Prior to that date the pursuer had instructed his Edinburgh agents, Messrs Ronald & Ritchie, to recover the amount of his account from Mr Dawson. On the 11th October Messrs Ronald & Ritchie accordingly wrote to Mr Dawson asking him to make payment before the end of the week then current. On the 13th of October

Messrs Ronald & Ritchie saw Mr Fyfe, writer in Glasgow (who acted both for Mr Lawson and Mr Dawson in the sale of the property), and Mr Fyfe asked them to delay taking proceedings as he hoped that arrangements would be made for paying the pursuer's account. On the 14th Messrs Ronald & Ritchie wrote to Mr Fyfe intimating that unless the debt was paid 'or a sufficient guarantee given for its payment on Monday first' (that is, the 16th October), an action would be raised and inhibition used. Mr Cargill (of Messrs Ronald & Ritchie) says that when that letter was written he had not heard it suggested that Mrs Dawson should give a guarantee, and he had not a guarantee by her in his mind when he wrote the letter. The debt was not paid, nor was any guarantee given on the 16th October, and accordingly Messrs Ronald & Ritchie signeted a summons against Mr Dawson, and recorded a notice of inhibition. The inhibition, therefore, was not used until after the contract of sale of the property was concluded, but although it could not have prevented the sale being carried out, it might quite probably, if it had not been withdrawn, have caused delay and trouble as well as some expense.

"On the 24th October Mrs Dawson wrote, and sent to the pursuer the letter quoted in the third article of the condescendence, and upon the same day she sent to Mr Fyfe the mandate also quoted in that article.

"These documents were written by Mrs Dawson unwillingly and upon the suggestion of Mr Fyfe. The latter advised Mrs Dawson to grant the letter, because he feared that the inhibition might create difficulties in carrying out the sale, and he was aware that Mrs Dawson was the party truly interested in having the sale carried out. He was further informed that Mrs Dawson, in any case, intended to devote any money which she might recover under her bond to enable her husband to settle with his creditors.

"Mrs Dawson, on the other hand, says—and I see no reason to doubt her statement—that her belief was that if the inhibition was not withdrawn the sale would be stopped, and that if she had known that the inhibition would not prevent the sale being completed, she would not have written the letter to the pursuer.

"The pursuer, on his part, withdrew the inhibition, and allowed his action against Mr Dawson to drop upon the faith of Mrs Dawson's letter. I do not think that either the pursuer or his agents knew when the letter was granted that the contract of sale had been completed before the notice of inhibition.

"It was argued for Mrs Dawson that her letter did not import an obligation, because it only stated her intention to see the pursuer paid. I do not think that that is an argument which can be sustained. The question is one of intention, and it seems to me that there can be no doubt from the terms of the letter that Mrs Dawson's intention was to bind herself, in the event of the money in her bond being handed over to her, to pay the pursuer's account in so far as he did not receive payment from her husband's estate.

"Mrs Dawson, when examined as a witness, admitted that she intended to bind herself to pay the money, but she said that she only undertook to do so if she received the full amount in her bond, and that as she had not received the full amount she was not bound.

"Now, of course, Mrs Dawson's evidence cannot be taken as modifying or controlling an obligation which she undertook in writing, but only as a statement of the construction which she puts upon her letter, and the question is, whether the letter is capable of bearing that construction.

"Mrs Dawson commences the letter by stating that she has a bond for £2500 over the property, and she goes on to express her intention of seeing the pursuer paid 'as soon as the money is handed over to me;' and the question is, whether the full sum in the bond, not having been handed over to her, but only a sum substantially smaller, she is under any obligation to the pursuer?

"It seems to me that the letter must be construed in the light of the circumstances in which it was written. Now, it was written in contemplation of and with reference to the sale of the property for £16,000, which had been arranged. That price was apparently sufficient to pay Mrs Dawson the full amount of her bond, but she has not in fact obtained the full amount, because, as I understand, the expenses of the sale have been large, certain accounts for which there was a lien over the title-deeds have had to be paid, and there were arrears of interest due to the prior bondholders. But, nevertheless, the sale in reference to which the letter was written has been carried out, and Mrs Dawson has obtained payment of her money in so far as the price was sufficient to yield it after payment of prior claims. I think that was just the position of matters contemplated in the letter. The money, upon receipt of which she bound herself to pay the pursuer's account, was in my opinion the money which she should receive in respect of her bond in the event of the sale of the property, which had been arranged, being carried out.

"I am therefore of opinion that unless Mrs Dawson is entitled to plead the inability of a married woman to grant a personal obligation, she is bound to pay the pursuer's account.

"This brings me to the question whether the obligation to pay the pursuer's account was *in rem versum*. It was contended for Mrs Dawson that the debt was the proper debt of her husband, and that she did no more than become cautioner for him. I do not think that the obligation which she undertook was a cautionary obligation at all. It was, in my opinion, an independent obligation, the cause of granting being peculiar to Mrs Dawson herself. She undertook liability for the debt in consideration of the withdrawal by the pursuer of the in-

hibition, which she feared might prevent her getting the benefit as postponed bondholder of the sale of the property which had been arranged. I think that that was an obligation *in rem versum* of Mrs Dawson, because the object of the obligation was to secure to her the payment of the money in the bond, which was her separate estate, which she would obtain if the sale of the property was allowed to proceed, and which she might not obtain if the sale was prevented by the pursuer's diligence.

"But it was said that Mrs Dawson did not as matter of fact get the benefit in consideration of which she granted the letter, and that the obligation did not turn out to be in fact *in rem versum* of her. She granted the letter in consideration of an inhibition which she understood would absolutely stop the sale of the property, if it was allowed to stand, being withdrawn, whereas as matter of fact the inhibition could not have stopped the sale, although a trifling amount of expense might have been incurred in getting it discharged. As matters turned out, therefore, she undertook to pay her husband's debt for no consideration, or for an altogether inadequate consideration.

"I think that the answer to that argument is that Mrs Dawson was not induced to grant the letter by any representations of the pursuer, nor was she misled in any way by the pursuer. The latter did not know that the contract of sale had been completed before the inhibition was used, and he did not ask Mrs Dawson to guarantee the debt. All that he knew was that Mrs Dawson's obligation was offered to him if he would withdraw the inhibition, and he did withdraw it.

"Then it was argued that the obligation was truly undertaken for behoof of Mr Dawson, in respect that the desire of Mrs Dawson was to obtain payment of the money in order that she might employ it in helping her husband to settle with his creditors. I do not doubt that that was Mrs Dawson's intention as to the application of the money, but she was at liberty to apply her money as she chose, and her intention of using it for paying certain creditors of her husband did not make it the less her separate estate, nor did it make the obligation which she granted to the pursuer the less an obligation in regard to her separate estate."

The defender reclaimed, and argued—(1) The letter did not constitute a binding obligation. *Prima facie* there were no words of *de presenti* obligation in it, but merely an expression of an intention to pay subject to a condition, the condition being that the defender received payment in full of the sum in her bond. The pursuer's own agents did not consider it an explicit obligation, and the evidence of the defender's other letters might be legitimately brought in to show that she did not intend to bind herself unconditionally. (2) Even if the letter did constitute a binding obligation, as a married woman the defender was not bound. It was in reality a cautionary obligation undertaken by her on her husband's behalf, and did not apply to her own estate. (3) If held to be a direct obligation, it was not *in rem versum* of her estate, *i.e.*, was not applied to the advantage of it, which was the true meaning of the expression. The defender had gained no advantage by the removal of the inhibition, for the sale had been concluded before it was laid on. She got no consideration for undertaking the obligation, and therefore it was void—*Ewing* v. *Lady Strathmore's Trustees*, March 5, 1831, 9 S. 558; *Jackson* v. *Macdiarmid*, March 1, 1892, 19 R. 528; *Deans* v. *Allan*, 1703, M. 5985. In *Biggart* v. *City of Glasgow Bank*, January 15, 1879, 6 R. 470, there was some consideration, while here there was none. (4) If regarded as an unconditional promise to pay, this was nothing more nor less than a promissory-note, and as such should have been stamped, and could not be after stamped—*Thomson* v. *Bell*, October 26, 1894, 22 R. p. 16.

Argued for the pursuer — (1) There were words of present intention in the letter, and it constituted a direct obligation, and the pursuer had understood it as such, and had in consequence of it withdrawn his inhibition. (2) Even as a married woman the defender was still liable, for the transaction was clearly *in rem versum* of her estate. To bring in that doctrine it was unnecessary that the transaction should result in benefit if it was entered into under the belief and with the intention that it should operate for the benefit of her estate — *Biggart* v. *City of Glasgow Bank*; *Burnet* v. *British Linen Bank*, February 9, 1888, 25 S.L.R. 356. (4) As regarded stamping, this was clearly not a promissory-note, for no sum was mentioned in it, and it therefore could not have been stamped with an *ad valorem* stamp?

At advising—

LORD ADAM — [*After narrating the facts of the case, and reading the defender's letter of 24th October* 1893]—This letter was addressed to the pursuer, and was to be handed to him with the object, as I think is most clearly proved, of inducing him not to proceed any further with the action. Mr Dundas has read to us other letters of the defender, to show what her real intentions were as expressed in this letter, but I think that is irrelevant, and that the true question is, what would the defender construe the letter to mean? And he had no means of divining her intentions otherwise than by it. Now, it has been said that there are no words of obligation contained in the letter. That is true; but, on reading it, it can hardly be doubted that the defender did intend to bind herself. Is not the meaning of it to this effect—"If you will stop the action, I will see that your account is paid"? That is the only reasonable construction, and the result of the letter was that the pursuer did stop his action. Therefore I have no doubt that the letter did constitute an obligation.

The next point raised was that the defender stated that she had a bond for £2500, and intended to pay only when that sum was handed over to her. Now, even if this were her intention, the defence fails in fact, for the sum of £16,000 for which the property was sold was paid over, and the bond for £2500 due to the defender was discharged. In point of fact, the sum actually realised by her, after deducting expenses, was about £2370. But I do not think that thiswas the intention expressed in the letter. In my opinion the true meaning of it was that the defender would pay the pursuer if she realised enough money out of her bond to do so. She did realise enough, and therefore she is bound to pay.

Now, under these circumstances, the next question is as to whether the defender, being a married woman, is bound under this obligation. I cannot see why she should not be bound; the obligation was entered into in her own interests, and referred to her own private estate, and that being so, on what principles should she not be bound? I do not see why a married woman may not, for her own interests, contract obligations binding her own estate.

But it has been said that this obligation was undertaken solely in order to get quit of the inhibition, and that the defender really derived no benefit thereby. It may be that in result she was not benefited; but that is not the question. When she contracted the obligation, she did so with the idea that it was to be for her benefit. And, indeed, who can tell that, if she had not got rid of the inhibition, she would not have been subjected to trouble and annoyance, or even litigation, at the hands of the purchaser when he found that he could not get an unencumbered title to the subjects? It may have been a real benefit to the defender to take away this possible source of trouble.

That appears to be the state of the case with regard to this question, and I agree with the Lord Ordinary's decision upon it.

LORD M'LAREN—I have come to the same conclusion. The Lord Ordinary has decerned against the defender Mrs Dawson in terms of the conclusions of the summons, founding upon the letter which your Lordship has quoted, and which is set out in the third article of the condescendence. The Lord Ordinary explains, in his opinion, that that letter is equivalent to an undertaking to pay Mr Henderson's account, or to see it paid, and being an undertaking in relation to the lady's private affairs or separate estate, it is binding on her, and not open to the general objection that the personal obligation of a married woman is null.

There is an alternative argument for the defender to the effect that this letter should be regarded as a promissory-note, and that it was therefore void, having been unstamped. We are are all of opinion, I understand that that proposition is untenable. Wide as the definition of the Stamp Act is, I am clear that it could not be held to cover a writing which is altogether indefinite as to the sum of money to be paid. The letter has been subsequently stamped with an agreement stamp, and the penalty for after-stamping has been exacted. I agree that the instrument is no longer open to objection under the Stamp Acts.

Coming to the question of the meaning of the letter, I venture to think that it imports an undertaking to pay Mr Henderson's account. It is addressed to Mr Henderson, and states Mrs Dawson's intention to pay the money due to him, always on the condition that she receives the money out of the bond for £2500, and she significantly adds that she has instructed the law-agent "to retain sufficient money to settle your account." This latter statement was true, for a letter to the effect stated was sent to the agents on the same day. Now, if anyone writes to a person that he intends to pay his account, and that she has made provision for doing so by instructing her agents to retain certain moneys for the purpose, and if the person accepts that statement, and on the faith of it alters his own position in regard to certain proceedings which he has taken to recover payment, then, I think, there can be no doubt that such a letter is nothing else than an undertaking to pay. Then as regards the condition, the fair construction appears to be—"Provided you withdraw all opposition to the sale of the estate which is affected by my bond, and the sale is carried through, I shall pay you out of the proceeds of the bond." Now, it seems to me that even if Mrs Dawson did not get the full value of the bond out of the price obtained for the subjects, yet if she got sufficient wherewith to pay the account, she was liable in terms of her obligation, but that she was not under obligation to pay anything in excess of the sum received from the proceeds of the sale.

The point which seemed to be most strongly relied on was the objection founded on the alleged incapacity of Mrs Dawson as a married woman to undertake a purely personal obligation, The answer to that argument was founded on the known exception from the general rule of acts that are *in rem versum* of the lady or her estate. We were not referred to any very clear definition of the expression *in rem versum*, and I am not prepared to say that its meaning is or ought to be determined by a critical construction of the meaning of the words. The rationale of the decided cases is that when a married woman is in the position of being the owner of estate separate from her husband's estate, it would be impossible for her to manage or administer it to her own advantage, unless she were entitled to enter into obligations like an unmarried woman with reference to the administration of her estate. I should be prepared to say that whenever the obligation of a married woman is referable to the lady's separate estate, and has for its object an anticipated advantage, then the obligation is binding upon her. It is not necessary that the contract should actually turn out to be for the benefit of her estate; it is enough that she expected on reasonable grounds that it would prove to be for her

advantage and convenience in matters relating to her estate. Now, in this case it was quite clearly for the advantage of Mrs Dawson in relation to the sale of the property that Mr Henderson should withdraw his inhibition. An inhibition, no doubt, strikes only against the personal and voluntary acts of the seller, and the inhibition in question, being laid on after the personal contract had been concluded could not have prevented the due implement of the sale. But supposing that Mr Henderson had declined to withdraw his inhibition before the purchaser got his disposition, it would have appeared on the records that an inhibition had been laid on before the date of the disposition, and the disponer might afterwards have been hampered by its existence in a question with a purchaser from him. Of course after a disposition has been recorded, the missives on which it proceeded are treated of little importance, and may fall aside and disappear, and in the next transaction in connection with the subjects the agent of the purchaser, on looking through the searches, would find an inhibition standing on the records, and apparently striking at the sale. I cannot doubt therefore that the purchaser of this property would have had the right to insist on the record being cleared of the inhibition, and that could only be effected by the voluntary act of Mr Henderson or under a petition to the Court. Now, in that state of circumstances it was clearly of advantage to Mr Dawson to get the inhibition withdrawn; that was the consideration in respect of which she gave her obligation; and I cannot doubt that the contract was therefore truly *in rem versum* of her.

LORD KINNEAR—I am entirely of the same opinion. It seems to me that the letter quite clearly expresses an obligation by the defender to pay the pursuer's account. If taken alone and apart from the surrounding circumstances, there might be some difficulty in construing it; but that is not the condition under which we are required to consider it. We must look at the circumstanees in which it was written. Now, it seems that proceedings had been taken by the person to whom the letter was addressed, the result of which would possibly have been to interfere with and embarrass the sale of the property. With reference to that state of matters, she says to him—[*His Lordship read the defender's letter of 24th October* 1893]. Upon receipt of that letter the pursuer withdrew his inhibition. It is impossible, therefore, to read what the defender says as a mere expression of a present intention to pay, which the writer may or may not alter when the time for payment arrives. I think that when one expresses an intention to pay money, and in respect of that requires something to be done by the person whom she addresses, and the receiver of the letter does that thing accordingly, then the words used impose an obligation just as clearly as if she had said, "I oblige myself to pay." I have no doubt that the writer intended the letter to be read as an obligation, and that the recipient read it as such. I agree also that no such qualification as the defender maintains can be read into the undertaking, and that she was bound to pay the account out of the proceeds of the bond for £2500, irrespective of the amount which might come into her hands. I could have understood that there might have been present to the minds of the parties a condition having reference to the amount which might be received if the sale had been uncertain. But the contract for the sale of the property had been completed and the price fixed. It could not be more or less than £16,000 without the consent of the defender herself. It appears to me, therefore, that the suggestion of any contingeney in the mind of the lady as to the amount to be received is out of the question.

If that is the true meaning of the obligation I agree that it is binding on the writer although she is a married woman. It is quite clear that she entered into the transaction for her own advantage. The property had fallen into disrepair, and it was necessary to put it into good repair, so as to give it a value for letting or selling purposes, and Henderson was employed by the lady's husband to execute the necessary repairs. There is evidence that it was with the knowledge of the lady that Henderson was employed, and although there may not be evidence that she had undertaken to pay, there is certainly evidence that both parties understood it to be for her interest that the repairs should be made. If in those circumstances the pursuer had said—"I will not execute the repairs unless the defender will undertake to pay my account," then it is not doubtful that the obligation of the defender had she given it would have been *in rem versum* of her. There was no such obligation given, but the effect of the repairs was to put the subjects into a saleable condition, and a purchaser was found and a bargain made with him. But before he had obtained a disposition the pursuer intervened to stop the sale until his account should be paid. That being so, it could not be said that it was not to the defender's advantage that he withdrew his inhibition, and therefore I have no doubt whatever that her obligation is binding on the defender, although a married woman. As to the general law on the subject, it is clearly settled that the obligations of a married woman with reference to her separate estate are as binding on her as the obligations of anyone else. Her position is practically the same as that of an unmarried woman. Whether the literal meaning of the phrase *in rem versum*, as it is used in the authorities referred to during the discussion, is in any way different from the doctrine of law established in *Biggart's* case, it is not necessary to determine, for if the passages cited import a more limited right—a greater amount of protection to married women—then they can not be regarded as sound in law. But it appears to me that all that is necessary to satisfy the rule intended to be expressed in these words, is that the obligation should be

undertaken by the wife in her own interest, and not for the exclusive advantage of the person contracting with her, or of some third person. Whether it turns out in the result to be a beneficial transaction cannot be the test, otherwise the questions which have been decided would not have arisen, because it is only when the contract has proved to be disadvantageous that there is any interest to challenge its validity. I therefore agree with your Lordships that the Lord Ordinary's judgment must be sustained.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuer — Salvesen — A. S. D. Thomson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender—D. Dundas—W. Thompson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Saturday, July 13.

FIRST DIVISION.

ARTHUR *v.* LINDSAY AND OTHERS.

(*Ante*, vol. xxxii. p. 335.)

Expenses—Auditor's Report—Fee to Senior Counsel at Adjustment of Record—Principle of Taxation where Two-Thirds of Expenses as Taxed are Allowed—Expenses of Agent Employed Jointly by Three Defenders where only One Defender is Found Entitled to Expenses.

On objections to a report of the Auditor, *held* (1) that a fee to senior counsel at the adjustment of the record fell to be allowed; (2) that, where the Court allowed a party "two-thirds of the expenses as the same shall be taxed," the duty of the Auditor was first to tax the account, and then deduct one-third from the taxed amount; and (3) that, where three defenders were represented by the same agent, though by separate counsel, and one only was found entitled to expenses, the successful defender was only entitled to one-third of the agent's charges for work done by him on behalf of all the defenders jointly.

In this action which was an action of damages for slander at the instance of Dr Hugh Arthur, Airdrie, against Alexander Lindsay, William Jameson, and Robert Shanks, Airdrie, the jury awarded the pursuer damages against the defenders Lindsay and Shanks, but returned a verdict for the defender Jameson. The Court, on being subsequently moved to apply the verdict, pronounced the following interlocutor:—"On pursuer's motion apply the verdict, and in respect thereof decern against the defender Alexander Deuchar Lindsay to make payment to the pursuer of £250, being the damages assessed by the jury upon the first issue, and decern against the defender Robert Shanks to make payment to the pursuer of £25, being the damages assessed by the jury on the first issue applicable to the said defender, and on the motion of the defender William Glasgow Jameson apply the verdict, and in respect thereof assoilzie him from the conclusions of the action, and find him entitled to expenses against the pursuer, and decern: Find the pursuer entitled to two-thirds of the expenses against the defenders Alexander Deuchar Lindsay and Robert Shanks, as the same shall be taxed: Remit the accounts of expenses now found due, when lodged, to the Auditor to tax and to report."

Upon the Auditor's report coming before the Court the pursuer took objection to it, in respect (1) that the Auditor had disallowed a fee paid to senior counsel for adjustment of the record.

Argued for the pursuer—This was an important stage of the case, and one where a senior counsel might be reasonably called in. Moreover, it was a case of great importance, involving as it did the professional character of the pursuer. There were precedents for allowing the fee—*Stott* v. *M'William*, March 1, 1856, 18 D. 716; *Clay* v. *Home*, June 7, 1838, 16 S. 1125.

The Court sustained the objection.

The pursuer objected (2) that the Auditor had taxed the account on a wrong principle. By the interlocutor of the Court it had been found that the pursuer was entitled to two-thirds of the expenses against the defenders Lindsay and Shanks, as the same should be taxed. The Auditor had first disallowed the whole items upon which the pursuer had been unsuccessful, and had then struck one-third off the remainder, following the principles adopted in *M'Elroy* v. *Tharsis Copper Company*, June 28, 1879, 6 R. 1119. But this should not have been done in the present case, for the Court by striking one-third off the pursuer's expenses had intended roughly to deduct that amount for his non-success on certain of the issues. The Auditor, therefore, should have gone on the assumption that the pursuer was entitled to the whole expenses, and simply struck of one-third of that amount—*Strang* v. *Brown & Son*, July 19, 1882, 19 S.L.R. 890; *Rigley* v. *Downie*, July 16, 1872, 9 S.L.R. 627.

The Court repelled the objection, holding that the meaning of the interlocutor was, that the account should be taxed in the ordinary way, and thereafter one-third deducted.

(3) The defender Jameson objected that the Auditor had struck off two-thirds of certain of the items in his account. The three defenders had employed the same agent, but each of them had been represented by different counsel. Where the agent had discharged a duty which might be held applicable to all three defenders, the Auditor, following the case of *Robertson* v. *Steuart*, July 15, 1875, 2 R. 970, had allowed this defender only one-third of the agent's fees. But this case was distinguishable, for there was really only one case in *Robertson* v. *Steuart*, and the two