tory of our law to sustain words not expressly importing such an obligation.

I think the question must be answered in favour of the first parties.

LORD SHAND—I have always understood that such clauses are to be strictly construed. They impose burdens, and the language must be made perfectly clear if it is intended to shift the obligation to pay such burdens from the person who ought naturally to pay them.

It would in my opinion require the rule to be reversed in order to entitle the second party to succeed here.

There are two categories of cases in this branch of the law. There is either an express obligation of relief in the deed, or else there is a clause warranting the vassal against the payment of the burdens. The proposal here is to extend these two categories, and to say that a mere stipulation as to a feu-duty being in full of certain burdens is to import an obligation of relief against the superior in favour of the vassal. No doubt reference was made to the words "affecting or which may affect" as importing a contract with reference to the future. I do not, however, think the words can be held as sufficient to support the contention of the second party.

LORD ADAM and LORD M'LAREN concurred.

The Court answered the questions in the negative.

Counsel for the First Parties—R. V. Campbell—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for the Second Parties—Dundas. Agents—Waddell & M'Intosh, W.S.

Friday, July 18.

FIRST DIVISION.

SMITH AND OTHERS (MRS CRAWFORD BROWN'S TRUSTEES) *v.* BROWN AND OTHERS.

Succession — Trust Conveyance — "Heirs and Assignees"—Foreign.

By antenuptial trust-deed executed in Scotland a domiciled Scotswoman in contemplation of her marriage conveyed her whole estate to trustees, directing them to pay her the income during her life, to hold and apply the capital for behoof of the issue of the marriage, and failing them "for behoof of my heirs and assignees in fee." The truster married in Australia a domiciled Australian, and died there without issue.

In a competition between her heir-at-law, her heirs *in mobilibus*, and her husband, the latter maintained that he was entitled to the whole estate in terms of the law of the truster's domicile.

Held that although according to the law of Australia the husband would have taken *jure mariti* if there had been no destination in the deed beyond the wife, as there was a destination to "heirs and assignees," which did not include the husband, and as the deed regarded as a will was not revoked by marriage, the husband's claim fell to be dismissed.

This action related to an antenuptial deed of trust executed by Miss Josephine Anne Bayne, Cumin Place, Grange, Edinburgh, in contemplation of her marriage with Henry Crawford Brown, New South Wales. By the said trust conveyance Miss Bayne conveyed to the trustees named in the deed her whole means and estate, *acquisita* and *acquirenda*, and especially her shares of provision under her father's and mother's marriage-contract, and also her share of succession under her mother's settlement.

The object of the trust-deed as set forth in the narrative was to secure the funds of the truster from the creditors of her intended husband.

The purposes of the trust were (1) for the payment to the truster of the free annual income, and (2) for payment of the fee to the children of the marriage in the proportions and in the terms specified in the deed, and failing children, the destination was thus expressed, "for behoof of my heirs or assignees in fee." The deed also reserved to the truster a power of apportionment among the children of the marriage, and also a power to provide a liferent of her estate to her husband if he should survive her.

Shortly after the execution of this deed Miss Bayne proceeded to New South Wales and was married to the said Henry Crawford Brown.

Mrs Brown died in Australia in February 1888 without issue, and without leaving any writing other than the trust-deed above referred to relative to the disposal of her means and estate.

On Mrs Brown's death the fee of her estate was claimed (1) by her husband, as heir to his wife according to the law of Australia. It was also claimed (2) by her brother and sister, as heirs and next-of-kin of the deceased. In these circumstances Mrs Brown's trustees raised the present action of multiplepoinding.

A claim was lodged for Henry Crawford Brown, who averred, *inter alia*—The said Mrs Josephine Anne Bayne or Brown was at the date of her death domiciled in New South Wales. By the law of said Colony, the marriage of the said Mrs Josephine Anne Bayne or Brown to the claimant operated *ipso facto* a revocation of all testamentary deeds or writings made and executed by her before marriage, including the deed of 17th May 1886, in so far as the same was of a testamentary and revocable character; and in particular it operated a revocation of the destination in said deed to her "heirs or assignees in fee." The said law fell to be applied in determining (1) whether the succession to the estate of the said Mrs Brown was to be regarded as testate or intestate; and (2) the persons

who were entitled to take the moveable estate left by her if she died intestate. According to said law (1) the said Mrs Brown died intestate, and (2) the claimant as her husband was entitled to the whole moveable estate of which she died possessed. Alternatively, the claimant contended that the said destination to "heirs" imported, according to the law of Scotland, a conveyance of Mrs Brown's estate to those who should have been entitled thereto by operation of the law if she had died intestate, according to the law of New South Wales, where she had died domiciled. As therefore by said law the claimant would have been entitled to the whole moveable estate of which she died possessed if she had died intestate, he was entitled thereto under said destination. In any event, and assuming that the succession in question fell to be regulated by the law of Scotland, as maintained by the competing claimants, the claimant as husband of the deceased Mrs Brown was entitled to one-half of her moveable estate in virtue of the provisions of the Married Women's Property (Scotland) Act 1881, section 6. He also averred that his deceased wife's whole estate was of a moveable nature *quoad* succession. He claimed the whole or alternatively the half of the fund *in medio*.

A claim was also lodged for John Alexander Bayne, a brother of the deceased, who, *inter alia*, averred that a portion of the estate to which the deceased Mrs Euphemia Brown succeeded under her father and mother's marriage-contract and under her mother's deed of settlement was heritage, and he accordingly claimed as heir-at-law of the deceased to be ranked and preferred on the heritage which formed part of the fund *in medio*.

A claim was also lodged for the antenuptial marriage-contract trustees of Mrs Euphemia Bayne or Brown (a sister of the deceased), who averred that the trust-conveyance above referred to was executed in Scotland when she was domiciled there, and was a Scottish deed. The claimants, as in right of one of the two next-of-kin and heirs *in mobilibus* of the said Josephine Anne Bayne or Brown, were entitled under the said deed to the whole of her moveable estate, if her estate should be held to be partly heritable and partly moveable, or to one-half thereof if it should be held to be wholly moveable, and that in accordance both with the law of Scotland and also with the law of New South Wales. By the law of New South Wales the husband of a deceased person was not an heir of the deceased in moveables, and would not take as such heir in a destination to heirs in a deed by his deceased wife. The averment of the claimant Henry Crawford Brown in regard to the law of New South Wales was denied.

The claimants claimed the whole or alternatively one-half of the moveable estate of the deceased.

On 25th January 1889 the Lord Ordinary (FRASER) repelled the claim of Henry Crawford Brown.

"*Opinion.*—The only question argued before the Lord Ordinary was that as to the claim of Henry Crawford Brown, who married, on 5th October 1886, Josephine Anne Bayne, whose estate is sought to be distributed in this action of multiplepoinding. There are other questions left over for discussion; but as this claim can be separated from these, and at once disposed of, it is proper and expedient to do so. The claimant Mr Brown is a banker and merchant in New South Wales, and it is not disputed that his domicile is in New South Wales, and that it was there also at the time when he was married. Miss Bayne's domicile at that time was in Scotland, and she went out to New South Wales to be married, and of course acquired her husband's domicile there. She died on 5th February 1888, in Australia, without issue.

"The case for her surviving husband is that she died intestate, that her moveable succession falls to be regulated by the law of New South Wales, and that by that law the claimant is entitled to the whole moveable estate of which she died possessed, and that the whole of the estate now to be distributed, so far as she was concerned, was of a moveable nature *quoad* succession.

"On the other hand, it is contended for the brother and surviving sister of Mrs Brown that she did not die intestate, and that by an irrevocable—or at all events an unrevoked—deed, executed by her she disposed of the whole of her property in such a manner as to exclude the claim now made by her surviving husband.

"The deed in question is a trust conveyance by her, dated 17th May 1886, four months and some days before her marriage. By this deed, on the narrative that she was desirous of securing the funds and property belonging to her from the creditors of her intended husband, she assigned, disponed, and conveyed in trust to John Arbuthnott Smith and others resident in Scotland her whole means and estate 'which shall belong to me during the subsistence of my intended marriage, and particularly, but without prejudice to the said generality, my share as one of the children of the said Alexander Bayne and Mrs Hannah Roper or Bayne, his wife.' This conveyance carried the whole share of Josephine Anne Bayne or Brown in her father and mother's succession, and it is her share in that succession that is now to be distributed. The purposes of the trust were, 1st, for payment to herself during her life of the annual income and produce of her estate; 2nd, the fee or capital of the estate was to be held by the trustees for behoof of the children of the marriage, payable in the proportions and at the times specified in the deed. There were no children of the marriage, and for that contingency provision is made in the following terms:—'And failing such child or children and their lawful issue, or in the event of their existing, but all deceasing before the term of payment after mentioned of their provisions, then for behoof of my heirs or assignees in fee.' The question in the case is as to the meaning of the words 'my heirs or assignees in fee.'

"Powers of investment were given to the

trustees, and the usual powers of appointing factors. Miss Bayne reserved also to herself power 'to provide a liferent of my said means and estate after my death to my surviving husband, under burden of maintaining and educating my children who may be in minority or unable to maintain themselves. And in the event of my exercising such power, the provisions in favour of my said children shall not be payable till the expiry of said liferent.' Mrs Brown did not exercise this reserved power. The trustees accepted the trust, entered upon the management of the trust estate, and were in progress of realising it when the present action of multiplepoinding was brought.

"The claimant Mr Brown contends that the words 'heirs or assignees' must be interpreted according to the law of the domicile at the time of the death, viz., Australia, and if such construction be adopted, then he is the 'heir or assignee' according to that law. On the other hand, Mrs Brown's brother and sister, John Alexander Bayne and Euphemia Orrock Bayne or Brown—the latter through her marriage-contract trustees—insist that the construction of these words must be according to the law of Scotland, and if so, then they, as the brother and sister, are the heirs under the destination. No claim has been lodged for the trustees themselves, and such claim was unnecessary in respect of the claims by John Alexander Bayne and the marriage-contract trustees of Euphemia. The Lord Ordinary is of opinion that the words 'heirs or assignees' must be construed according to the law of Scotland. This was a trust conveyance executed in Edinburgh, and framed in the ordinary terminology of Scottish conveyancing. The domicile of the trust was in Edinburgh. It was a deed which took effect at once, and operated *inter vivos*, but it has no doubt had the effect of operating as a will in so far as it disposes of the property on the maker's death in the event of the failure of children. No doubt in the general case of a simple will the presumption is that it is to be construed according to the law of the domicile at the time of the death, because it is held to be a final declaration of the testator's intention, who is supposed to have regard to the law of the domicile where he or she was living at the time of death. But that rule is by no means absolute even in the case of a simple will. The Lord President in the case of *Mitchell & Baxter* v. *Davies*, December 3, 1875, 3 R. 211, made these observations on these matters—'The Lord Ordinary has found that Mrs M'Millan "having been a domiciled Englishwoman" the effect of the provisions of her settlement must be determined according to the law of England. I think that interlocutor is not satisfactory on the face of it, because it deals with the question as if the domicile of the maker of these deeds was absolutely conclusive. I do not think it is so. The real question, as in every testamentary deed, is, what was the intention of the testator? In solving that question it no doubt becomes necessary to inquire what system of jurisprudence the testator had in view in making his settlement. But it does not follow of necessity that that must be the law of his domicile. It might be his intention that his settlement should be construed by the law of a different country, and that intention might be expressed in his will. If so, the law of that country would regulate the construction, and if from other circumstances it can be shown that he had in view the law of a particular country, although that may not be the law of his domicile, it must govern the construction of his settlement.' The subject has been discussed in several other cases. In *Ferguson* v. *Marjoribanks*, April 1, 1853, 15 D. 640, Lord Rutherfurd had to deal with the point—'He will merely observe that though the general rule may be that the law of the testator's domicile shall give the construction of a will, especially where it was executed according to the law of the country of domicile, yet other circumstances may bring in the law of another country, and more especially the law of the place of performance. Mr Story, in his 479th section (2d ed. p. 704), sums up the doctrine in these words—"Indeed, it may be laid down as a general rule that wherever words of an ambiguous signification, or different significations in different countries, are used in a will, they are to be interpreted in the sense in which they are used in the law of his domicile, with which he may be presumed either to be most familiar or to have adopted. Sandius says, *In ambigua hac testatoris voluntate spectandum esse consuetudinem regionis, in qua testator versatus est.* The same rule has been recognised in England, or rather it has been generalised, for it has in effect been held that in the construction of ambiguous instruments or contracts the place of executing them, the domicile of the parties, the place appointed for its execution, and other circumstances, are to be taken into consideration." This is anything but a statement that the law of the domicile is exclusive, and it humbly appears to the Lord Ordinary that if in any case the principle is admissible of appealing to the law of the place of performance the Scots law should receive effect in all questions regarding the form as well as the administration of a trust which was to be executed in Scotland, and under the superintendence of its Courts.' Now, in the present case, the place of execution of the deed, the place of performance, the estate specially conveyed, were in Scotland; the trustees also were resident in Scotland; and holding therefore that there is no absolute rule of law finding the interpretation of a will to be according to the law of the domicile, such a rule should not be followed when there is any reason, from such circumstances as these now mentioned, to suppose that the maker of the deed had in view not the law of the domicile but the law of the place of execution. At the time when the trust conveyance was executed by Josephine Bayne she knew nothing about the law of Australia, and was thinking only of the law of her own land."

Henry Crawford Brown reclaimed.

After hearing counsel the Court, on 29th October 1889, allowed certain amendments to be made on the record, the substance of which is contained in the foregoing narrative, averments, and claims, and further appointed parties to prepare and lodge a case with a view of ascertaining the law of New South Wales in regard to the averments of that law made in the amended record.

A joint case was accordingly, on 17th February 1890, lodged, in which, after setting forth the deed in question, and narrating the facts mentioned above and the contentions of parties, the following questions were submitted for the opinion of counsel skilled in the law of New South Wales:—

"*Queries.*

"(1) According to the law of New South Wales, Who is entitled to succeed to the separate personal estate of a married woman, who dies intestate and without issue? Has her husband any right of succession to said estate? and, if so, what? What is the nature of her husband's right, if any, in said estate, and, in particular, can his right be defeated by will executed by his wife during the marriage? (2) Did the marriage of the said Mrs Josephine Anne Bayne or Brown, according to said law, operate a revocation of all testamentary deeds or writings made or executed by her before marriage? In particular (*a*) was the deed of 17th May 1886 revoked in whole or in part by her marriage? and (*b*) assuming the conveyance in said deed to trustees for behoof of Mrs Brown in liferent and her children in fee to be irrevocable, and the ulterior destination on the failure of children 'for behoof of her heirs or assignees in fee,' to be revocable and testamentary, was said last-mentioned destination revoked by her marriage? (3) According to said law, Who would take Mrs Brown's personal estate under the destination 'to her heirs or assignees in fee?' Would the husband be excluded from participation in said estate?"

"*Opinion.*

"Before answering the specific questions put to me, I wish to state the facts as they appear to me. In 1886 Miss Bayne, a domiciled Scotchwoman, in anticipation of marriage with Mr Brown, domiciled in New South Wales, conveyed all her estate, real and personal, to trustees in trust, to pay her the income therefrom during life, with remainder to her children, and ultimate remainder to her 'heirs or assignees in fee.' Shortly after Miss Bayne left Scotland for New South Wales, married Mr Brown, and died *sine prole*, and without having by any deed or will dealt with her property except as above. Now, the validity in whole or in part of the document of 1886 is a question entirely for the Scotch Courts, and on which I pronounce no opinion whatever. It will be for a Scotch tribunal to decide in accordance with Scotch law who are the heirs or assignees, or whether such terms are void for uncertainty or otherwise.

"(1) In answer to the first question—In case of the devolution of a separate estate of a married woman not being provided for by the instrument creating the separate estate or by the will of the married woman, then by her death it loses its quality of separate estate, and the property will go, in case of moveable chattels, to the husband *jure mariti*, and choses in action to the husband as administrator to his wife's estate. See *Proudly* v. *Fielder*, in which case money in the funds, the property of the intended wife, was settled to her separate use, and no provision was made for its being dealt with in case of her dying without issue, which in fact happened. It was held that the husband was entitled, as the words creating the separate estate had no reference to the devolution of the property after her death. See also *Drury* v. *Scott*, 4 Y. & Coll. Exch. R. 264, where a father bequeathed a legacy to his married daughter for her separate use, and it was held that the surviving husband was entitled to the legacy on her death—*Molony* v. *Kennedy*, 10 Sim. 254; *Johnstone* v. *Lamb*, 15 Sim. 308. This right of the husband can be defeated by will made by the wife. (2) No portion of the deed would be revoked by marriage according to the law of New South Wales. (3) This is a very difficult question to answer, because the terms 'heirs or assignees in fee' are terms (I presume) of art in Scotch law, and the Court of New South Wales would seek to know what they meant according to Scotch law. But supposing an Australian Court had to construe such words according to English law, then I am of opinion, though with great doubt, that they would hold that the heir took as a *persona designata*, for it would be clear in this case that she had not assigned, and it is also clear that she had an heir. Supposing the Court of Australia were to be informed that such words had been held by competent Scotch authority to be void, then the fact of the use of such terms would not in any way interfere with the husband's rights according to the law of New South Wales.—AUGUSTUS NASH, Lincoln's Inn, 30th January 1890.

Argued for Henry Crawford Brown—Succession in moveables was regulated by the law of domicile. The truster here was at the date of her death (which was the period of distribution of her estate) a domiciled Australian, so the law of Australia must regulate her succession. The destination to "heirs" imported a conveyance to those who would have been entitled thereto if Mrs Brown had died intestate, and by the law of Australia the claimant was that party. The object of the insertion of the words "heirs and assignees" was a mere conveyancer's device to protect the truster's own liferent, and for the sake of her children. As these two purposes were defeated by the death of the truster without issue, it followed that the estate should go as if the truster had died intestate—*Stair* v. *Head*, February 29, 1844, 6 D. 904; *Nimmo* v. *Murray's Trustees*, June 3, 1864, 2 Macph. 1144; *Haldane's Trustees* v. *Murphy*, December 15, 1881, 9 R. 269;

Gregory's Trustees v. *Alison*, April 8, 1889, 16 R. (H. of L.) 10. In order to get over the rule that succession in moveables was to be regulated by the domicile of the testator, the intention must appear very clearly on the face of the deed—*Young*, L.R., 29 Chan. Div. 617. If the word "heirs" was to be construed as meaning heirs *in mobilibus* according to the law of Scotland, then the claimant was entitled under 44 and 45 Vict. c. 21, sec. 6, to one half of the fund *in medio*.

Argued for John Bayne and Mr and Mrs W. S. Brown's marriage-contract trustees —This was not a case of intestacy. The heirs of the truster were her brother and sister, and not her husband. They took by the operation of the deed (and as conditional institutes), and not through its failure. The testator here invoked the Scots law, and not private international law. The intention of the truster in the event of a failure of issue was quite plain and should receive effect. The deed was a Scottish deed, and it should be interpreted and receive effect as such—*Inglis* v. *Inglis*, January 28, 1869, 7 Macph. 435; *Mackenzie* v. *Mackenzie*, July 10, 1878, 5 R. 1027; *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200.

At advising—

LORD PRESIDENT—The pursuers are trustees under a conveyance in trust executed by Miss Josephine Anne Bayne (afterwards Mrs Brown) dated 17th May 1886.

The fund *in medio* is the whole estate left by Mrs Brown at the date of her death on 5th February 1888. The deed was executed by Miss Bayne while she was a domiciled Scotswoman, and while she was acting under the advice of her friends and law advisers in this country; and accordingly we find that it is expressed in the technical language of the law of Scotland. It proceeds upon the consideration of the truster's intended marriage with Mr Brown, and it narrates that the object for which it was executed was to secure Miss Bayne's property from the creditors of her intended husband. She therefore conveys to her trustees her whole estate and especially certain funds to which she had a right under her parents' marriage-contract, and also a share of the property which is to come to her under her mother's settlement. The objects of the trust were (1) for the payment to Miss Bayne during her life of the free annual income of her estate; (2) that the fee or capital should be held and applied by the trustees for behoof of the children of the intended marriage, and of any subsequent marriage in such proportions and on such terms as she or her surviving husband might appoint by any writing under her or his hand; and failing such appointment, equally to the said children, or the survivors of them jointly; and failing such child or children then for behoof of her "heirs or assignees in fee."

Miss Bayne went to Australia and was married to Mr Brown, but there was no issue of the marriage, and Mrs Brown died, as I already said, on 5th February 1888.

Now, in the circumstances which have occurred, the first question arises upon the construction of the destination "failing issue, to my heirs or assignees in fee." That is a form of expression with which we are perfectly familiar in deeds of this description, and the meaning of them is quite fixed in our practice. If the estate be heritable it would go to the heir; if it be moveable it would go to the heir *in mobilibus;* and if it be partly the one and partly the other it would be divided according to the rules of common law. But it would be quite a mistake to suppose that because that effect is given to these words this is a case of intestacy. The heirs or assignees do not take by reason of failure of the deceased to make any will; on the contrary, they take by the operation of the will; they take as conditional institutes after the children, and as such they are entitled to uplift and possess the estate under the title of a disponee and not under a title made up by confirmation or service.

All that is plain enough according to our law, but it was contended that although that is the true construction of the words contained in this deed, yet the construction would have to be varied according to the domicile of the granter at the time of her death, and as Mrs Brown died domiciled in Australia, her heir or next-of-kin according to the law of Australia would take in preference to the heir or next-of-kin according to the law of Scotland. I express no opinion on that question because it does not arise. There are no parties before us representing the heir or next-of-kin according to the law of Australia. The parties are, in the first place, her surviving husband, her heir in heritage according to the law of Scotland, and her heirs *in mobilibus* according to that law. The husband's claim as made upon this record is somewhat ambiguous, and it is not improper to attend to the very terms in which the claim is expressed in his record as finally amended. He says in his condescendence — "The claimant contends that the said destination to 'heirs' imports according to the law of Scotland a conveyance of Mrs Brown's estate to those who would have been entitled thereto by operation of law if she had died intestate according to the law of New South Wales, where she died domiciled." . . . He does not say he is entitled to it as "heir" or "next-of-kin," but simply that he is entitled to it according to the law of the domicile of his wife; and his plea-in-law is that he "is entitled to be ranked and preferred to the whole fund *in medio* by virtue of the destination to 'heirs' in the said trust-deed executed by his said wife, in respect that by the law of New South Wales, where she died domiciled, he would have been entitled to her whole moveable estate if she had died intestate."

In the course of the proceedings before us on a reclaiming-note against the Lord Ordinary's interlocutor it was found necessary by the parties to obtain some information upon the law of the domicile of Mrs Brown, and a case was submitted to counsel learned in that law, and we have his opinion before us—It is not a very satisfactory way

of obtaining information upon foreign law, but the parties agreed to adopt that course and the Court did not object; and what is the result of that opinion? It amounts to this—that Mrs Brown's deed was not revoked in whole or in part by her subsequent marriage; in the second place, that if there is no destination in the deed beyond the wife, and no will, the husband would take *jure mariti;* and thirdly, that the *jus mariti* will be excluded either by destination in the deed creating the separate estate or in a will subsequently made by the wife. That is a summary of the law given by the learned counsel. What is the effect. It is that the parties who are to take according to the will of the maker, are the heir in heritage or in moveables. The husband is neither the one nor the other. He is not so by the law of Scotland. He is not so by the law of Australia as ascertained in this opinion, and therefore he claims only under his *jus mariti*, on the footing that the object of the deed to create a separate estate in the wife during her lifetime having been accomplished, on her death his *jus mariti* revives, and the estate falls to him accordingly. The result, however, of sustaining such a claim would be to refuse to give any effect to the express words of the deed. I think therefore that the Lord Ordinary has decided rightly. While not determining the question whether the heirs in heritage or moveables are to be sought in this country or in Australia, all that he has done is to repel the husband's claim.

LORD SHAND—I am entirely of the opinion which your Lordship has expressed. When the case came before us first I think there were amendments of the record by both claimants, and the result was that the Court thought it necessary to have some opinion on the law of Australia. One of the points alleged on behalf of Mr Brown was that the trust-disposition, in so far as it could be regarded as a will and not as a contract, was revoked by the truster's marriage; that point is entirely out of the case, because the opinion returned is that the marriage did not act as a revocation. The only question that remained therefore was whether the husband of this lady was entitled to take under the final destination in the deed under which failing issue the property was destined "for behoof of my heirs and assignees in fee."

The first point to be determined in considering these words is, whether this is an appeal to intestacy. I agree with your Lordship in thinking that this is a case of testate succession, that these words are words of destination, and the lady having declared by that destination that her property is to go to her heirs and assignees, that destination must receive effect. It is not alleged that there was any assignation of the property, therefore the destination is to her heirs. That being so, now that we have the opinion of counsel the husband has no right that can be sustained. It may be that if she had died in Scotland the substantial rights would have been the same if she had died intestate, but there then would have been no difficulty. I would be prepared to hold that this is not a case of intestacy. It seems quite plain from the opinion that the expression is one that according to Australian law would not be interpreted as including anyone but an heir, because I find in answer to the question, "According to said law, who would take Mrs Brown's personal estate under the destination 'to her heirs or assignees in fee;' Would the husband be excluded from participation in said estate?"—"This is a very difficult question to answer, because the terms 'heirs or assignees in fee' are terms (I presume) of art in Scotch law, and the Court of New South Wales would seek to know what they meant according to Scotch law." And so the view I take of the case is that whether you appeal to the law of Scotland or to the law of the domicile in this question the lady has destined her property by the deed to her heirs—meaning in Scotland, so far as moveables are concerned, her heirs *in mobilibus*. It is thus quite clear that the husband would not take in any case.

LORD ADAM—I concur in the opinion expressed by your Lordships, but I may add that I would have been quite prepared to adhere on the grounds stated by the Lord Ordinary.

LORD M'LAREN concurred.

The Court adhered.

Counsel for Henry Crawford Brown—Low—Salvesen. Agent—James Philp, S.S.C.

Counsel for Bayne and Others—W. C. Smith—Graham—Stewart. Agents—Cairns, M'Intosh, & Morton, W.S.

Friday, July 18.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CAMPBELL *v.* HALKETT AND ANOTHER.

Property — Servitude of Road — Implied Grant.

The proprietor of two adjoining estates H and B, who used to drive carts and cattle through B from H to the public road, left H to his brother in liferent and his grandniece in fee and B to his nephew in fee. The titles were silent as to any servitude over B in favour of H, which had another although less convenient access to the public road. *Held* that no grant of servitude was to be implied from these dispositions.

In 1889 William Campbell, Esq., M.D., of Burnsyde, in the parish of Largs and county of Ayr, brought an action of declarator against Mrs Margaret Kerr or Halkett, Great Fosters, Egham, Surrey, proprietrix of the lands of Hangingheugh in the