in the Act itself, and the function of the Court is only to say whether the facts of the case come within one or the other category. I have made these observations, because, while I find in the English decisions that not much weight is now attached to the *ejusdem generis* rule of construction of this clause, yet I think it desirable, at least for my own satisfaction, to see upon what grounds the true construction can be maintained and defended. Coming to the application to the facts of this case, one of the grounds on which it has been the practice of the Court to decree a dissolution is where there is a small number of partners equally or nearly equally divided so that it is impossible that the business of the company can be carried on. That is a rule that would very seldom be applicable to a company under the Companies Act—never certainly where the company appeals to the public for subscriptions to its shares—because if the directors are equally divided, or if there is such a division as makes it difficult to carry on the company's affairs, the remedy of the shareholders is to turn them out and to elect a harmonious board of directors. But then this is not a company that is formed by appeal to the public. It is what, for want of a better name, I may call a domestic company, the only real partners being the three brothers of a family, the other shareholders having only a nominal interest for the purpose of complying with the provisions of the Act. In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies on the grounds of incompatibility between the views or methods of the partners would be applicable in terms to the division of the shareholders of this company, and I agree with your Lordship that this is a case in which it would be just and equitable that this company should be wound up and the partners allowed to take out their money and trade separately.

LORD KINNEAR—I agree with your Lordship that the judgment proposed is in accordance with the views taken in the Court in England to the authority of which we must always attach the greatest possible weight since their experience of the operations of the statute is so much larger than ours. I think it is just and equitable that this company should be wound up on two grounds which have separately been considered sufficient in former cases, and which in the present case occur in combination. The first is that the affairs of the company have been brought to an absolute deadlock, which can only be relieved, so far as we can see, by winding up; and the second is that the entire administration of its affairs is now concentrated in one director, who is enabled by the assistance of subscribers to the memorandum, who have only a nominal interest in the company, to overrule at his pleasure the judgment and opinion of his co-directors, the other members who have a real interest in the concern. I do not think that it is just or equitable that this state of things should be allowed to continue, and I therefore agree with your Lordships.

The Court pronounced this interlocutor—

"Order that Symingtons Quarries, Limited, be wound up by the Court under the provisions of the Companies Acts 1862 to 1900, and appoint John M. Macleod, Esq., C.A., Glasgow, to be official liquidator of the said company, he always finding caution for his intromissions and management before extract, and decern," &c.

Counsel for Petitioners—Ure, K.C.—R. S. Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Respondents—Younger, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Tuesday, November 21.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

WESTERMAN (WESTERMAN'S EXECUTOR) *v.* SCHWAB AND OTHERS.

International Law—Succession — Will — Revocation by Marriage—Will of Englishwoman subsequently Marrying Domiciled Scotsman—Wills Act 1837 (1 *Vict. c.* 26), *secs.* 18 *and* 35.

Held that a will dealing with moveable estate, which was duly executed by a lady domiciled in England, was not revoked by her subsequent marriage in England to a domiciled Scotsman.

The Wills Act 1837, section 18, provides —"And be it further enacted that every will made by a man or woman shall be revoked by his or her marriage. . . ." Section 35 provides—"And be it further enacted that this Act shall not extend to Scotland."

This was an action of multiplepoinding, raised in the Sheriff Court at Aberdeen, at the instance of Thomas Collette Westerman, executor-dative of the late Mrs Sarah Ann Scott or Westerman, wife of the deceased Edward Westerman, soap manufacturer, 104 Leslie Terrace, Aberdeen.

Mrs Westerman died at Aberdeen on 25th March 1904. Her husband, who had survived her, died on 27th April 1904 without having expede confirmation of her estate. The pursuer, who was a son of the late Mr Westerman by a prior marriage, thereafter gave up an inventory of her estate, and was duly confirmed executor-dative. After paying preferable claims the free residue of her estate amounted to £272, 2s.—one-half of which was paid to the husband's representatives as *jus relicti*, and the remaining half (£138, 11s.) formed the fund *in medio* in this action. To this fund claim was made (1) by Frederick Schwab and others, the executor and legatees under a will dated 4th June 1897, made by Mrs Westerman prior to her marriage to Westerman, and while she was a spinster and

a domiciled Englishwoman; and (2) by George Worth and others, Mrs Westerman's next-of-kin.

The claimants Schwab and others pleaded — (2) "Mrs Sarah Ann Scott or Westerman becoming by her marriage a Scotswoman, her will was not revoked by her marriage, but remained valid and effectual."

The claimants Worth and others pleaded —"(1) The will founded on having been executed before the marriage of the said Sarah Ann Scott or Westerman, who continued domiciled in England down to the date of her marriage, was, by her marriage, revoked."

On 28th December 1904 the Sheriff-Substitute (ROBERTSON) found that the will executed by Mrs Westerman on 4th June 1897 remained valid notwithstanding her subsequent marriage, and accordingly ranked and preferred the claimants Schwab and others in terms of their claim.

The claimants Worth and others appealed to the Sheriff (CRAWFORD), who on 11th February 1905 recalled his Substitute's interlocutor, found that the will executed by Mrs Westerman was revoked by her subsequent marriage, and that the claimants Worth and others were entitled to the whole fund *in medio*.

The claimants Schwab and others appealed, and argued—The Sheriff-Substitute was right. The law of the husband's domicile at the time of the marriage governed the legal results of the marriage—Dicey, Conflict of Laws, 684, 694. And whether a will made by a lady prior to marriage would be revoked by her subsequent marriage, depended on the domicile of the husband at the date of the marriage—*Loustalan* v. *Loustalan*, [1900] P. 211, at p. 236. The husband's domicile here was Scotch, and by the law of Scotland marriage did not revoke a prior will. Further, when there was no marriage-contract the law of England implied an agreement that the law of the husband's domicile would govern the property relations of the marriage—Jarman on Wills, 112; Theobald on Wills, 41. Such implied agreement was to be given effect to—*De Nicols* v. *Curlier*, [1900] A.C. 21. Alternatively, as Mrs Westerman died domiciled in Scotland, her succession was regulated by the law of Scotland, and half of the residue had already been paid as *jus relicti* to her husband's represesentatives. The validity of the will, therefore, was not affected by the Wills Act (1 Vict. c. 26), as that statute did not apply to persons not domiciled in England — *Bremer* v. *Freeman*, 1857, 10 Moore's P.C. Rep. 306; *In re Reid's Estate*, 1866, L.R., 1 P. & D. 74; Westlake's Private International Law, 4th ed. 71, 112, 114; Wills Act, sec. 35.

Argued for respondents (claimants Worth and Others) — The decision of the Sheriff was right. At the date of the will there was an implied condition that the will was only to last till marriage. The rule of English law that marriage revoked a will was based "on a tacit condition annexed to the will itself when made, that it should not take effect if there should be a total change in the situation of the testator's family" —*per* Tindal, C.-J., in *Marston* v. *Roe*, 1838, 8 A. & E. 14, at p. 58; *Israell* v. *Rodon*, 1839, 2 Moore's P.C. Rep. 51. The will was therefore revoked. The case of *Loustalan* (*cit. sup.*), which impliedly overruled *Bremer* (*cit. sup.*), was decided on the ground that there was an implied assignation to the husband which was inconsistent with the will made by the lady. That was independent of the Wills Act. That case, moreover, was a decision as to effect of marriage on the proprietary rights of the spouses, and not as to the effect of marriage, apart from the Wills Act, on a will previously executed. In the case of *De Nicols* (*cit. sup.*) the question was between contractual and testamentary rights, and the Code Civil was read in as equivalent to a marriage-contract. Section 18 of the Wills Act (*cit. sup.*) should similarly be read in here.

At advising—

LORD PRESIDENT — Miss Scott was a domiciled Englishwoman, and she executed a will—properly executed it according to the law of England—by which she disposed of her whole estate. Some years thereafter she married Mr Westerman of Aberdeen, a domiciled Scotsman. Some years after that she died, having continued to live with her husband in Scotland. She left no will behind her except the will which she had made while she was a spinster. Her husband claimed and has received one-half of her moveable estate in respect of his *jus relicti*, and a competition has arisen as to the other half, the competitors being the executors under her will which I have referred to, and her next-of-kin, upon the assumption that she died intestate.

The argument for intestacy turns entirely upon the fact that by the 18th section of the Wills Act 1837 it is enacted that every will made by a man or woman shall be revoked by his or her marriage. It is admitted by the parties that the Wills Act does not apply to Scotland, but it is contended on the one side that, being an Englishwoman, the moment she married her will was cut down, whereas, on the other side, it is maintained that the moment she married she became a Scotswoman, and that therefore the Wills Act had no effect, and the will was not cut down. The Sheriff-Substitute and the Sheriff have taken different views upon the matter. The point is a novel one, as to which I do not think that, in this country at any rate, there is any authority. The Sheriff-Substitute held that the will was good. His view is very well expressed. He says—"It is the law of the testatrix's domicile at the time of her death that determines the validity of the will. The testatrix died a Scotswoman, and by the law of Scotland, a will valid when made according to the law of the testator's then domicile remains in force, notwithstanding a subsequent marriage, unless, of course, revoked. No doubt, if the testatrix here had married an Englishman, the will would have been, *ipso facto*, revoked as if it had never been, and could not have been

resuscitated even though she afterwards acquired a Scottish domicile. But the case here is different. The act that would otherwise have revoked the will exempted the testatrix from the provisions of the revoking statute." The Sheriff, on the other hand, while agreeing with much that the Sheriff-Substitute says, states this, and this is the keynote of his judgment—"All three things are simultaneous and occur at the same moment—the marriage and its two results—the revocation of the will and the change of domicile. The important point is that the two results are strictly simultaneous with each other. The same stroke which cuts off the English domicile cuts off the will. It is impossible to say that the testatrix had acquired a Scottish domicile before the event which revoked the will. For these reasons I am of opinion that the will was revoked, and that the claimants under it cannot succeed."

In these circumstances it cannot but be said that the question is one of nicety. If I may venture a criticism upon the learned Sheriff's judgment, it would be this, that I do not think the case can be well disposed of upon what I may call metaphysical considerations as to the precise moment of time at which these things happened.

I think the way to dispose of the case is to begin at the beginning of the elementary principles that govern such matters. The first question undoubtedly is this—what is the domicile of the alleged testatrix at the time when she died? There is no doubt about that; everybody agrees that she died Scottish. Therefore you have first the undoubted proposition that it is the law of Scotland that will regulate the distribution of the effects which she left behind her; and indeed it is conceded not only in argument at the bar, but it is conceded *de facto* by what has happened, because, of course, it is under the law of Scotland that one-half of her moveable estate has been given to her surviving husband in name of *jus relicti*, which is a purely Scottish right. But further, the law of Scotland goes on to say that the half which is not affected by the *jus relicti*, the half which is the dead's part, shall be carried by a will if she left one; and accordingly it is the law of Scotland which will first of all decide whether she did leave a will or whether she did not. A certain document is produced which upon the face of it bears to be a will; and here the law of Scotland, although completely keeping to itself the right of pronouncing whether anything is a will or is not, will often have to have recourse to other systems of law in order to know whether a particular document is or is not a will. Take the case that the will in question was a will, which undoubtedly was badly executed according to the law of Scotland, but of which it was alleged that it was quite properly executed according to the law of the country where the person was domiciled at the time that he executed it. The law of Scotland will always go to that system of law and will inquire—"Is this will well executed according to the forms of that other country, or is it not?" If the answer is in the affirmative, then it will give effect to it according to the law of that country. We had a very excellent argument upon both sides of the bar, but I cannot go the whole length that Mr Brown wished us to go in the second portion of his speech, when he urged that the moment we say that this lady was a domiciled Scotswoman then the question ended. The question does not end, because once you have to go to another system to find out whether this is a will or not, you have got, of course, to take the history of the document. I am assuming you are answered at once that according to English law the will was well executed; but then it would be pointed out, that although it is well executed, it was put out of existence by something else happening, and we are bound to look into that. Now, what is that something? That something is the fact of the marriage, and accordingly it seems to me that we are bound to consider as the next question what was the state of the law which arose upon the marriage. By what law is that to be determined?

It seems to me that the real principle is that when you come to consider the effect of the marriage upon the patrimonial rights of the persons who were married, you must, apart of course from questions of special contract, always consider that according to the law of the domicile of the married persons, and the law of the domicile of married persons is the law of the domicile of the husband.

I am confirmed in this view, because I think it is directly in accordance with the views that were taken by the Master of the Rolls, now Lord Lindley, in a case which does not seem to have been cited before either of the learned Sheriffs—*Loustalan* v. *Loustalan*, L.R. [1900] P. 211. The judgment itself does not touch this case, and there was so much difference of opinion among the learned Judges who disposed of the case upon the precise import of the facts, that one has to look at the case with considerable care in order to extract from it what was really laid down in it. The question was, whether a will made by an unmarried Frenchwoman was or was not revoked by her subsequent marriage. The lady in question was undoubtedly French in origin. She came over to England and entered domestic service with an English family. While she was in England she made this will. It was not executed according to the law of England; it was executed according to the law of France. About four years after that she left domestic service and established a laundry business in London. In the same year she married a French refugee, who was flying from France at that time in order to escape from a prosecution for some offence which he had committed. Indeed, he had been sentenced in absence to ten years' imprisonment. The parties lived together for some time in England, and then, the ten years having run out, the husband seemed to have thought it safe to go back to France again, which he then did. He and his wife parted company, she

remaining in England and he going to France. In that state of matters she died, leaving no will behind her except the old will which she had made as a spinster. The point in that case, as in this, was simply whether that will had been revoked by her marriage. The case was first disposed of by the late President of the Probate Division, Lord St Helier, and it subsequently went to the Court of Appeal, composed of Lord Lindley, Master of the Rolls, and Lords Justices Rigby and Vaughan Williams. The learned Lords took very different views upon the facts. The President held that at the date of her death her domicile was in France, because, in his opinion, her husband was domiciled in France at her death, but he held that when they married, at the moment of marriage they intended that the matrimonial regime should be in England, and upon that he came to certain conclusions. The Master of the Rolls did not take that view at all. He thought that the domicile of both parties was French all along, that is to say, he thought that she had not lost her French domicile when she married, and that he did not lose his French domicile when he married her, in respect that he went back to France, and accordingly she was French from beginning to end. The other two Lords Justices, on the other hand, thought that the husband's domicile at the time of the marriage was English, and upon that view they held that the will was not good. But I am bound to state that I do not think they put their judgment nearly so much upon the operation of the marriage, in respect of the Wills Act, as they did upon this, that if the husband was a domiciled Englishman at that time, which was before some of the recent Married Women's Property Acts, the result was simply to transfer the lady's whole estate to the husband, and that consequently it was not so much a question of whether the will was good or not, as a question of there being nothing for the will to operate upon. I think Mr Watson's observation was well founded, that although the case looks, upon the mere reading of the rubric, to be an authority against him, it is not really an authority upon this point, and I agree with him.

There are certain observations of both Lord Justice Rigby and Lord Justice Vaughan Williams to the effect that this 18th section of the Wills Act is part of the matrimonial, and not of the testamentary, law, with which I find it difficult to agree. I am not sure that I quite understand what they mean by that, because I cannot see that you can divide the law into chapters, and say that such a thing belongs to one portion of the law and not to another. Of course in many cases it may be convenient to do so for the purposes of discussion or reference, but I do not see how the effect of a thing can depend upon that division into chapters. What I take from the case of *Loustalan*, accordingly, is not the decision, but rather certain observations of Lord Lindley, which I think are absolutely in point in the view of the law which I am suggesting, although as a matter of fact they did not receive application in that case owing to the view of the facts that Lord Lindley took.

Now, Lord Lindley begins, just as I have ventured to begin, by saying you must first of all begin at the death of the alleged testatrix, and find what the domicile then was. He held that her domicile at her death was French; but he goes on to say—"The validity of a will of moveables made by a person domiciled in a foreign country, at the time of such person's death not only may, but must, depend on the view its courts take of the validity of the will when made." Here it is agreed that the will was valid when made. But then he goes on to say, not only that it depends on the validity of the will when made, but on its subsequent revocation if that question arises. "These questions," he says, "may or may not turn on the domicile of the testator as understood in this country;" and then he goes on to state the facts, and says—"By whatever court this question is to be decided, the English law of marriage, which in such a case involves, and indeed turns on, English views of domicile, must be considered. If this view be ignored the effect of the marriage will be inadequately, and indeed erroneously, ascertained. If the domicile of the testatrix is to be treated as English, when she became a married woman her will was revoked by her marriage, for such is the law of England whatever the intentions of the parties may be; but if her domicile was French, her will would not be revoked by English law, and still less by French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him. The effect of her marriage must therefore depend on the English view of his domicile." That is exactly what I have suggested to your Lordships. Further on, in a later portion of his judgment, his view is made perfectly clear, if your Lordships keep in mind what I have said upon the facts of the case, because at page 233 the learned Lord says this—"The domicile of the testatrix being French when she made her will and when she died, it became necessary to ascertain the effect of her will on her moveable property according to French law. The husband being, in my opinion, domiciled in France when she married, it became necessary to ascertain the effect of such marriage by French law upon her will, and if in order to ascertain this it became necessary for the French experts to be told what the English law was, they should have been told that it depended on the view which an English Court would take of the domicile, in the English sense, of the husband, and if I am right in my view of his domicile, the experts should have been told that by English law the marriage in this case did not revoke the wife's will."

Your Lordships will notice that I have emphasised the fact that he always speaks of the husband and his domicile. He excludes altogether the consideration of what was the domicile of the wife. He says it is quite enough if you settle, one way or another, what was the domicile of her hus-

band at the time of the marriage, because the moment you do that, you settle what her domicile is; and then, if you settle what the domicile of the parties at the time of the marriage is, you at once settle the law according to which the proprietary effects of the marriage are to be judged—either French law, if he is a domiciled Frenchman, or English law, if he is a domiciled Englishman. And, accordingly, he further goes on to say—"It was not necessary, or indeed proper, on this occasion to pursue the inquiry further, and to see what matrimonial regime the parties intended to adopt. It was not necessary to cite authorities to show that it is now settled that according to international law, as understood and administered in England, the effect of marriage on the moveable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense. . . . This being clear, the will was not revoked." That would be a *non sequitur* unless the whole point depended upon the domicile of the husband at the time of the marriage.

Accordingly, I think that, carefully looked into, it will be found that I certainly have the great authority of Lord Lindley for the proposition that I am putting, that when you come to consider what the effect of the marriage is upon the will, which you have already started with as being properly executed, you must consider that in the light of the law of the domicile of the married persons at the date of the marriage, and the law of the domicile of the married persons is the law of the domicile of the husband. Here the domicile of the husband at the date of the marriage was Scottish; and therefore you have to consider the effect of the marriage upon the will in the light of the Scottish law and not of the English. That being so, there is no question whatsoever that by the Scottish law the will of this spinster, being valid before her marriage, was not revoked, and accordingly I think the will stands.

That disposes of the case; but I ought to mention a very ingenious argument Mr Watson pressed upon us, which was this, that the effect of the English Wills Act was really, so to speak, to read a clause into every English person's will to the effect that his will shall be revoked on marriage. He cited authorities in which certain expressions were used that are consistent with that view. I am not in any way controverting the authority of these cases, because they do not touch the point at all. It would be quite a convenient way of speaking to say that every will has got that read into it; but if you are to press that form of expression to more than a convenient way of speaking, then I do not agree. I do not think we need go further on this point than to cite the case of *Loustalan*, where the Court held the will was revoked. The lady in that case married a person whom the Court held to be a domiciled Englishman. Of course it does not matter whether the facts were rightly or wrongly decided. The husband in that case was a domiciled Englishman according to the majority of the Court, and that revoked the will. That could only be by the operation of the Act at the time of the marriage, because it is evidently absurd to suppose that that French spinster's will had ingrafted into it a condition that revoked it upon marriage, because everybody agrees that, at the time she made the will, the will was a French document and not an English document. Accordingly, I think that shows that what Mr Watson says is no more than a convenient form of expression, and did not really go to the root of the matter. On the whole matter, I am of opinion that we should recal the judgment of Sheriff, and revert to the judgment of the Sheriff-Substitute.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—This is said to be a new point, but it depends on well-settled principles, and I think it has been rightly decided by the Sheriff-Substitute. The testatrix died in 1904 a domiciled Scotswoman, leaving a will which, while she was still a spinster, she had executed in 1897 in England, which was the place of her domicile at that time. There is no question that the validity of the will, since it affects only moveable property, must be determined by the law of the domicile at the time of her death, that is, by the law of Scotland; and the parties are agreed that by that law it was originally a perfectly good will, since it was duly executed according to the forms required for the authentication of wills by the law of the place of execution. But it is said to have been revoked, because by the law of England, embodied in the Wills Act of 1837, every will made by a man or a woman is revoked by his or her marriage. It was maintained that the question of revocation, like every other question as to the efficacy of a will, must be determined by the law of Scotland, and, so far as it goes, that is probably a sound proposition. But it does not much advance the argument, because in order to decide whether the will has been revoked, the law of Scotland must take into account facts occurring in England, and the law incidentally operating upon those facts; and if the will were once revoked in England, it can hardly be held that it would be revived by a mere change of domicile.

The question therefore is, what effect, according to those principles of what is called international law, which form part of the law of Scotland, is to be ascribed to the rule of the law of England that marriage revokes a will. The rule upon which that depends appears to me to be well settled; and it is this, that the effect of marriage on the civil rights of the married persons, and in particular on their rights in moveable property, depends upon the law of the domicile of the husband. Without referring to the text writers upon this subject, I think it is enough for the purposes of this case to cite the highest authority in law—the decisions of the House of Lords in cases

appealed from this Court—*Warrender* v. *Warrender* and *Munro* v. *Munro*. In *Warrender* it was assumed that a marriage in England of a domiciled Scotsman was to be considered a Scottish marriage; and the same doctrine formed the ground of judgment in *Munro* v. *Munro*. It is thus stated by the Judges in the minority in the Court of Session, whose opinion was upheld in the House of Lords—"Assuming Sir Hugh Munro to have been a domiciled Scotsman at the date of his marriage, we are of opinion that the marriage, though celebrated in England, must be considered as in law a Scotch marriage in respect of all the incidents and consequences of marriage. It cannot in our opinion be of any consequence that before the marriage the lady may have been a domiciled Englishwoman, for in the moment and in the act of marriage, the wife necessarily adopts and becomes attached to the domicile of her husband. . . . It is of no consequence what was the domicile of the wife; and it is of just as little consequence where the marriage was celebrated. The law of the domicile of the husband is the law of the marriage." The same law was stated in two sentences by Lord Chancellor Cottenham in the House of Lords—"It was hardly contended that the country in which the marriage took place was material. It was considered as immaterial by the writers upon civil law. . . . The law of the country where the marriage is celebrated ascertains its validity. The law of the country of the domicile regulates its civil consequences." Lord Brougham states his opinion to the same effect.

It is true that the main question involved in that case was one of status, but that makes no difference for the present purpose. It only created a difficulty which does not arise in the present case, by reason of the conflict between the English law of bastardy and the Scottish law of legitimation *per subsequens matrimonium*. The point decided was that the marriage of a domiciled Englishwoman in England to a domiciled Scotsman was, as regards all its civil consequences, a Scottish marriage. The question must have been decided obviously exactly in the same way if it had concerned only a question of property and not a question of status; and, indeed, the question of status was considered only as a step towards the decision of a question of property, because the real point in dispute was whether the child whose legitimation was in question was or was not entitled to succeed to the estate of Fowlis. Lord Brougham says—"I apprehend that the decision to be given upon this case is not a judgment absolutely and generally finding that the party is legitimate, but it is a judgment finding according to the conclusions of the libel, which proceeds upon the statement of facts, that she ought to be found and declared, as lawful daughter, entitled to succeed under the entail as next heir." The application of that doctrine to the question now in dispute seems to me to be perfectly clear. Without considering the question which seems to have been discussed in England, as to whether the rule of the Wills Act is part of the testamentary law or part of the matrimonial law, I think this at least is certain, that if the revocation of the will is the direct consequence of the marriage, then if it is an English marriage its effect in law will be to revoke this will, and if it is a Scottish marriage it will not. I apprehend there can be no reasonable doubt, and I think it was not disputed in argument, that if the law be as I hold it to be, that the civil consequences of a marriage are fixed by the law of the husband's domicile, then the whole moveable property of the wife, although she was a domiciled Englishwoman until the marriage, must be regulated by the law of the husband's domicile which she then adopts. If this marriage had taken place before the passing of the Conjugal Rights Act and the Married Women's Property Act, there could be no room for doubt that the whole moveable property of the wife, in the absence of contract, would have been carried to the husband by the assignation implied in marriage. And there seems to me to be just as little doubt, that if the law of England now were that the marriage vested the whole of the wife's property in the husband, the wife in this case would, notwithstanding, have been entitled to the benefit of the Scottish Married Women's Property Act. I refer to the language of that Act for the purpose of observing that it assumes the law of Scotland to be, as in my opinion it is, that the civil rights of the spouses must be determined by the domicile of the husband—"Where a marriage is contracted after the passing of this Act, and the husband was at the time of the marriage domiciled in Scotland, the whole moveable or personal estate of the wife shall be vested in the wife as her separate estate, and shall not be subject to the *jus mariti* of the husband." By the law of Scotland, therefore, the personal estate of this testatrix became vested in her on her marriage as her own separate estate, to the exclusion of any right in her husband, and the same law which determines her right to the property, must determine her capacity to dispose of it by testament. That the law of England should be called in to revoke a will already made, as one civil consequence of the marriage, and then make way for the law of Scotland to regulate all the other civil consequences of the same marriage, seems to me to be contrary to all legal principle and sound reason. I think, with your Lordship, we may be confirmed in this view, not, indeed, of the rule of law as settled by the decision of the House of Lords, which needs no confirmation, but of its application to the particular question before us, by the opinion of Lord Lindley in the case of *Loustalan* v. *Loustalan*. It seems to me that our decision might be expressed in the exact words which are used by Lord Lindley, substituting only the name Scotland for the name France, for his Lordship says this—"If the domicile of the testatrix is to be treated as English when she became a married woman her will was revoked by

her marriage, for such is the law of England whatever the intentions of the parties may be, but if her domicile was French her will would not be revoked by the English law, and still less by the French law. Both laws are alike in regarding her domicile as that of her husband as soon as she married him." Now, in the exposition of the case which your Lordship has been good enough to give us, you showed how the Judges there had differed upon certain points, and especially they differed on the question of fact as to whether the domicile was in truth French or English, but I do not find that any of these learned Judges dissent from this general statement of the law which is given by Lord Lindley, and in accordance with that statement I say that the question here is simply whether the domicile of the husband at the time of the marriage was Scottish or English. If it were Scottish, then the question of the subsistence or revocation of the will, will depend upon the law of Scotland, and according to that law this will is a perfectly good will. If it had been English, the will would no doubt have been revoked by English law. I am therefore of opinion that we cannot sustain the judgment of the Sheriff-Depute, but that we should revert to that of the Sheriff-Substitute.

The Court recalled the Sheriff's interlocutor, found in terms of the interlocutor of the Sheriff-Substitute, affirmed the said interlocutor, and decerned.

Counsel for the Appellants—A. R. Brown. Agents—Horne & Lyell, W.S.

Counsel for the Respondents—Hon. W. Watson. Agents—Dalgleish & Dobbie, W.S.

Friday, October 27.

FIRST DIVISION.

[Lord Dundas, Ordinary.

M'COSH *v.* MOORE.

(See *ante* June 9, 1903, 40 S.L.R. 691, and 5 F. 946.)

Arbitration—Lease—Clause of Reference—Application to Claims Advanced after Termination of Lease.

A mineral lease contained a clause of reference of disputes between the parties as to, *inter alia*, "the rights or obligations of either party, or in any way in relation to the premises." It also stipulated that the tenant should be bound "before the expiry or sooner termination hereof to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections in so far as the same may be their own property, and to clear away or trench in all tramways, railways, and heaps of rubbish so as to restore the land occupied by them and their said predecessors, . . . and to render the same arable, and as suitable and fit for the purposes of agriculture or any other purpose in every respect as before being originally interfered with."

A claim having been made by the landlord, after the termination of the lease and removal of the tenant, for the fulfilment of this stipulation, and the tenant having denied liability, *held* that the decision of the dispute fell within the reference clause.

Andrew Kirkwood M'Cosh, ironmaster, residing at Cairnhill, Airdrie, was the proprietor of the lands of Garrockhill and Bankhead, in the county of Ayr, including the minerals, conform to a disposition in his favour, dated 14th, and recorded 30th June 1900. By the disposition there were assigned to him all arrears of rents and royalties due by the tenants prior to his term of entry, and all claims against them under their leases and relative agreements for restoration of land, &c. By lease, dated in 1884, his predecessors had let, with a small exception, the whole coal seams in and under the lands, and to this lease Alexander George Moore, coalmaster, St Vincent Street, Glasgow, had acquired right by assignation, dated 15th September 1893, and under it Moore had taken possession of the subjects and had worked the mineral field. On 12th November 1897 the tenant gave notice that he would terminate the lease at Whitsunday 1898, which notice was accepted by the landlords, but owing to there being negotiations for a renewal of the lease the tenant did not remove till some time subsequent to that term. Thereafter the landlords called upon Moore to fulfil certain prestations under the lease, and M'Cosh, after acquiring the property, insisted in these demands, and on Moore denying liability, he invoked the aid of the arbiter named in the lease, James M'Creath, civil engineer, Glasgow. The nature of the demands is disclosed in the decree-arbitral, *infra*.

On 14th February 1905 M'Cosh raised the present action against Moore to have it found and declared that he was bound to implement the decree-arbitral, dated 2nd November 1904, pronounced by the said arbiter. The summons also contained conclusions that the defender should be ordained (1) to make payment of a sum in name of damages caused by a sit, and to drains and watercourses, (2), (3), and (4) to execute certain work required of him by the decree-arbitral, and (5) to make payment of certain sums of expenses.

The lease provided, *inter alia*, as follows —"And further, the second parties (the lessees) shall be bound, and they hereby bind themselves and their foresaids, all jointly and severally as aforesaid, before the expiry or sooner termination hereof, to fill up, if desired, all pits and excavations already made or to be made, and to remove all engine buildings or other erections, in so far as the same may be their own property, and to clear away or trench in all tramways, railways, and heaps of rubbish, so as to restore the land occupied by them and their said predecessors, or in any way