the Sheriffs arrived, I find myself unable to do so, and I agree in the opinion which has been delivered. After all, the point is mainly of academic interest, because it is conceded that if a written notice had been given by letter that payment was demanded within a reasonable time, or it may be immediately, there could have been no answer to the action, and a period of ten days elapsed between the time that the schedule was served and the raising of the action. When one keeps that in view and also the law which entitles a heritable creditor to record his bond and to give a six days' charge upon it, although the interest may not be in arrears, and so to enforce payment of the bond, I do not think it is introducing any additional hardship into the debtor's position that this action should be held competent.

But taking the case from the strict legal point of view I think the debtor here was in default when after having received the schedule of intimation he did not make payment of the principal sum and interest, of which he was thereby notified that the creditor required payment. I agree with what Lord Dundas has said, that there may be circumstances in which the Court will protect a debtor from anything savouring of oppression, but that is a matter for the Inferior Court to decide—it was not a point on which we were asked to pronounce.

LORD GUTHRIE—The pursuers are only entitled to raise this action of maills and duties if, in terms of section 119 of the Titles to Land Consolidation (Scotland) Act 1868, there has been on the part of the defender "default in payment" of the principal or of the interest due under the bond named in the summons. There has been no default in payment of interest; but the pursuers, founding on schedules of intimation, requisition, and protest served on the defender by them in the form given in Schedule FF (No. 2) of the Act, allege that the defender was at the date of the summons in default of payment of the principal sum due under the bond. It is said that the pursuers had a simple and direct way of making a demand for payment, in which they would have intimated that if payment was not made within a certain short space of time other proceedings would follow. Instead of taking this course, to which it is admitted there would have been no answer, they choose to make their intimation in accordance with the above schedule—that is to say, a form which was designed, not as a preliminary to an action of maills and duties, but as a preliminary to a sale of the heritable subjects. This course has resulted in the defenders' plausible defence. I was at first inclined to think that the course taken by the pursuers had not resulted in the circumstances in producing default in payment, and to concur in the view expressed by the Sheriff when he says—"All that was done was the serving of the schedule, which is the ordinary first step in the process for realising the property, and he (the defender Anderson) had no notice of any intention of taking the present proceedings, as he had paid up the interest to the present time, and it is not averred that he has been sequestrated or is *vergens ad inopiam*."

But I have come to think with Lord Dundas, subject to the suggestion contained in the last sentence of his opinion, that if all that is needed is default of payment on the part of the defender, such default is sufficiently created by any demand made by the pursuers on him in clear terms, and that such demand is contained in the schedule of intimation, requisition, and protest in question.

LORD JUSTICE-CLERK—I have had the advantage of reading the opinion delivered by Lord Dundas, and I entirely concur with it.

The Court recalled the interlocutors of the Sheriff-Substitute and the Sheriff, and remitted the cause to the Sheriff-Substitute to proceed as might be just.

Counsel for the Pursuers and Appellants—D. P. Fleming. Agents—Laing & Motherwell, W.S.

Counsel for the Defender—D. Anderson, K.C.—Mackenzie Stuart. Agents—Balfour & Manson, S.S.C.

Wednesday, June 11.

SECOND DIVISION.

[Lord Dewar, Ordinary.

M'DONALD *v.* FANN.

Succession—Husband and Wife—Parent and Child—Legitim—Fund for Division—Donation inter virum et uxorem.

Held (*diss.* Lord Dundas) that an unrevoked gift of moveables made by a husband to his wife some years before his death formed part of the legitim fund of his children, because the gift was revocable, being a donation *inter virum et uxorem.*

Mrs Catherine M'Donald or Fann, wife of and residing with John Viotti Fann at 36 Pine Road, Cricklewood, London, *pursuer*, brought an action against Mrs Margaret Nicolson or M'Donald, residing at Crossroads, Broadford, in Skye, widow and universal legatory of John M'Donald, carpenter, at one time residing at Crossroads aforesaid, and also against David Munro, bank agent, Nairn, and Archibald Macdonald, bank agent, Broadford, foresaid, the executors-nominate of the said John M'Donald, for their interest, *defenders*. The conclusions of the summons were for an accounting by the defender Mrs M'Donald of the whole moveable estate belonging to the said John M'Donald, received and ingathered by her, whereby the true amount of the legitim due to the pursuer out of such estate might be ascertained for payment of such sum to the pursuer, or, in the event of her failing to account as aforesaid, for payment of £400.

The pursuer averred, *inter alia*—"(Cond. 1) The pursuer and her brother John James M'Donald, presently residing in Rhodesia, are the only children of the late John M'Donald. The said John M'Donald was twice married, the pursuer and her brother being children of his first wife. He spent a great part of his life in Natal, where he acquired considerable means. In 1904, when about seventy years old, he fell under the influence of the female defender, whom he married on 15th July 1905. They lived together at Broadford in Skye until 7th January 1910, when the said John M'Donald died. He left a settlement under which he disponed and legated his whole means to the female defender and appointed the defenders David Munro and Archibald M'Donald executors to act under said settlement. The said settlement was recorded in the Sheriff Court Books at Inverness, but the defenders Munro and M'Donald never confirmed or at any time acted as executors under said settlement. There was no estate whatever standing in the name of the deceased at his death except his furniture, which the female defender has taken possession of. . . . (Cond. 2) During the marriage between the female defender and the said John M'Donald the latter transferred large sums of money to the former by handing the same to her to deposit in bank or elsewhere in her own name, or by depositing the same at his own hand in her name. The following sums were so transferred:—In the latter part of 1905 he handed her £100 or thereby, which she at his desire deposited in bank in her own name; in September 1905, at Broadford, in Skye, he paid her £50, which by his direction she deposited in her own name; in April 1906, also at Broadford, he deposited the contents of a bank draft for £200 in bank in her own name, but afterwards transferred the money to the Clyde Trust; in December 1906 he deposited £700 in bank in her name; on 16th November 1907 he directed his banker to transfer to her name a deposit for £70 then standing in his own name, and the banker did so; in 1908 he again took a bank draft for £200 to bank and deposited the contents in her name. All these deposits still stood in her name at the death of the said John M'Donald in the form in which he had directed them to be made. The defender during the lifetime of the deceased John M'Donald did no act of ownership in regard to said deposits and investments, the same although in her name being really the property of her husband, who collected the revenue and directed the investment thereof. It is believed that he similarly placed in her name other sums of money to the amount of about £200, which she also put in her own name and which remained there at his death. . . . The revenue accrued during the lifetime of the deceased was at least £200, and legitim is due therefrom. She is also now in possession of all the estate belonging to the deceased at his death."

The pursuer pleaded, *inter alia*—"(1) The pursuer being entitled to legitim out of the funds condescended on, and the same being in possession of the female defender as universal legatory or donee, the latter should be ordained to account therefor as craved. (2) The funds condescended on having been transferred by the deceased with the sole object of defeating his children's claims of legitim, the defender is liable to account for legitim therefrom."

The defender Mrs M'Donald lodged defences and pleaded, *inter alia*—"(3) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the action."

On 4th March 1913 the Lord Ordinary (DEWAR) pronounced this interlocutor—"Sustains the first plea-in-law for the pursuer: Repels the third plea-in-law for the defender: Finds that the pursuer is entitled to legitim out of the funds transferred by her father, the late John M'Donald, to the defender, and that the defender must account to the pursuer therefor: Appoints the cause to be enrolled for further procedure, and grants leave to reclaim."

Opinion.—"The question in this case is whether a father can defeat his children's claim to legitim by making over his whole property to his wife during the marriage.

"The pursuer is a daughter of the late John M'Donald, Broadford, Skye, and she brings this action against Mrs Margaret Nicolson or M'Donald, her stepmother, concluding for £400 in name of legitim. The pursuer's father married the defender on 15th July 1905, when he was about seventy years of age, and he died on 7th January 1910. He left a trust-disposition and settlement, but it is admitted that there was no estate standing in his name at the date of his death. It was all made over to the defender during the marriage. She admits that on various dates between May 1905 and November 1907 she received as gifts from her husband sums amounting in all to £1436. The money was sometimes handed over and deposited by her in bank in her own name, and at other times the deceased directed his bankers to transfer the money which stood in his name to the name of the defender. In this way he disposed of all he had and it stood in the defender's name at his death. The pursuer avers that this was done at the defender's instigation to defeat her claim and her brother's claim to legitim; and that although the said funds stood in the defender's name they were truly the property of the deceased, who directed the investment thereof and collected the revenue, and must therefore be regarded as having been held in trust for the deceased, or alternatively were a donation *mortis causa*. And further, and in any event, if they were, as the defender claims, donations *inter vivos*, they still must bear legitim, on the ground that they were a donation *inter virum et uxorem*, liable to be revoked at any time during the deceased's life; that the gift did not become absolute until his death, when legitim had fully vested in the pursuer.

"I do not think that it is necessary to inquire whether it was truly a trust or donation *mortis causa*, because I am of opinion that it must bear legitim even if it be, as the defender contends, a donation *inter vivos*.

"The right of legitim belongs to the children independently of the father, but it is settled that the father may so dispose of his property during life as to defeat his children's claim. He may, for example, give away his money, or deliver securities transmissible by delivery or by deed *inter vivos*, provided the deed of alienation or gift be absolute and irrevocable. But he is not entitled to defeat legitim by any scheme or device having merely the appearance of disposing of his means and estate *inter vivos*, but in reality not doing so until after his death. Thus if a conveyance, though *ex facie* absolute and irrevocable, is of such a nature that the disponee has yet power over it legitim is not barred. The test appears to be whether the donor has absolutely and irrevocably divested himself of his estate. If he has, the claim for legitim will be defeated, but not otherwise—*Craigie* v. *Craigie*, Hume 288; *Black* v. *Black*, Hume 290; *Buchanan* v. *Buchanan*, March 7, 1876, 3 R. 556, 13 S.L.R. 353.

"If I am right in this, I think it follows that a gift from one spouse to another, being revocable at any time during the lifetime of the donor without the knowledge of the donee, does not fulfil the condition which is essential to defeat the claim of legitim. It appears to be in the same position as a donation *mortis causa* in a question of legitim, and it is settled that although a *mortis causa* deed may in express terms bar legitim it will be unavailing, because the legitim has vested in the child at the same moment the deed comes into operation. In the present case the gift to the defender did not become absolute till the donor's death, and at that period the legitim had fully vested in the pursuer.

"The defender pleads on record that the action ought not to be allowed to proceed unless the pursuer's husband sists himself as a party. But I am not referred to any authority in support of this plea, and I think that in an action such as this effect cannot be given to it.

"On the whole matter I am of opinion that the pursuer is entitled to legitim out of the funds transferred by her father, and that the defender must account to her therefor."

The defender reclaimed, and argued—If the gift had been made to a stranger instead of to the wife the claim for legitim would have been excluded, and there was no reason why a wife should be in a less favoured position than a stranger. Admittedly the gift was revocable as a gift *inter virum et uxorem*, but in its other aspects it was an absolute gift. Moreover, the revocability of the gift was a resolutive, not a suspensive condition, and where, as here, the power to revoke was not exercised, the gift took effect from its own date, not from the date of the donor's death. It was not a gift in trust to the donee to be held for the donor—Ersk. Inst., i, 6, 32; Bell's Prin., sec. 1617; Fraser, Husband and Wife (2nd ed.), vol. ii, p. 959; *Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1036, *per* Lord President (Inglis) at 1041, 4 S.L.R. 184, at 186; *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, *per* Lord Shand at p. 834, 17 S.L.R. 597, at 603; *Kemp* v. *Napier*, February 1, 1842, 4 D. 558; *Edward* v. *Cheyne*, March 12, 1888, 15 R. (H.L.) 37, 25 S.L.R. 424. The husband's executors could not have claimed it—*Thomson's Trustees* v. *Thomson*, July 9, 1879, 6 R. 1227, 16 S.L.R. 727. Nor were they liable for any obligations to third parties which might arise out of it—*Wright's Executors* v. *City of Glasgow Bank*, January 24, 1880, 7 R. 527, 17 S.L.R. 333. The legitim fund consisted of what was *in bonis* of a father at the time of his death—*Lashley* v. *Hog*, July 12, 1804, 4 Pat. 581, *per* Lord Chancellor (Eldon) at pp. 610 and 622; Fraser, Husband and Wife, 2nd ed., p. 1001; M'Laren, Wills and Succession, 3rd ed., sec. 245. It might be that if the power to revoke were express the gift might be liable to a claim for legitim, but in the present case the power to revoke was not express but was only implied by law—*Mackintosh & Nicolson* v. *Hunter*, March 3, 1841, 16 F.C. (8vo.), 728, *per* Lord Justice-Clerk (Boyle) at p. 736, 3 D. 675; Bell's Prin., sec. 1585. The cases cited by the Lord Ordinary were irrelevant so far as regards the question in the present case, because these cases dealt with the question whether or not there had been divestiture by the donor. The following cases were also referred to—*Balmain* v. *Graham*, January 18, 1721, M. 8199; *Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237, 12 S.L.R. 169; *Boustead* v. *Gardiner*, November 4, 1879, 7 R. 139, 17 S.L.R. 67.

Argued for the respondent—If, as here, the donor was not completely divested of the gift, the children were entitled to legitim out of it—*Buchanan* v. *Buchanan*, *cit.*; *Lord Advocate* v. *Gunning's Trustees*, 1907 S.C. 800, 44 S.L.R. 514; Fraser, Husband and Wife, 2nd ed., ii, pp. 959 and 1001. Alternatively, the gift had been revoked by the donor's settlement, and therefore it fell into the executry estate and formed part of the legitim fund.

At advising—

LORD JUSTICE-CLERK—The question to be decided in this case is whether a donation made by a husband to his wife *stante matrimonio*, and which he had taken no steps to recall during his life, does at his death form part of the fund on which the children have a claim for a share as legitim, there being no doubt that the right to revoke was in the husband until the time of his death, such a right being implied in law. This question the Lord Ordinary has answered in the affirmative. Giving the best attention I can to the matter, and the more so as I understand there is a difference of opinion among your Lordships, I have come to be of opinion that the judgment is right and ought to be affirmed. It

appears to me that the true criterion in such a case is as expressed by the Lord Justice-Clerk Boyle in the case of *Nicolson's Trustees* in the Faculty Collection, when he says "That if we are satisfied that power over the estate is still retained . . . the claim of legitim will be sustained." It seems to me that the passages quoted to the Court at the debate from the institutional writers bear out the pursuer's contention that when a donation is not so given as to be irrevocable, and nothing is done during the granter's life to stamp it as irrevocable, the fact that the donor could have revoked it at any time during his life places the subject of the donation under liability for his obligations after his death. It forms part of the fund liable to meet his debts, and legitim being a debt in law due by his estate, the claim of those entitled to legitim must be satisfied from it if it is necessary in whole or in part to meet the claim. At the moment of the husband's death it is true that he can no longer exercise his right of revocation, but equally at that moment the legitim claim emerges. And the legitim claim being a claim for a debt it cannot be ousted by what was a revocable gift which was not made absolute while the maker of the gift otherwise revocable was alive.

I do not consider it necessary to go at length into the authorities and cases which were quoted at the debate. I have had an opportunity of considering an opinion which has been prepared by Lord Salvesen, in which he has gone most fully into the matter. And concurring as I do in the result at which he has arrived, I content myself with expressing that concurrence, and in the grounds he gives for his decision, and would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD SALVESEN—In this case I am so well satisfied with the reasons assigned by the Lord Ordinary for his judgment that I should not have been disposed to add anything but for the fact that the precise circumstances in which the present claim is made have never formed the subject of express decision. This is somewhat strange, seeing that donations by a husband to a wife are of frequent occurrence and often remain unrevoked at the death of the donor, and I can only account for there being no decision precisely in point on the footing that the principles that fall to be applied have been long settled.

The defenders' counsel conceded that according to the law of Scotland a donation by a husband to his wife (subject to certain exceptions with which we are not here concerned) is revocable at any moment, and may be revoked even by a *mortis causa* settlement. It follows that the subject of the donation is, up to the moment of the donor's death, under his control. If he dies bankrupt without having revoked, his creditors are entitled to claim the subject of the gift as part of his estate, and this even although sequestration is only taken out a considerable time after death. It follows, I think necessarily, that such a donation cannot operate an exclusion of the children's legitim from the subject of the gift, for they are entitled to claim legitim from all moveable estate which was *in bonis* of their father at the time of his death. The failure of the husband to revoke the donation only makes the gift absolute in favour of the donee as in a question with the husband's representatives, but legitim is a claim of debt and not a right of succession, and while it cannot even rank alongside of the claims of ordinary creditors it takes precedence of any testamentary provision in favour of third parties. It was argued that the right of revocation which is inherent in the donating husband, and of which he cannot deprive himself, when it becomes absolute by his death without revoking draws back to the date when the gift was made. I do not doubt it, but here the gift only became absolute subject to the right of creditors and to the children's right of legitim, which vested in them the moment the breath was out of the father's body.

I put one illustration which I think demonstrates that legitim cannot be excluded from the subject of a donation revocable during the father's life. Suppose that in this instance the deceased, instead of leaving his whole estate to his widow, had by his will directed that it should be conveyed to third parties, and expressly included in the conveyance the donations to his wife, I apprehend it could not have been contended for a moment that any part of his moveable estate would have been exempt from a claim of legitim. Can there be a different result because he leaves unrevoked the donations in favour of his wife? The legitim fund in each case must be precisely the same whoever may be the object of the testator's bounty.

It has been suggested that as the claim for legitim only arises on the father's death and is a claim against his executry estate it cannot be payable out of moveable property which has been made the subject of a donation *inter vivos*, which donation has become absolute on his death without revocation. Precisely the same thing might be said of a claim by the Government for succession duty. Yet it was held in the case of the *Lord Advocate* v. *Gunning's Trustees* (1907 S.C. 800) that the estate upon which succession duty fell to be paid included donations made by the testator to his wife *stante matrimonio*. The executor maintained there, as here, that as the testator had not revoked his gift the subject of it formed no part of his estate at the time of his death; but the Court held that it was still property of which the deceased was at the date of his death competent to dispose, and was therefore liable to duty. The test seems to me to be exactly the same in the case of legitim. I know of no case, and can conceive none, where moveable property over which the testator had the full control during his life and right to dispose of after his death has been excluded

from the legitim fund. There may in certain circumstances be a difficulty in recovering the donations, and if these have been consumed by the donee, who has no other funds, the legitim fund must suffer abatement in the same way as if the estate consisted partly of a debt which proved to be irrecoverable. Here there is no such difficulty, as the widow is the universal legatory of her husband's estate and is the leading defender in the present action. Moreover, no such plea has been stated on her behalf.

One other concession which the defenders' counsel made seems to me to put him out of Court. He conceded that where a gift has been made in favour of a third party by a deed which expressly reserved the granter's power to revoke it at any time the deed would not be effectual to bar legitim. I should certainly not hold a party bound by his counsel's concession in law if I believed it to be erroneous, but an examination of the authorities satisfies me that the concession was rightly made. All the text-writers seem agreed that while a father may defeat legitim by alienating his moveables onerously or gratuitously, the alienation must be such as to divest him completely of the property. Thus Fraser on Husband and Wife says, page 1001—"1. The deed of alienation or of gift must be absolute and irrevocable. 2. It must be *inter vivos*, and not *mortis causa*." So again Bell, in his Principles, section 1585, deals with the matter thus—"Legitim may be defeated by an irrevocable deed *inter vivos* although the term of payment is after the husband's death and although a liferent or any annuity is reserved, but not by a deed *mortis causa* or by one which does not absolutely divest the father." It is true that in the original edition the word "irrevocable" does not appear, nor the last clause above quoted, but there is nothing in the original text inconsistent with these additions, and they have the authority of a distinguished lawyer. In M'Laren's Wills and Successions, section 249, the proposition is stated in different terms but to the same effect—"The legitim fund is therefore effectually diminished by deeds of alienation or conversion executed *inter vivos* and in *liege poustie*, provided they are absolute and irrevocable and are not intended as a mere device for diminishing the children's legal provisions." In Erskine's Institutes the matter is dealt with precisely on the same lines. It would be remarkable if all the text-writers who deal with the subject should have misread the authorities on which their statement of the law is based. I have studied some of these for myself, and I think they have rightly apprehended their import. I shall cite only two or three as examples. In the case of *Nicholson's Assignee* (1841, 3 D. 675, also reported 16 F.C. 8vo, 728) the question was whether estate settled by a gratuitous trust deed for payment of debts and of a restricted liferent annuity to the granter, and disposing otherwise of the fee of his property, barred the children's claim to legitim, and it was held that it did not. The ground of decision was thus expressed by Lord Ordinary Lord Moncreiff, a very weighty authority on a subject like this—"For it appears to him to be a very clear matter of law that the truster was not by the trust deed divested of his estate and funds to all effects whatever. That trust might have been superseded altogether if the truster's condition and the state of his affairs were such as to admit of sequestration, or of a process of ranking and sale. . . . The question is whether the truster was so divested that diligence directed against him would not have been effectual to attach the residue of the funds, not through the trustees but directly through the truster himself, and such proceedings might have arisen in consequence of new debts by the truster after the execution of the trust deed." This decision was affirmed by the Second Division. Lord Justice-Clerk Boyle in giving the leading opinion says—"But if there is the least indication on the face of the deed that the divestiture is not total and absolute (for it may be such that the granter has no power to attach the subjects conveyed, but is divested out and out), we must look at the deed to ascertain this, and if we are satisfied that power over the estate is still retained, then the other principle comes into play and the claim of legitim will be sustained." I pause to observe that it is long settled that in event of sequestration of a donor, whether during his lifetime or after his death, a donation to the bankrupt's wife would fall under the sequestration.

Again, in the case of *Collie* (13 D. 506) the circumstances were that a party had lent a sum of money on a bond taken, payable to trustees for behoof of his two grandsons, reserving his own liferent right to the interest, and the debtors had by his direction delivered the bond to his son-in-law, one of the trustees, whom he desired to keep it till he should receive further notice. Interest was paid to the son-in-law both before and after the lender's death. Parole evidence was led which showed that it was the lender's intention that the deed should be irrevocable; and it was accordingly held that it was effectual to exclude a claim of legitim at the instance of a daughter. Apart from the parole proof, it is plain that all the circumstances indicated that the granter had completely divested himself of the fee by the deed in question. The beneficiaries were two of his grandchildren, his own liferent interest was reserved, and the deed was in possession of one of the trustees whom he had appointed to hold the estate. Nevertheless the Court thought it necessary to have parole evidence that there was no sort of understanding between him and the trustees that he should be reinvested in his property if he so desired. The whole reasoning of the Judges proceeded upon the view that the granter had been completely divested of his estate so far as it related to the fee of the subjects; and it is plain that they would have reached the

opposite result if they thought it could have been revoked by him. Lord Medwyn said—"Considering the object and character of this bond, and the circumstances under which it was granted, I think it may be inferred that it was the intention of old Pirie to make it an irrevocable deed." And again—"There does not appear the slightest ground for supposing any change of intention as to this money, or that he wished to retain any power over it;" and Lord Moncreiff thus stated the case for the pursuer—"As I have understood the pleas maintained, the case appears to be rested on the ground that the deed was never delivered—that it continued revocable till the death of Mr Pirie—and that it was therefore ineffectual as a deed *inter vivos* to divest the deceased of the funds in question, and so ineffectual to impair the fund of legitim." The whole of that learned Judge's opinion is then directed to showing that in the particular circumstances of the case there had been an irrevocable donation of the fee to take full effect *inter vivos* in favour of the beneficiaries.

These cases appear to me to establish beyond question in the case of donations to third parties *inter vivos* that if they are revocable during the granter's life and do not completely divest him of his estate they are ineffectual to exclude legitim. If so, I think it impossible to differentiate such a case from one where the right of revocation, although not expressly reserved, is implied by law. Suppose that the deposit-receipts which are here in question had been assigned by a writing which expressly reserved the husband's right of revocation, such a case would admittedly have been within the scope of previous decisions. How can it make any difference that the condition is not expressed but is implied by law? The donee must be assumed to know the law and to take the gift subject to the implied condition that the donor may at any time revoke it.

Can it then be said there is anything in the quality of an *inter vivos* gift between man and wife which differentiates it from other similar gifts? There may certainly be distinctions, but they are not favourable to the wife. Thus in *Collie's* case the donation could not have been revoked by a testamentary act of the donor although ineffectual as in a question with his creditors; whereas it is certain that a donation to a wife may be revoked by will. The truth is that where the donee is a husband or wife the property donated is held on a highly precarious tenure. "The donee cannot . . . alienate the subject nor charge it with any burden to the prejudice of the donor; and consequently the donor returns, upon his revocation, to the full property of the subject, free from the consequences of all the intermediate deeds granted by the donee, even to his creditors or singular successors" (Ersk. Inst. i. 6, 32).

This passage probably refers primarily to a donation of heritable estate; and so far as the rights of third parties are concerned it probably falls to be qualified when the subject of the donation is money or moveables, as explained in Fraser on Husband and Wife, p. 960. As in a question with the donee, however, the rule holds good; and it may even be that the donee is accountable for the income of the subject gifted unless it has been consumed with the consent, express or implied, of the donor. Until the donor's death, therefore, the donee is a mere trustee for the donor, having the chance of becoming absolutely entitled to the gift in the event of the donor dying without revoking it. If the donor in his last settlement expressly confirmed a donation it would become absolute in virtue of a testamentary act; and it cannot be any better that the law implies such a confirmation where no inconsistent testamentary act can be founded on.

In short, in order that the donation *inter vivos* may be effectual to exclude legitim, it must, to use the language of Professor Bell, "be absolute and irrevocable"; and the gifts which are treated in this case are admittedly not in that position. On these grounds I have no difficulty in reaching the same conclusion as the Lord Ordinary.

LORD DUNDAS—The question we have here to decide is, as conditioned by the argument, whether a gift (or series of gifts) of moveable property made by a husband to his wife some years before his death, and with which she has ever since dealt as her own property, must be reckoned as part of the husband's moveable estate at his death for the purpose of computing legitim, on the sole ground that donations *inter virum et uxorem* are by law revocable. The Lord Ordinary has decided in the affirmative. He considers that the gift in order to be good against a claim for legitim must be absolute and irrevocable in the sense that the donor must not only have divested himself of the subject absolutely, but must also have placed it beyond his power to recal; and that inasmuch as a donation *inter sponsos* is by law revocable by the donor during lifetime, it necessarily fails to satisfy this essential test or condition. The reasoning is plausible, but at the conclusion of the debate I had formed an impression that it was unsound, and I thought (and think) that the Lord Ordinary is palpably in error when he adds—what enters deeply into the problem—that such a gift is "in the same position as a donation *mortis causa* in a question of legitim." I have recently had an opportunity of studying the much fuller and more elaborate opinion written by my brother Lord Salvesen, which I understand your Lordships agree with, and which reaches the same conclusion as the Lord Ordinary upon substantially the same grounds. Having given the best consideration I can to the matter, I find myself unable to agree with your Lordships and the Lord Ordinary. It appears to me that a gift under the conditions postulated,

being *ab initio* not void but merely voidable, is a valid alienation *pro tanto* of the donor's moveable estate as from its date, provided that the resolutive condition inherent by law in its nature has not come into operation.

One must consider somewhat closely the legal nature and quality of a claim for legitim on the one hand, and of a *donatio inter sponsos* on the other. Legitim—the *legitima pars liberorum*—may, I take it, with sufficient accuracy be described as the share of the deceased's personal estate to which his surviving children are by law entitled on his death. Their claim emerges only on the father's death. It is a claim, not against the living father, but against his executors for a share of the executry estate, and cannot extend to anything not comprehended within that estate. I do not see how the subject of such a gift as we are here discussing can be, *in bonis defuncti*, part of the executry estate of the deceased husband and father. The case of *Gunning's Trustees* (1907 S.C. 800) was founded on as supporting the affirmative of that contention. It seems to me to have no bearing in that direction. It decided that the Crown was entitled to estate duty upon a sum of money which the deceased had gifted to his wife and had never recalled. The decision was reached on the ground that it was "property of which the deceased was at the time of his death competent to dispose" within the meaning of section 2 (1) (*a*) of the Finance Act 1894, as the words quoted are defined by section 22 (2) (*a*) thereof. To put it otherwise, the donor was entitled to revoke. Therefore it was within his competency to dispose of the money by revocation. But that is very different from affirming that the gift unrevoked did form part of his executry estate. The two things seem to me to have no true relation to one another. Thus, by another sub-head of the same section of the Finance Act (section 2 (1) (*c*)), duty is claimable upon gifts made *inter vivos* by the deceased if within twelve months of his death. Yet it could never be maintained that these formed part of his executry estate. It is not *hujus loci* to consider whether or not the Crown may have a claim for duty in this case, or against whom; but I think one may discard *Gunning's Trustees* as an authority in point for the present discussion. Now it seems to me that a claim by this pursuer against her father's executors for payment of a share of the moneys gifted by him to his wife would have been completely met by the executors with the defence that the moneys sued for were neither in their possession nor under their control. The executors could not, so far as I see, have successfully sued the wife for recovery of the moneys; for a trust settlement in general terms does not revoke a donation *inter virum et uxorem* (Ersk. Inst. i, 6, 31; Fraser, Husband and Wife (2nd ed.), p. 953; *Thomson's Trustees*, 1879, 6 R. 1227). *Thomson's* case is worth notice as being, so far as I know, the only direct authority on the point before us. The question was raised in that case, not (as here) by a child claiming legitim, but by testamentary trustees claiming the subject of the wife's gift as forming part of the deceased husband's general estate. The Court repelled the claim on the ground that the gift, not having been recalled, could not be held to be part of the husband's estate at his death. If the decision was sound (and I see no reason to doubt it) it is clear that a claim to a part of the subject in name of legitim must have been refused on the same ground, viz., that the subject gifted was not *in bonis* of the father at his death. Such a donation, as already said, is by our law not void but only voidable; it is a valid gift, subject only to a resolutive condition (Ersk. Inst. i, 6, 32; Bell's Prin., section 1617; Fraser, Husband and Wife, 959). In the present case the condition cannot now come into operation, for the husband did not revoke the gifts, and there is no suggestion that there is any creditor in a position to do so. I think, therefore, that the gifts were valid alienations of his moveable estate, vesting in the donee at their respective dates, subject only to a possible defeat which cannot now take place, and that they cannot be held as forming part of the donor's executry estate in this question of legitim.

A gift of this sort does not constitute a trust for the donor in the person of the donee—it is something very different; at the moment of gift the husband is divested and the wife vested, not in the mere title, but in the beneficial right of ownership. The gift is indeed subject to the risk of recal, but unless and until that event shall happen her right of ownership is as full and complete as that of any other donee, and on the husband's death the gift holds good as against the executors under his general settlement. It is equally clear that such a gift does not stand *in pari casu* with a mere testamentary bequest, for if the wife should predecease the husband and he thereafter die leaving the gift unrecalled, the gift, having vested in her as at its date, would pass to her own executors or representatives as part of her estate—Fraser, Husband and Wife, 952, 959. Nor is it, I respectfully think, a tenable view—though it seems to commend itself to the Lord Ordinary and to your Lordships—that a gift *inter sponsos*, such as we are here considering, is in the same position as a donation *mortis causa*. In the latter case "the property is immediately transferred to the grantee, upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and failing such revocation then for the grantee on the death of the granter. It is involved of course in this definition that if the grantee predecease the granter the property reverts to the granter, and the qualified right of property which was vested in the grantee is extinguished by his predecease" (*per* Lord President M'Neill in *Morris* v. *Riddick*, 1867, 5 Macph. 1036, 1041). I have already referred to sufficient authority to show that a gift *inter sponsos* is not held in

trust for the donor, and that if the donee predeceases the gift still remains good and will pass to her own executors or representatives if not subsequently recalled by the donor. It vests in the donee *ab initio*, subject only to a risk of defeat.

It was, however, strongly maintained that inasmuch as donations *inter sponsos* are by law revocable, and the donor cannot effectively discharge his or her right to revoke, they fall short of what the Lord Ordinary calls the "test" or "essential condition" necessary to defeat a claim of legitim, viz., the absolute and irrevocable divestiture of the property by the donor. Lord Salvesen observes that the defender's counsel put himself out of court by conceding "that where a gift has been made in favour of a third party by a deed which expressly reserved the granter's power to revoke it at any time, the gift would not be effectual to bar legitim." I did not recollect and have not noted that such a concession was made, but if it was I should not be prepared to hold a party litigant as bound by a concession in law made by counsel in the course of a somewhat perfunctory debate, if, as I consider to be the case, the legal point conceded was erroneous. The element of irrevocability is no doubt important in all questions of gift or alienation, and it is dealt with by the text-writers and by the Judges in discussing gifts to third parties. But one must be careful to read any particular passage in the light of the decisions cited as supporting it, and any dictum along with its full context; and I do not think that if that is done there will be found either authority or decision for the proposition that a gift to a third party is subject to a claim for legitim on the sole ground that it was not irrevocable. I believe that all the cases where the claim was allowed were decided on the ground that the alienation founded on was truly of a testamentary character, *i.e.*, not merely revocable, but also intended to be prestable, and taking effect only after the granter's death. There are some cases where the deed or transaction under review has been set aside or disregarded as being "simulate"—by which I apprehend is meant a transaction *ex facie* and in form duly completed *inter vivos*, but in truth and substance not taking or intended to take effect during life. A recent type of this class of case is *Buchanan* (1876, 3 R. 556). In the case before us, however, upon the postulates of the argument, there is no "simulate" transaction or alienation, for *ex hypothesi* the donee dealt with the subjects of gifts throughout as her own property. Reverting now to the institutional and text-writers, Mr Erskine (Inst. iii, 9, 16), under the title "Of Succession in Moveables," observes that "the husband, though he should be in *liege poustie*, cannot dispose of his moveables to the prejudice of the *jus relictæ*, or right of legitim, by way of testament, *or indeed by any revocable deed;* for revocable grants create no debt till the death of the granter, and at that period the right of the society goods is fully vested in the widow and children." I think the words which I have italicised can mean no more than that a claim for legitim is not to be defeated by any revocable deed which does not take effect until after the death of the granter; for the only case cited by Mr Erskine (*Henderson*, 1728, M. 8199) was clearly of that nature, as appears from the report in Morison. Lord Fraser, writing more than a hundred years later than Erskine, says, under the head of "Legitim" (Husband and Wife, ii. p. 1001), that a father's deed or gift, in order to effectually defeat a claim for legitim, must be—1, absolute and irrevocable; 2, *inter vivos*, and not *mortis causa*. In considering the first of these propositions one must not lose sight of, nor entirely disjoin it from, the second. Under the heading that, "the father's deed must be irrevocable," the learned author, after citing the passage in Erskine I have just referred to, discusses a series of cases. The first is the well-known case of *Hog* v. *Lashley* (1804, 4 Pat. App. 501). The subject of controversy there was certain bank shares, part of which the father had ostensibly given to his son while continuing to draw the dividends, &c., himself, and another part of which he had ostensibly given to the son while in fact the latter held them upon an agreement or understanding that he would invest the same in land to be entailed after the father's death. The House of Lords held, in regard to both classes of shares, that a claim for legitim was not excluded—in regard to the former class, upon the ground, as I gather from the report, that the fact of the father having continued to receive the dividends, &c., was sufficient to warrant the legal inference that he had never ceased to be the true beneficial owner—in other words, that there was truly no gift at all to the son; and as to the latter class, that in respect of the understanding between father and son as to the application of the shares after the father's death there was no true gift to the son, who was to be merely the instrument for carrying out his father's testamentary intentions. I do not think *Hog* v. *Lashley* touches the present question, for, on the assumption postulated by the argument, there was here a *bona fide* gift (or series of gifts) of which the donee thereafter received the interest as her own property, without any understanding or restriction as to the ultimate disposal of principal or interest. Lord Fraser next cites the important case of *Nicolson's Assignee* (1841, 3 D. 675; better reported 16 F.C. 8vo, 728). But the decision in that case, so far as it supported the claim for legitim, proceeded, I think, plainly upon the ground that the deed under consideration was of a testamentary character. The counter-pleas on the point were as follows:—The defenders pleaded that the granter "had irrevocably" (the deed bore *ex facie* to be irrevocable) "by a proper and rational deed conveyed away his property *inter vivos*, reserving only to himself an annuity." The pursuer pleaded

that "the claim of legitim was in no way cut off or affected by the execution of the deed in favour of the defenders, in respect it was of a testamentary and *mortis causa* nature, and, in so far as it had reference to the testator's lifetime, was, for his own behoof, gratuitous and revocable." The Lord Ordinary (Moncreiff), in making avizandum to the Court, pointed out that the deed consisted of two parts—one for payment of debts and a life annuity to the granter; the other is a universal settlement, *mortis causa*, for the disposal of his property at his death." Lord Moncreiff went on to say—"The question here is, whether Mr Macalister's whole personal estate in possession, or still to be realised, was so completely alienated by the trust-deed, that after all the existing debts were paid nothing remained in his own person, and all was vested in gratuitous legatees, to whom no right was given till his death. And the more particular question is whether the right of legitim existing during his life, though not coming into operation as a debt till his death, could be defeated by such a gratuitous trust. The Lord Ordinary doubts much whether any mere trust, which substantially was for the truster's own benefit after the payment of debts, could have this effect. He has yet seen no example of its being so held. A man may indeed injure or impair the right of legitim by *bona fide* converting personal funds into heritable estate, or *bona fide* giving away or spending his money in his lifetime. But it is a very different thing to make a universal settlement of his whole property *mortis causa* by the mere interposition of trustees to act as his executors at his death. Supposing such a deed to be effectual for its purposes otherwise it is thought that it cannot prejudice the right of legitim competent to the children." The Court, agreeing with these views, held the first purpose of the deed to be a proper alienation *inter vivos*, but were of opinion that the ulterior purposes were testamentary, and therefore ineffectual to exclude the claim of legitim (*cf.* M'Laren on Wills and Succession (3rd ed.) pp. 128, 129). I need not notice in detail the other cases referred to or commented on by Lord Fraser. They include *Buchanan* (*sup. cit.*). In each and all the point seems to have been that a deed or gift which is in substance of a revocable nature (whether declared to be irrevocable or not), in the sense that it was not truly intended by the granter to take effect during his life, will not defeat legitim. The same observation is, I think, true of the cases (which are mainly those referred to by Lord Fraser) cited by Professor Bell in support of his statement (Prin., section 1585) that legitim may be defeated by an "irrevocable deed *inter vivos*, though the term of payment is after the husband's death, and although a liferent or any annuity is reserved, but not by a deed *mortis causa* or by one which does not absolutely divest the father." The absolute divestiture desiderated is a *bona fide* alienation *inter vivos*, not one where the beneficial right is to take effect only after the granter's death. In this sense again I think one must read Lord M'Laren's statement (Wills and Succession, i, p. 128) based on the same (or similar) cases as those referred to by the other text-writers, that "the legitim fund is therefore effectually diminished by deeds of alienation or conversion executed *inter vivos* and in *liege poustie*, provided they are absolute and irrevocable, and are not intended as a mere device for diminishing the children's legal provisions." It seems to me, therefore, that revocability or the reverse has never been made *per se* the test or essential condition of the validity or otherwise of a gift or alienation *inter vivos* to diminish or extinguish the legitim fund. I am not aware of any case where a gift has been made of moveable property (*e.g.*, a yacht, a family jewel, or even of stock or investments) to a third party, the donee having thereafter exclusive use and enjoyment of it, but upon an express condition that the granter should be entitled at any time during his life to recall the gift. Such a case would form a close analogue of the kind of donation *inter sponsos* we are here considering. It appears to me that, upon principle, the gift (in the case I have supposed) would, if not revoked, plainly be no part of the executry estate of the granter, and that the same is true in the present case.

I have now stated the reasons which lead me to a conclusion opposite to that of the Lord Ordinary. I think (differing from your Lordships) that his interlocutor ought to be recalled. But the case would in that event have to go back to the Outer House for proof. The argument at our bar was necessarily conducted on the footing that, as averred by the defender, she dealt with the subjects of gift, from the respective dates of gift, entirely as her own property, collected the revenue derived from them, and paid it into her own bank account. This is denied by the pursuer, who avers that the defender during the lifetime of her husband did no act of ownership in regard to the deposits and investments, the same, although in her name, being really the property of her husband, who collected the revenue and directed the investment thereof. If the latter account of the matter were proved to be true, it might well be that the result of the case would be different from that which, upon the postulates of the argument before us, I think we ought, upon the legal question, to affirm.

LORD GUTHRIE — The pursuer claims legitim out of certain sums, amounting according to her to £1850, and according to the defender to £1436, which during the marriage of the pursuer's deceased father with the defender, the deceased's second wife, the pursuer's stepmother, formed the subject of donations from him to the defender. The pursuer has allegations on record to the effect that the so-called donations were simulate and remained the absolute property of her father, and alter-

natively that they were truly held by the defender in trust for the deceased. The Lord Ordinary has decided the case on a ground which obviates consideration of these averments, because he has held that even if, as alleged by the defender, the sums in question were *bona fide inter vivos* donations by the deceased to the defender, they are still liable to legitim in favour of the pursuer and her brother, being the only children of the deceased. The circumstances that the deceased at his death left no estate other than the sums in question, and that the defender is, under her husband's settlement, his universal legatory, obviously exclude any attempt to exclude claims of legitim either on the ground that the sums in question were presents or that they constituted no more than a reasonable provision for a widow. The donations were unrevoked at the deceased's death, and no question arises with outside creditors. It is settled law that a general settlement like that executed by the deceased, containing no indications of intention to affect the donations, cannot operate as a revocation.

The question at issue is whether *bona fide inter vivos* donations, made *inter virum et uxorem* without a deed and unrevoked at the donor's death, exclude claims for legitim of the donor's surviving children. But I think the question may be stated more broadly, namely, if A gifts, whether *inter vivos* or *mortis causa*, personal estate to B with a right of revocation reserved to A, whether express or implied in law, and dies without revoking, is the gift in the hands of B or of B's representatives liable to the legal claims of A's surviving spouse and children? There is no sound distinction between the case where a right of revocation is expressly stipulated and the present case where it is implied by law, or between the case where the gift is accompanied by a deed and where it is given without a deed, or between the claims of children and those of a surviving spouse.

The pursuer contends, and the Lord Ordinary affirms the proposition, that by the law of Scotland no donation of moveable estate, although *bona fide* and *inter vivos*, can exclude the legal claims of the donor's surviving children unless it be originally, or have been made prior to the donor's death, irrevocable. The pursuer says that, apart from the claims of the Revenue and of outside creditors, a revocable donation of moveable estate can only take full effect in Scotland in favour of the donee in the event of the donor leaving no surviving spouse and no children whose claims have not been discharged. In the case of a *mortis causa* donation this result, admitted by the defender, is attributed by her to the fact that in that case the donor remains in full control of the donation till his death, at which date it is still *in bonis*. But the pursuer maintains that the same principle applies to the case of an *inter vivos* donation which is subject to recal, because although in the case of an *inter vivos* donation the donor may part with the possession, he still retains control, although indirectly, being able to recal it instantly and without reason assigned if the donee is not dealing with it as he thinks proper.

It is scarcely disputed that, if the passages to which your Lordships have referred in the works of Erskine, Bell, Fraser, and M'Laren (and the corresponding passages in reference to *jus relictæ*) be read apart from the authorities to which they refer, the pursuer's contention must prevail. The passages say, in express terms, that to exclude legitim claims, not only must a donation be *bona fide* and *inter vivos*, but it must also be irrevocable. It is, no doubt, true that there is no case referred to by these writers or subsequently decided which affirms the exact proposition now maintained by the pursuer, namely, that a *bona fide inter vivos* gift to a wife unrevoked at the death of the donor, her husband, is liable to be affected by a legitim claim. It is also true that the cases hitherto decided turned directly, not on revocability, but either on whether the alleged donation was not truly simulate, or on whether an alleged *inter vivos* donation was not truly *mortis causa*. But this does not seem to me to conclude the question, if the generality of the words (which must be assumed to have been carefully chosen) unambiguously covers the precise case we are now dealing with, unless indeed there be some clear reason for excluding it.

I do not find such a clear reason in the fact that legitim is only due to children, who survive the parent, out of whose estate legitim is claimed. It was argued that legitim cannot be claimed out of an unrevoked *inter vivos* donation, because before the right to legitim has vested, the right of the donee has become irrevocable. But what truly happens at the death of the donor is, that the donee's right to the donation as irrevocable, and the children's right to legitim, arise at the same moment; and the emergence of the right to legitim prevents the right to the donation becoming irrevocable so far as the donation is required to satisfy the legitim claim. As Mr Erskine puts it (Inst. iii, 9, 16)—"The husband cannot dispose of his moveables to the prejudice of the right of legitim by way of any revocable deed; for revocable deeds create no debt till the death of the granter, and at that period the right of the society goods is fully vested in the widow and children."

Then it was said, that seeing that on the death of the donor the donation draws back to the original date of the gift, no right like legitim, which arises only on the death of the donor, can affect it. But this consideration (which obviously does not apply to the case of a sequestration after the death of a donor) loses all force if I am right in thinking that the right to legitim prevents (to the extent above mentioned) the donation becoming irrevocable and so drawing back to its original date.

It was also maintained that legitim was excluded because if the donation was *bona fide inter vivos* and unrecalled at the donor's death it was not *in bonis* of the deceased at his death. Now no doubt, in

the ordinary case, if a subject is *in bonis* of a deceased, the executors are entitled and bound to include it in the inventory, and they have a title to sue for it if it is in the hands of a third party. In a case like the present, the executors (supposing the estate had not been destined to the donee) could only have included in the inventory, or, at all events, could only have sued for such part of the donation as was required to satisfy the legal claims of the surviving spouse and children and to pay the revenue. But this does not seem to me to prevent the donation being *in bonis* of the deceased at the date of his death so far as requisite to satisfy these claims. Equally in the case of sequestration the revocation which is affected either by the sequestration itself or by express recal by the trustee does not necessarily void the whole donation, for the trustee can only recover such a part as is necessary to render the estate under his charge solvent. I do not see why, if sequestration, taken out after a donor's death and after a donation whether *inter vivos* or *mortis causa* has therefore become irrevocable, operates as a partial recal of the donation, a claim like legitim should not operate to prevent the donation, so far as required to satisfy the legitim claim, from becoming irrevocable.

I am therefore unable to adopt a view which would, I think, read out one of the conditions laid down by the institutional writers in the case of donations as necessary to exclude claims of legitim, namely, irrevocability.

Like Lord Dundas, my opinion is not affected by the case of *Gunning's Trustees*, 1907 S.C. 800. The question in that case turned entirely on the construction of the Finance Act of 1894, sec. 2 (1) (*a*). Lord Kinnear put it thus—"The question is whether certain pecuniary interests did or did not belong to the deceased in the sense of the statute." The clause of the statute was not declaratory of the common law, but involved consideration of a special provision which provided a test different from that applicable to the present case. In that case the question was whether the deceased was competent to dispose of certain funds —a provision which may be wider or narrower in its scope, but is certainly not co-extensive with the question whether funds are, even if only for a special purpose, *in bonis defuncti*.

I am therefore of opinion that the Lord Ordinary has come to a right conclusion, and I agree in the grounds of his opinion and of the opinion of Lord Salvesen.

The Court adhered.

Counsel for the Reclaimer (Defender)—Maclennan, K.C.—Morton. Agents—W. & J. L. Officer, W.S.

Counsel for the Respondent (Pursuer)—A. J. P. Menzies. Agents—Shiels, Macintosh, & Ward, W.S.

HOUSE OF LORDS.

Wednesday, June 18.

(Before the Lord Chancellor (Haldane), Lord Shaw, Lord de Villiers, and Lord Moulton.)

DICK *v.* ALSTON.

(*Ante*, July 17, 1911, 48 S.L.R. 996, and 1911 S.C. 1248.)

Agent and Client—Law Agent Transacting with Client—Transactions between Law Agent and Client's Wife.

Circumstances in which a law agent, who was also a banker, was *assoilzied* in an action of damages brought against him by a wife who had lost her fortune through making advances to and supporting her husband's business, although he was the only law agent employed in the transactions, and although he and his bank were interested in the success of the business.

Bank of Montreal v. *Stuart*, [1911] A.C. 120, *distinguished*.

This case is reported *ante ut supra*.

The pursuer appealed to the House of Lords.

At the conclusion of the argument for the appellant—

Lord Chancellor—This case has been argued with great thoroughness by the learned counsel who led for the appellant, and he has said everything that could be said on behalf of his client, but we do not think it necessary to call upon counsel for the respondent.

The appeal arises in proceedings which were brought by the appellant as pursuer against a Mr Alston, who was then alive and who was defender in the action, and the nature of the action was shortly this: Mrs Dick, the appellant, claimed against Mr Alston, the defender; that Mr Alston, acting as her law agent, had improperly advised her with regard to certain transactions whereby she had suffered damage by his breach of duty; and that, further or alternatively, he while occupying the position of law agent had made a profit which he was unable to retain.

Before adverting to the history of the case I wish to speak of the principles which govern these matters and which have to be applied to transactions of this kind, for I should be sorry if anything that fell from me or from any of your Lordships should seem to throw the least doubt upon principles which are well settled. To begin with, a claim which may be made by a client against her solicitor in a case of this kind may fall under three heads. It may be a claim for negligence—that is to say, for damage arising from a breach of duty to give proper advice or to exercise proper skill. If in such a case the solicitor has acted at the same time for two clients, the law readily presumes, if those clients had inconsistent interests, that he has been swayed in his advice unduly, and has not