principle of such cases is, that when a man leaves his wife in search for his livelihood, his earnings being spent in the parish, he is therefore regarded as residing there. But there is nothing of the kind here.

LORD BENHOLME absent.

Agents for Pursuer—H. & A. Inglis, W.S.
Agent for Southdean—John Gibson, jun., W.S.
Agent for Edinburgh—Geo. Cairns, S.S.C.

Friday, October 22.

FIRST DIVISION.

DUNDAS AND OTHERS *v.* DUNDAS.

Antenuptial Contract—Heirs—Heritable. A sum of money was assigned to trustees by a lady in her antenuptial contract, with a provision that if she left no disposition of the money, and no children of the marriage nor their issue survived, it was to go to her heirs. *Held* that the part of the sum which was heritably invested at the commencement and dissolution of the marriage, and had not been converted into moveables by the trustees though empowered to do so, must go to the heir-at-law.

By antenuptial contract of marriage between Colonel, afterwards General Sir James, Simpson and Miss Elizabeth Dundas, second daughter of the late Sir Robert Dundas of Beechwood and Dunira, Bart., the former assigned £7500, and the latter £10,000, to trustees, directing them to pay the produce of the money to Colonel Simpson during the subsistence of the marriage. On its dissolution the trustees were directed to set apart certain provisions for the child or children of the marriage, and to pay the produce of these provisions and the balance of the trust funds to the survivor of the spouses.

In the event of there being no children of the marriage, nor their issue, alive at its dissolution, the £10,000 contributed by Miss Dundas were to go to her disponees, or if she left none, to her heirs, after the termination of Colonel Simpson's liferent. Of this sum of £10,000, £6500 were heritably secured at the date of the marriage and at its dissolution. The trustees were empowered to convert the various securities into money, and were directed to pay the provisions to the children rateably out of the funds contributed by the spouses.

Mrs Simpson died on 27th November 1840, leaving no deed nor will; and no children were born of the marriage. On General Simpson's death, a competition arose between Mrs Simpson's heir-at-law and the next of kin for the possession of the £10,000.

The Lord Ordinary (BARCAPLE) found that the £3500, as being moveable, went to the next of kin, but the £6500, as being heritably invested, went to the heir-at-law, and found no expenses due by either party. His Lordship added the following note:—

"The Lord Ordinary could have had no hesitation in repelling the claim of Sir David Dundas, as heir-at-law, to the sum of £3500, which was invested on moveable bonds at the constitution of the trust. The subsequent investment of that portion of the trust-funds on heritable security was mere matter of trust management, for the better preservation of the funds, and was not done either in obedience to a direction of the truster or from any necessity arising in the execution of the trust. This part of the claim was not insisted in at the debate.

"The question which remains for decision is, whether Mrs Simpson's heir in heritage or her next of kin have right to the sum of £6500, which was invested on an heritable security at and prior to the constitution of the trust, and was conveyed in that form to the marriage trustees. If this question had arisen upon the construction of a mere testamentary trust-deed by Mrs Simpson, containing trust directions as to the disposal of the fund identical with those which occur in the marriage-contract, the Lord Ordinary would have had no doubt that it was not intended to make the sum of £6500 moveable by destination, as regarded her heirs, who were to take on the failure of children, and that, there being no direction to convert that sum into moveable estate, and no necessity for its conversion having arisen, it must have been held to be heritable, and to go to the heir in heritage. He thinks that the authorities against conversion in such circumstances would have been entirely applicable and conclusive, and he sees no ground for holding that a mere testamentary destination to the heirs of the truster on the failure of the children for whose benefit the trust was created, is to be read as excluding the heir-at-law in regard to any portion of the trust-funds which are heritable.

"The question in the present case, however, relates to a trust executed in implement of an obligation in a marriage-contract, the trust purposes, including the destination to the truster's heirs, being contained in the contract. In the case of *Meiklam's Trustees*, 15 D., 159, where an heritable bond was conveyed by the husband to marriage-contract trustees in implement of an obligation in the marriage contract to content and pay £30,000 to them, it was held that a surplus of that sum beyond what was required for the purposes of the trust, which the trustees were directed to pay and make over to the husband and his heirs and successors, was not heritable, and did not go to the heir-at-law, in respect of the heritable form in which it was conveyed to the trustees. In that case the Court looked to the obligation out of which the trust originated, which was simply to pay a sum of money. It was held that the character of the trust-fund was not altered by the fact that the trustees accepted, in implement of that obligation, an heritable investment which the husband offered them, any more than it would have been by their procuring such an investment from any other quarter. It appears to the Lord Ordinary that, in this respect, the present case is different in principle. The obligation undertaken by Mrs Simpson was to convey to the marriage trustees the sum of £10,000 contained in three several bonds specially set forth, viz., an heritable bond for £6500, and two moveable bonds for £3500, being her whole fortune, which then stood on these investments. This being so, the Lord Ordinary thinks that the constitution of the trust, and the directions for disposal of the fund, must be held to have relation to the estate as it was actually invested. The ultimate destination of the fund, on the failure of children, is truly a testamentary provision, and no part of the contract between the spouses, and must be dealt with on the principles applicable to such provisions. If Mrs Simpson had survived her husband, there being no children of the marriage, the sum of £10,000 conveyed by her to the trustees would, by the express terms of the trust, have been 'at her absolute disposal.' There can be no room

for doubt that in that event she would have been entitled to insist upon the trustees denuding in her favour of the several investments conveyed to them if they were still extant. The Lord Ordinary thinks that the same right must be held to have passed to her heirs, who are called to take in place of her, in consequence of her having predeceased the termination of the trust; that is to say, if the original investments had been now in existence her heirs would have been entitled to require the trustees to make them over to them. The right of the heirs being of this nature, and not a mere *jus crediti* for a certain amount of money, and the destination being in general terms to heirs, the Lord Ordinary thinks that it must be interpreted by reference to the nature of the subject, so as to give what was heritage at the constitution of the trust to the heir-at-law, and what was moveable to the next of kin. It is of no consequence that in fact the investments have been changed in the course of ordinary trust management, and that the whole funds are now heritably invested. In making the destination to her heirs, the truster must be held to have had in view the condition of the fund as it existed at the constitution of the trust, and as it might have continued to exist to the present time. She took full powers to alter or modify that destination in any way she pleased. It is only on her failing specially to dispose of the fund that it is to go to her heirs. The Lord Ordinary thinks that such a destination must be read as importing that, failing a special disposal of the fund by the truster, the right of succession in regard to it is to take place according to law. He sees nothing from which it can be inferred that Mrs Simpson intended by the conception of the trust in the marriage contract to set aside the ordinary rules of succession to her property as it then existed, in the event of the failure of issue of the marriage."

The next of kin reclaimed.

LORD ADVOCATE (YOUNG) and ASHER, for them, argued—The obligation on Mrs Simpson was to provide a sum of £10,000. Had there been a child of the marriage the balance of the £10,000 would have been heritable or moveable according as the trustees had set apart the provision from the heritable or moveable sum. The sum contributed by the husband was clearly personal, and meant to go to his next of kin: the presumption therefore is, the wife's funds were intended to go in the same manner. "Heirs" is a flexible term, not only as to the mode in which the funds are invested, but also as to the circumstances of the deed. Authority cited, *Meiklam's Trustees* v. *Meiklam*, 15 D., 159.

SOLICITOR-GENERAL (CLARK) and WATSON, for the respondent, were not called on.

The Court unanimously adhered, with expenses from the date of the Lord Ordinary's Interlocutor.

Agents for the Reclaimers—Paterson & Romanes, W.S.

Agent for the Respondent—Anthony Murray, W.S.

COURT OF JUSTICIARY.

Friday, October 22.

ROSS *v.* STIRLING.

Suspension—Expenses—Penalty—Public Houses Act—Summary Procedure Act. In a conviction obtained under the Summary Procedure Act for a breach of section 16 of the Public Houses Act of 1862 the defender was found liable in expenses as well as penalty. *Held* that expenses cannot be awarded unless the special statute contravened allows them; and as from the form of the conviction the two parts could not be separated, that the whole must fall.

On Wednesday last, the 20th curt., a special diet of the High Court was held for hearing a bill of suspension of a sentence by the Justices of Peace for the county of Nairn, pronounced on 24th August last, whereby the complainer was found guilty of a contravention of the 16th section of the Public Houses Amendment Act, 1862, and fined in a modified penalty of 5s., with 35s. of expenses. The complainer, who is a brewer, was charged with retailing some bottles of ale outside his premises on a market day; and the proceedings took place under the Summary Procedure Act 1864, and at the instance of the chief constable, as Procurator-Fiscal. In consequence of the last mentioned Act limiting the time for any prosecutions for repetition of penalties illegally imposed, or for damages in case of wrongous proceedings, to two months from the date of the cause of action, the complainer a few days previously applied for an early hearing, and in consequence the Justiciary Court met as above.

BRAND, for the suspender, argued—That in awarding expenses against the complainer Ross, and authorising immediate imprisonment unless paid, the Justices acted in direct violation of the statutes, and assumed a jurisdiction not conferred upon them. They were only entitled to sentence the complainer "to pay a fine not exceeding £10, and failing payment, to imprisonment for a period not exceeding sixty days." This was neither a case of breach of certificate nor of trafficking without a license, both of which were separate offences dealt with under other clauses of the Act of Parliament, and in which expenses were expressly authorised to be recovered. The prosecutor, therefore, in pressing for costs in addition to the penalty, acted contrary to the 22d section of the Summary Procedure Act, which only allowed expenses (even though not craved for) to public prosecutors when such were specially authorised to be levied by the Act or Acts contravened. The prosecutor, Mr Stirling, in fulfilling his statutory duty of stating in the body of the complaint "the nature of the forfeiture or penalty and the alternative," had made an unwarrantable addition by including therein "the costs of conviction" as part of the consequences of contravention, and thereby had misled the Court; and if he specified any particular section of the Act libelled, he ought to have specified every section on which he meant to found, especially in regard to his right to claim costs, so as to prevent the suspender and the Justices from being misled as to the extent of the latter's powers.

FRASER, for the respondent, replied, that suspension in the Court of Justiciary was here incompetent, since the sole ground of challenge appeared to be an excess of jurisdiction on the part of the Justices, in which case a reduction in the Court of Session was the proper mode of review; and that, in any view, the power of levying costs in the above particular class of cases was to be implied from the terms of the 25th section of the Summary Procedure Act, enacting that prosecutions for recovery of "penalties, together with the costs of prosecution and conviction," should be raised in the