limit of age. We therefore want a special clause put in for our benefit, to restore us to the position that we would have been in if all along we had known that the bye-laws of 1850 were to be the regulating bye-laws." I do not say that I have not got some sympathy for the objectors here, but I do not think that this is a thing the Court should do. After all they had the matter in their own hands, because they might have forced their way into the society by an action, as Mr Allan did; and it is getting into regions far too speculative to say that, if it had not been for this attitude taken up by the officials of the society, these people would have joined. I do not know whether they would have joined or not, and I cannot take it from them—who are now wise after the event—that they would have joined. On the whole matter I do not think that the Court can put in a rule of that sort against the wishes of the society in general.

The second addition to the rules is an addition that allows the funds to be given to widows of members of the craft who were not members of the society. That may be a very worthy and charitable purpose, but I think it is sufficient for us to say that it is not a purpose that is put forward by the general members of the society; and although I am not doubting the actual power of the Court, under the section of the statute that has been quoted, to put in what additions to the rules it pleases, yet I think your Lordships agreed with me in the last discussion when I said that *prima facie* we are not here settling a scheme, but we are here seeing if a scheme settled by the society themselves is a proper scheme. Now the society themselves do not propose any such rule, and I do not think that it is for your Lordships to force a rule of this sort upon them, which certainly, however estimable in itself, is a different disposition of the funds of the society from the disposition as it was in the past.

Accordingly I do not think we can make either of these additions. The result seems to be to approve of the bye-laws as adjusted by Sir Charles Logan.

LORD KINNEAR and LORD PEARSON concurred.

LORD M'LAREN was absent.

The Court interponed authority to the bye-laws as adjusted by the reporter, and allowed the respondents their whole expenses as between agent and client out of the funds of the Incorporation.

Counsel for the Petitioners—Clyde, K.C.—M'Lennan, K.C.—Chree. Agents—Cumming & Duff, S.S.C.

Counsel for Respondents—Dean of Faculty (Campbell, K.C.) — Constable — Hon. W. Watson. Agent—Thomas Liddle, S.S.C.

Saturday, March 9.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

FENTON LIVINGSTONE *v.* FENTON LIVINGSTONE.

Husband and Wife—Donation—Revocation—Sums of Money—Sums Given to be Applied and Consumed.

In an action by a wife to recover as donations sums of money gifted by her to her husband, said to be out of capital, the Court *allowed* a proof *quoad* such of the sums as *ex facie* of her statement did not bear to have been applied and consumed; but *quoad* such as *ex facie* bore to have been so, *repelled* her claim as irrelevant.

Per Lord President—"A donation between husband and wife may, of course, be revoked, but the thing to be revoked must, I think, be a thing which is in the proper sense of the word extant."

On 27th September 1904 Mrs E. M. M'Dougall or Fenton Livingstone, wife of J. N. E. Fenton Livingstone, of Westquarter, Stirlingshire, raised an action against her husband for payment of £2187, 2s. 1d., the amount of sums which she alleged she had either lent or given to her husband, and which, as she had revoked all donations made during the subsistence of the marriage, now fell to be repaid. She averred that the sums lent and given were realised funds from a trust estate of which, subject to a liferent, she was sole beneficiary; lodged in process (No. 65) a statement of the different sums claimed; and pleaded—"The various sums of money detailed in the statement referred to in the condescendence being of the nature either of donations *inter virum et uxorem*, which have been revoked, or of loans by the pursuer to the defender, decree ought to be pronounced in terms of the conclusions of the summons."

The defender in answer averred that the payments in the statement (No. 65) so far as not individual debts incurred by the pursuer, were payments for family expenses and for the joint welfare of the pursuer and defender and their family and the maintenance of their position in the world. He pleaded—"(1) The pursuer's statements are irrelevant. . . . (3) The pursuer's averments can only be proved by the writ or oath of the defender."

On 24th October the Lord Ordinary (MACKENZIE) ordained the pursuer to lodge a minute specifying which of the sums claimed were loans and which donations. In compliance with this interlocutor the pursuer lodged two statements, one (No. 75) setting forth the alleged loans, and the other (No. 76) containing the alleged donations. The statement of donations (No. 76) was:—

Date.	Particulars of Payment.	Amount.
1893.		
Aug. 4	(1) George S. Belfield, jeweller, Edinburgh, being payment for brooch presented by defender to pursuer on her twenty-first birthday, the latter being compelled to meet the account owing to the defender's lack of funds	£42 0 0
	(2) George M'Intosh, W S., defender's agent, being payment for two accounts due by pursuer, for settlement of which defender had previously been supplied by her with funds	24 13 8
,, 11	(3) J. N. E. Fenton Livingstone, the defender	35 0 0
,, 28	(4) J. N. E. Fenton Livingstone, the defender	15 0 0
Sept. 1	(5) Mrs A. Sinclair, nurse, being payment of wages due by defender .	3 6 8
,, 9	(6) J. N. E. Fenton Livingstone, the defender, for his expenses in London	15 0 0
Dec. 15	(7) Barbara Humphrey, servant, being payment of wages due by defender	1 17 6
1898.		
Mar. 1	(8) Mrs M'Dougall, 30 Stafford Street, Edinburgh, being payment for board of pursuer and family .	40 0 0
,, 23	(9) Helen Batcham, servant, being payment of wages due by defender	3 0 0
Apr. 1	(10) Professional & Civil Service Supply Association, Limited, Edinburgh, for household supplies .	2 10 0
	(11) J. & A. Sutherland, fishmongers, Edinburgh, for household supplies	4 3 10
,, 4	(12) J. N. E Fenton Livingstone, the defender	400 0 0
,, 7	(13) Mrs M'Dougall, 30 Stafford Street, Edinburgh, being payment for board of pursuer and family .	20 0 0
,, 8	(14) Copland & Lye, drapers, Glasgow, being payment of drapery for defender's house at Westquarter	4 9 0
,, 14	(15) David Adamson, coach-hirer, Edinburgh, for cab-hires .	4 0 0
,, 25	(16) William Sykes, being subscription for defender to bazaar at Falkirk	2 2 0
,, 28	(17) Andrew Melrose, tea merchant, Edinburgh, for household supplies	2 2 6
,,	(18) Professional & Civil Service Supply Association, Limited, Edinburgh, for household supplies	7 9 0
May 5	(19) J. N. E. Fenton Livingstone, the defender	50 0 0
,, 28	(20) J. N. E. Fenton Livingstone, the defender	50 0 0
June 6	(21) M. Binnie, newsagent, being payment for newspapers . .	1 1 8
,, 28	(22) Wylie & Lochhead, Limited, Glasgow, being payment on account of Goolan, carpenter, Falkirk, to whom the defender owed an account for work at Westquarter, and who accepted this payment to Wylie & Lochhead, to whom he (Goolan) owed the amount as part payment of the defender's debt to him	58 2 9
1899.		
Feb. 3	(23) J. N. E Fenton Livingstone, the defender	250 0 0
	(24) Janet M'Intosh, Elie, being payment of rent of house in Elie occupied by pursuer and defender and family . . .	140 0 0
	(25) Dr Stewart Palm, Elie, for medical attendence . . .	1 17 6
	Carried forward,	£1177 16 1
1899.	*Brought forward,*	£1177 16 1
Feb. 13	(26) J. N. E. Fenton Livingstone, the defender	50 0 0
,, 22	(27) Mrs M'Dougall, 30 Stafford Street, Edinburgh, being payment for board of pursuer and family .	20 0 0
Mar. 6	(28) J. N. E. Fenton Livingstone, the defender	10 0 0
,, 21	(29) Mrs M'Dougall, 30 Stafford Street, Edinburgh, being payment for board for pursuer and family .	5 0 0
May 23	(30) J. N. E. Fenton Livingstone, the defender	100 0 0
	(31) Mrs M'Dougall, 30 Stafford Street, Edinburgh, being payment for board of pursuer and family .	8 6 0
,, 29	(32) Mrs M'Dougall, 30 Stafford Street, Edinburgh, being payment for board of pursuer and family .	15 0 0
June 9	(33) Helen Melrose, nurse, being payment of wages due by defender .	13 0 0
July 3	(34) Annie Davidson, servant, being payment of wages due by defender .	8 0 0
		£1407 2 1

On 26th December 1906 the Lord Ordinary allowed the pursuer a proof by writ or oath in support of the statement of loans, and a proof *prout de jure* in support of the statement of donations *quoad* the sums which did not appear, on the face of the statement, to have been applied and consumed, viz., items 3, 4, 12, 19, 20, 23, 26, 28, and 30, but *quoad* the remaining items, which *ex facie* of the statement appeared to have been applied and consumed, he repelled the claim thereto as irrelevant.

Opinion.—"The pursuer has now lodged two statements, No. 75 specifying the sums said to have been lent, No. 76 specifying the sums said to have been given, by the pursuer to the defender.

"As regards No. 75 there is no difficulty. The pursuer is entitled to a proof by writ or oath. As regards No. 76, her case is that these are donations which she is now entitled to revoke. In my opinion a distinction must be drawn between the sums which on the face of the statement have been applied and consumed, and those which *ex facie* of the statement may or may not have been. As regards the former I think the cases cited establish that the pursuer has no claim—*Hedderwick* v. *Morison*, 4 F. 163; *Hutchison* v. *Hutchison's Trustees*, 4 D. 1399, 5 D. 469, at p. 472; *Edward* v. *Cheyne*, 15 R. (H.L.) 37, *affirming* 13 R. 1209.

"As regards the latter, I am of opinion that the pursuer is entitled to a proof *prout de jure*. I may say, however, that if all the pursuer is able to prove is that the sums specified were given to the defender without ear-marking them in any way as now extant, this would not avail her. The intimation by the pursuer that she revokes a donation made to the defender does not create the relationship of debtor and creditor between them."

The pursuer reclaimed, and argued—The pursuer was entitled to proof of all the items in No. 76. The sums given by the pursuer to her husband were part of her capital which she had been forced to give, and not payments out of income. The plea

of *bona fide* consumption therefore did not apply, and the pursuer was entitled to recover. *Hutchison* v. *Hutchison's Trustees*, June 10, 1842, 4 D. 1399, dealt with *income* and not with *capital*, and was therefore not in point—*vide* interlocutor 5 D. p. 472. *Edward* v. *Cheyne* (*aff. Baxter's Executor* v. *Baxter's Trustees*, July 6, 1886, 13 R. 1209, 23 S.L.R. 803), March 12, 1880, 15 R. (H.L.) 37, 25 S.L.R. 424, also dealt with income. Neither of these cases applied where the sums given were part of the *corpus* of the donor's estate. Lord Watson in drawing the distinction, in *Edward* v. *Cheyne*, between sums which had or had not been consumed was speaking of income and not capital. Whether the sums were earmarked or not was immaterial, and the pursuer was entitled to recover them whether the money was extant or not. The payments made here were not of the nature of "remuneratory grants," and therefore no defence of that kind could be pleaded against her—*Cuthill* v. *Burns*, March 20, 1862, 24 D. 849. Whether a sum paid was a donation or not was a question of intention. *Intention* and not *consumption* was the decisive test. Reference was also made to Fraser, Husband and Wife, pp. 916, 925, 927, and 961; *Allan* v. *Hutchison's Trustees*, February 1, 1843, 5 D. 469; *Laidlaw* v. *Laidlaw's Trustee*, December 16, 1882, 10 R. 374, 20 S.L.R. 261; *Hedderwick* v. *Morison*, November 22, 1901, 4 F. 163, 39 S.L.R. 124.

Argued for respondent—The Lord Ordinary was right. Money given with the intention of being spent and things given to be consumed could not be recovered, and the doctrine of revocation did not apply. Contributions made towards the upkeep of the family could not be recovered. The pursuer had failed to distinguish between suing for a specific thing and suing for a debt. The relation of debtor and creditor was not established by the revocation of a gift. The rule applicable to corporeal moveables did not apply to money—*Hutchison* (*cit. supra*), 5 D. at p. 472. Unless the money were earmarked, it could not be recovered—*Hedderwick* (*cit. supra*)—and further the pursuer had acquiesced in the spending of it. The case of *Laidlaw* (*cit. supra*) was not a case of gift, but one of loan—an advance by way of payment of debt—and therefore was not in point.

At advising—

LORD PRESIDENT—The only question here is whether the allowance of proof as to certain items, and the disallowance of proof as to certain other items, made by the Lord Ordinary is right.

I am of opinion that it is, and I think that the opposite view was really based on an error as to what donation between husband and wife properly is. A donation between husband and wife may, of course, be revoked, but the thing to be revoked must, I think, be a thing which is in the proper sense of the word extant. Of course if we take the cases in the books, the commonest cases are of revocation of deeds, and a deed sought to be revoked is always extant. So, too, in the case of corporeal moveables, if the subject of the donation be still extant, the donation can be recalled and the corporeal moveable brought back to the person who gave it. With regard, however, to sums of money I do not think it possible *ab ante* to lay down a rule, because a sum of money may be in an extant state in which it can be revoked, or it may not. But I think the great confusion made in the argument addressed to us on behalf of a universal proof lies in this, that it is not everything which in a popular sense may be said to be a donation that truly is so. That is to say, that if a husband or wife, as the case may be, allows part of their funds to be devoted to what are after all mutual purposes, then, though one spouse may have more enjoyment out of the money than the other, that would not be donation between husband and wife. Thus, for example, if a husband were to give his wife money to buy a ticket and go on holiday to the seaside, or to take lodgings at the seaside, in one sense no doubt he has given her the money, but he has not made a donation in the sense of the law. It is simply a husband saying—"I will allow my money to be spent in a certain way for household purposes, though you are to get more enjoyment out of it." On the whole matter I am of opinion that the Lord Ordinary, looking at the particular items which I have gone carefully through, is perfectly right, and that the allowance of proof must be as he has fixed it. Of course I say nothing at all at present as to what will be the fate of these particular sums of money, because that will depend on the circumstances of each case, of which I know nothing.

LORD KINNEAR—I agree with your Lordship for the reasons you have stated.

LORD PEARSON—I also agree.

The LORD PRESIDENT stated that LORD M'LAREN, who was absent at the advising, concurred in the judgment.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Solicitor-General (Ure, K.C.)—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Defender (Respondent)—Hunter, K.C.—Sandeman. Agents—Waddell & M'Intosh, W.S.