The case seemed too clear for argument, and accordingly I decided the case at the end of the debate. Upon re-consideration of the case I still adhere to the view of the case I took at the time.

But that does not interfere with our judgment in this case. The deceased lady here was the fiar, and she only could build the house, or give consent to its being built. She got money to build it with. Now, it does not matter in the least that it was her husband who provided the money, it would not have been different if she had obtained the money from any third party, unless it was given in donation. But the view that this sum was given to the wife as a donation and was revocable, and so was revoked, was not persisted in, and, indeed, there can be no revocation; the money was given to build the house, and there the house stands. That being the case, the idea that the sum was given by the husband to the wife as a donation is out of the question. I think the case is quite clear, and agree with your Lordship's judgment.

Lord Craighill—I am of the same opinion. It appears that the pursuer, having right of administration of his wife's property, made improvements upon this property at Stranraer. I think that the pursuer was acting in his own interest and convenience in making those improvements, and merely took an opportunity of carrying into effect these improvements at a cost defrayed by himself. He is not therefore entitled to recover the value of these meliorations from the heir-at-law of the late proprietrix. I do not think that in this case the pursuer has shown any ground on which he is entitled to succeed. The spending of this sum of money was not a donation to his wife, nor was there any error, which is necessary in a claim for recompense.

Lord Rutherfurd Clark—I am of the same opinion as your Lordships, and think that the defender ought to be assoilzied. I do not think that in the circumstances a case for recompense arises. I would prefer to put my judgment upon another ground—upon a peculiarity which arises in this case. The pursuer has no right of title to this house, nor did he have any through his wife; he had no right even to possession. No doubt under the circumstances of their marriage he had the *jus mariti* and the right of administration to his wife. But these powers gave him no right either to title or to possession. The Lord Ordinary says in his interlocutor—"Finds that such meliorations were made by the pursuer for his own benefit as a temporary possessor, in virtue of his *jus mariti* and right of administration of his wife's property." I never heard of the *jus mariti* giving a husband the right of possession over his wife's heritable property, and in any dealings with the wife's heritable property, so far as the *jus mariti* is concerned, the husband is in no way different from a total stranger. Of course when the rents of the heritable property are paid he may claim them under his *jus mariti*, because they then become part of his wife's moveable property. But with respect to his wife's heritable property he has no right to it whatever. There is nothing in this case but this. While the life-rentrix was in possession of the house she made or allowed to be made certain changes upon the house. I do not care where the money to make these changes came from. The only way in which that money could be recovered was by raising up a claim of debt against her estate—in the first place against her moveable estate, and if that was not large enough to satisfy the claim, then by proceeding against her heritable estate. But I do not see where any claim of debt can come in in this case, so that her executor may claim as his own any benefit made to the estate after her death. The claim must be for debt or nothing. As the money was given by her husband, it might be said that here was a case of donation; but that ground of claim has been rightly abandoned. I am therefore for assoilzieing the defender, but I confess I do not like the form of the Lord Ordinary's interlocutor.

The Court pronounced this interlocutor:—

"Find that the subjects libelled were ameliorated on the order of the pursuer and at his cost, and that the consequent increase in the value of the subjects is not less than £350: Find that the defender is under no obligation to make a compensatory payment to the pursuer for the value of the said meliorations; therefore refuse the reclaiming-note: Of new assoilzie the defender from the conclusions of the action, reserving to the pursuer all claims competent to him for the use of his gable adjoining the said subjects: Of new find the defender entitled to expenses in the Outer House: Find him entitled also to expenses in the Inner House," &c.

Counsel for Pursuer — Darling — Graham Murray. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Defender—J. P. B. Robertson—Low. Agents—Morton, Neilson, & Smart, W.S.

Thursday, May 27.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

LIFE ASSOCIATION OF SCOTLAND *v.* CAMPBELL SMITH AND OTHERS.

Obligation—Delivery—Mandate—Death of Signatory of Bond before it was Delivered.

A bond for money to be advanced was subscribed by one of the co-obligants, who thereafter died while the bond was in the hands of the agent of the borrowers, and before it had been delivered to the lenders. The borrowers' agent thereafter delivered the bond to the lenders in return for the money. *Held* that the implied mandate to the borrowers' agent to deliver had fallen by the death of the obligant, and that therefore the bond must be considered as undelivered in a question with his representatives.

This was an action at the instance of the Life Association of Scotland against John Campbell Smith, Sheriff-Substitute of Forfarshire at Dundee; Patrick Don Swan, Provost of Kirkcaldy; and William Andrew Douglas, merchant, Dundee, executor-dative of the deceased Andrew Douglas,

conjunctly and severally or otherwise severally, for payment of the sum of £6868, 14s., being the balance alleged to be resting-owing by the defenders of a bond for £15,000, which they along with certain other persons had subscribed as co-obligants. The bond in question was for money to be advanced to the Athole Hydropathic Company, Limited, of which the obligants were directors. The original amount contained in the bond, viz., £15,000, had been reduced by payments to account made by the other co-obligants. Defences were lodged for Campbell Smith and Douglas' executor.

The present question related to the liability of the executor of Mr Douglas, in regard to which the following were the facts:—The bond in question was signed by Mr Douglas on 11th May, and then handed to the secretary of the Hydropathic Company who held the bond, and was in course of having it executed when Mr Douglas died on 4th July. The bond was not delivered to the lenders, the pursuers in this action, until 24th July. Prior to that date Mr Douglas' agent interpelled the secretary of the Hydropathic Company from proceeding further, and intimated that nothing was to be done to increase Mr Douglas' liability in the matter.

The defender Douglas pleaded—"(1) The defender William Andrew Douglas is not liable to the conclusion of the action, in respect (1st) that the said Andrew Douglas died, and *separatim* his death was known prior to the completion and delivery of the bond; (2d) That the bond was delivered without the authority and contrary to the instructions of the said Andrew Douglas or his representatives."

The Lord Ordinary (KINNEAR) on 27th March 1886 assoilzied the defender Douglas.

"*Note.*—The case against the representatives of Mr Andrew Douglas is based exclusively upon his subscription of a bond which was admittedly not delivered until after his death. For the averment is that the money was advanced 'in exchange for the bond' on the 24th of July, and Mr Douglas died on the 4th. It is not alleged that he had contracted any obligation either to the pursuers or to his co-directors otherwise than by his subscription of the bond. The pursuer's case therefore is that the mere subscription of a deceased person to a bond will bind his representatives in repayment of money advanced to other persons after his death. It appears to me to be a sufficient answer that in a question with his representatives the bond must be considered as undelivered, for it was not delivered by him, and any authority which he might have given to an agent to deliver it would fall by his death. I should have thought the pursuers' averments therefore irrelevant independently of the special case stated in answer by the defenders. But they aver that the bond after being subscribed by the deceased was left in the hands of the secretary of the company for the purpose of getting it executed, and it may be assumed that he had a mandate from Mr Douglas, as well as from the other directors, to deliver it in exchange for the money advanced by the pursuers; but so far as Mr Douglas was concerned the mandate was revoked by the letters of his agent Mr Thomson, for Mr Thomson intimates at a time when no liability had been incurred by Mr Douglas—because the bond had not been delivered nor the money advanced—that 'nothing is to be done to increase Mr Douglas' liability in this matter.' Now, it is clear that, notwithstanding his subscription of the bond, Mr Douglas was entitled to withdraw from the contemplated obligation at any time before a binding contract was completed by delivery of the bond in exchange for the money. And I think Mr Thomson's letter was a very distinct intimation that the secretary of the company was not to fix Mr Douglas with a liability which had not as yet attached by the delivery of the bond bearing his subscription.

"It is not suggested that the bond was delivered by anyone but the secretary, or that anyone else had a mandate to deliver it on Mr Douglas' behalf. I think the secretary's mandate was expressly recalled. But if it were not recalled expressly, it fell by the death of the mandant.

"It is said that if the contract was not completed Mr Douglas' subscription was equivalent to an offer which might be accepted after his death as against his representatives. An unaccepted offer will fall like any other authority by the death of the party making it. But it is not said that the offer was made in any other way than by delivery of the subscribed bond, and the question therefore comes back to the point already considered, viz.,—Whether the bond was delivered on behalf of Mr Douglas or his representatives by virtue of any subsisting mandate.

"The question whether Mr Smith will be relieved by the release of Mr Douglas' representatives may depend upon matters of fact, as to which the parties are not agreed."

The pursuers reclaimed, and argued—The bond was delivered before Douglas' death in the only way in which it would ever have been delivered even if Douglas had lived, viz., by signing it, and passing it on to be signed by the next person. There was no reason why a bond should not be delivered *quoad* one of the persons subscribing, and yet not delivered *quoad* another.—*M'Donald*, July 5, 1810, F.C.; *Paterson* v. *Bonar*, March 9, 1844, 6 D. 987; *Mair* v. *Thom's Trustees*, Feb. 20, 1850, 6 D. 748; *Scottish Provincial Assurance Co.* v. *Pringle*, Jan. 28, 1858, 20 D. 465; *Simpson* v. *Fleming*, Feb. 3, 1860, 22 D. 679.

Counsel for the respondents were not called on.

At advising—

LORD PRESIDENT—I do not think that we need call for any answer in this case, for I think the ground of the Lord Ordinary's judgment is unimpeachable.

It must be kept in mind that the delivery of a deed is a question of fact, not one of law or of legal inference. The condition of matters here was that the bond had been subscribed by Mr Douglas, but was held by the secretary of the Hydropathic Company—that is to say, by the agent for the borrowers, and no money had been advanced. Therefore the bond was *de facto* undelivered when Mr Douglas died. No doubt the secretary of the Hydropathic Company would have been quite entitled if nothing had intervened, on the bond being subscribed and the money advanced, to deliver it to the pursuers in return for the money. For

there was clearly a mandate by the subscriber to the secretary to deliver the bond in exchange for the money. But Mr Douglas died while the deed was undelivered, and thus the mandate to deliver, or conditional mandate to deliver in exchange for the money, fell by the death of Mr Douglas. Therefore the deed being undelivered when Mr Douglas died he could not be bound by it, and his executors cannot be bound by it.

I think that is quite sufficient for the disposal of the case.

LORD SHAND—I am entirely of the same opinion. This document was held by the secretary under a mandate that when the deed was completed the transaction should go on. But the death of Mr Douglas put an end to the mandate, and therefore I think there was no delivery of the bond.

LORD ADAM concurred.

LORD MURE was absent.

The Court adhered.

Counsel for Pursuers — Pearson — Graham Murray. Agents—Melville & Lindesay, W.S.

Counsel for Defender Douglas—Hay. Agent —George Andrew, S.S.C.

Saturday, March 20.

OUTER HOUSE.

[Lord M'Laren.

MACKINTOSH *v.* YOUNG.

Process — Sheriff — Expenses — Extract — Sheriff Court Act 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 32.

Held (by Lord M'Laren, Ordinary) that sec. 32 of the Sheriff Court Act 1876 has altered the rule of the common law that the final extract of a decree on the merits puts an end to the cause, and prevents any further decree for expenses.

Therefore where a pursuer having obtained decree for a sum and been found entitled to expenses, obtained an extract of the decree on the merits, without waiting till the expenses were taxed and decerned for—*held* that he was not thereby precluded from subsequently obtaining and doing diligence upon a decree for the taxed amount of the expenses.

Section 32 of the Sheriff Court Act 1876, which occurs in Part VI. of the Act, being the part relating to appeals, provides that "notwithstanding anything contained in section 68 of the Court of Session Act 1868, extract of any judgment, decree, interlocutor, or order pronounced in the ordinary Sheriff Court may be issued at any time on the expiration of fourteen days from the date thereof, unless the same shall, if competent, have been sooner appealed against." . . .

An action of damages was brought against Mackintosh, the complainer in this process of suspension, in the Sheriff Court of Forfar, in which the pursuer John Duff obtained decree for a sum of damages, and was found entitled to expenses. On 17th September 1885 he extracted the decree for damages as a final decree on the merits.

The account of expenses were thereafter taxed at £26, but the Auditor's report was objected to by the pursuer. At the discussion on the Auditor's report Mackintosh maintained that the decree on the merits having been extracted, the cause was at an end, and the pursuer could not get decree for any expenses, the ground of this contention being that he had already extracted the decree on the merits.

The Sheriff-Substitute (ROBERTSON) on 29th October 1885 rejected this argument, and approved the report, and gave decree for taxed expenses, £26; but by a subsequent interlocutor, on the motion of the pursuer's agent, W. G. R. Young, the respondent in this process, allowed the decree to go out in his (Young's) name as agent-disburser.

Young then extracted the decree for expenses and charged Mackintosh thereon. Mackintosh brought this note of suspension of the charge.

The Lord Ordinary on the Bills passed the note, observing in his *note* that there was authority on the point—Dove Wilson's Sheriff Court Practice (3d ed.), 197; Mackay's Practice, i., 613; *Town Counsel of Rothesay* v. *Macneill*, M. 12,188; *Beveridge* v. *Liddle*, May 21, 1852, 14 D. 772; and observations on that case by Lord Justice-Clerk Inglis in *Taylor* v. *Jarvis*, March 20, 1860, 22 D. 1034.

The process was marked to Lord M'Laren.

Argued for the complainer — The law up to 1876 clearly was that after final decree on the merits the clause was exhausted, and therefore no subsequent decree as to expenses was competent. It was said that section 32 of the Act of 1876 altered this, but that section only applied to appeals, and did not affect the point now in controversy. *Tennant* v. *Romanes*, June 22, 1881, 8 R. 824, was not adverse, as the point was not really considered in that case.

The respondent argued that section 32 of the Act of 1876 had altered the former law, assuming it to stand as the complainer maintained. He founded on *Tennant* (*supra*).

The Lord Ordinary (M'LAREN) refused the suspension.

"*Opinion.*—In this case a suspension has been brought of a charge on a decree for expenses in the Sheriff Court of Dundee, and the ground of suspension is that judgment was given in the Sheriff Court action, and extracted before any decree was given for expenses. Expenses were found due, but were not taxed or decerned for. It is contended by the complainer that after decree on the merits has been extracted the case is at an end, and that no further decree can be given in the cause. It is admitted that review would not be competent of the Sheriff's decree for expenses, by way of appeal, because it has been settled that no appeal lies on a decree for expenses. But then it is said that although review would not be competent in that way it may be competent by suspension of the charge. Now, if it were necessary to consider the point, I should be disposed to think that the same considerations of convenience that led the Court to reject the appeals on matters of expenses should equally apply to the mode of review which is now sought. There is nothing statutory as to review