cause of death in January following.

The history of the deceased's case is somewhat remarkable. In 1883 he was under medical treatment for the same disease as he actually died of. Again in 1884 he was ill from the same cause. He was twice ill in 1886 from the same cause, and in 1887 before the illness could have been caused by the accident he was once ill. It is clear and certain that on all these occasions the symptoms were not set up by an accident.

Now, with that history before us, we come to the fact that he did meet with an accident. For five weeks after it he showed no symptom of the haematuria, which had manifested itself previously, but after five weeks the same symptoms showed themselves as had appeared on the five or six previous occasions, and the illness resulted in death.

Whatever the illness was from which he was suffering, can we take it that he was a sound man in October 1887? Whether it was Bright's disease or not is of no consequence. In these circumstances I think there was no connection between the accident and the death, and unless the former was at least a cause and the other the effect the pursuers have no case.

I am therefore for adhering to the interlocutor of the Lord Ordinary. The Lord Ordinary has said something about acceleration, but in my view that is not in the case.

LORD YOUNG—I am of the same opinion, and I only wish in a single sentence to say that I give no opinion upon the clause in the policy about natural disease and that I express no opinion upon the views of the Lord Ordinary as to the accident having accelerated the death. The case before us is that the insured sustained a bodily injury caused by an accident, which injury directly caused death within three months. That must be established to enable the pursuers to recover under this policy.

I think it is not proved at all that this injury within three months caused death. The evidence does not enable us satisfactorily to attribute the death to the accident.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court pronounced the following interlocutor:—

"Find that the deceased John M'Kechnie was disabled for three days wholly, and for nine weeks partially, by a fall from a Whitechapel cart, and that the defenders are due to the pursuers, his executors, the sum of £13, 15s. sterling in respect thereof: Find that it is not proved that the bodily injury sustained by him by the said fall caused his death: Recal the interlocutor of the Lord Ordinary reclaimed against: Ordain the defenders to make payment to the pursuers of the said sum of £13, 15s., with interest thereof at the rate of £5 per cent. per annum from the date of citation to this action till paid: *Quoad ultra* assoilzie the defender from the conclusions of the action: Find the pursuers entitled to expenses to the date of closing the record, and find the defenders entitled to expenses subsequent to that date," &c.

Counsel for the Pursuers—M'Kechnie—G. W. Burnet. Agent—D. Maclachlan, S.S.C.

Counsel for the Defenders—Jameson—Crole. Agents—J. & R. A. Robertson, S.S.C.

Friday, October 25.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

HENDERSON *v.* HENDERSON.

Husband and Wife—Jus mariti—Married Women's Property (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 21), *sec.* 4.

The Married Women's Property (Scotland) Act 1881 permits parties married before July 18, 1881, to declare by mutual deed that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by the Act; and provides that upon registration and advertisement of this deed as specified, the said estate shall be vested in the wife, and subject to the provisions of the Act.

A woman who possessed the stock and plenishing of a farm and the furnishings of an inn was married in February 1881. The spouses voluntarily separated in November 1882, and the husband allowed his wife to retain possession of the stock and plenishings of the farm and inn. He made no allowance for aliment. In 1888 the spouses were mutually divorced.

Held that the stock and furnishings which had passed to the husband *jure mariti* remained his property, as no mutual deed under sec. 4 of the Married Women's Property Act of 1881 had been executed, and as there was no evidence of intention on the husband's part between 1882 and 1888 to re-transfer this property to his wife.

This was an action whereby Andrew Henderson, blacksmith, Slains, Aberdeenshire, called upon Isabella Burd or Henderson, his wife, to produce an account of her intromissions with the estate which fell to the pursuer in virtue of his *jus mariti*. The parties were married in February 1881. There was no antenuptial marriage-contract between the spouses, and at the date of their marriage the defender was possessed of the stock and implements on a small farm of which she was tenant, as well as of the furniture, stock, and other effects in the inn at Whiteness, of which she was also tenant.

The spouses separated in November 1882, at which date the defender remained in

possession of the stock and furniture and continued to carry on her business as she had done previous to her marriage.

In January 1888 the defender raised an action of divorce for adultery against her husband, the pursuer, and in March of the same year the pursuer raised a counter action of divorce for adultery against the defender.

On 22nd June 1888 decree of divorce was pronounced against both spouses.

The pursuer claimed the stock, implements, and furniture of the farm and inn.

It appeared from the proof and subsequent proceedings that when the spouses voluntarily separated in 1882 an inquiry into the accounts of both was made with the assistance of Mr Raeburn, a solicitor. The pursuer resumed his business of a blacksmith, and the defender continued to occupy the inn and farm, and to maintain herself by this means. The pursuer did not make the defender any allowance in name of aliment in 1882 when the separation took place, but he left her in possession of the stock and furniture of the inn, and of the crop and implements of the farm. The pursuer was asked by Mr Raeburn to execute a deed under the Married Women's Property Act 1881, sec. 4, but refused, on the ground that he wished to have security against having to support his wife if she fell into poverty.

The Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21), sec. 4, provides—"It shall be competent to all persons married before the passing of this Act to declare by mutual deed that the wife's whole estate, including such as may have previously come to the husband in right of his wife, shall be regulated by this Act, and upon such deed being registered . . . and advertised . . . the said estate shall be vested in her . . . subject to the provisions of this Act." . . .

The defender pleaded, *inter alia*—"(3) The funds possessed by the defender at the date of her marriage to the pursuer not having fallen under the *jus mariti, et separatim*, the pursuer having abandoned any right which he might have acquired by the marriage over the same, the defender is entitled to absolvitor. (4) The said stock and furniture being no more than an alimentary provision for the defender, the pursuer's *jus mariti* does not extend to same. (5) The pursuer is barred by his own actings, and more particularly by his wilful desertion of the defender without contributing to her support, from maintaining the present action."

On 16th February 1889 the Lord Ordinary (Wellwood) found, *inter alia*, "as regards the said furniture and stock, that it must be held that the pursuer, when he left the defender as aforesaid, renounced or abandoned his right thereto, and to the earnings in the said business, and agreed that they should remain with and belong to the defender as an alimentary provision."

The pursuer reclaimed, and argued—The wife's property which fell under the *jus mariti* passed to the husband by the assignation of marriage, and the rights of the spouses were not affected by the Married Women's Property Act 1881, as the marriage took place some months before it came into operation. No mutual deed as provided for by sec. 4 of that Act was ever executed, and there was no re-transfer by the husband to the wife. Nor was there anything of the nature of an abandonment by the husband of his rights. The husband allowed his wife at the date of the separation to retain the stock and cropping of the farm and the furniture of the inn as a means of earning her livelihood, and instead of paying her aliment. He was not now claiming earnings, but merely the capital from which the wife supported herself so long as it was the husband's duty to aliment her. This ceased at the date of the decree in the mutual actions of divorce as to the rights of the spouses in such cases—*Fraser* v. *Walker*, June 21, 1872, 10 Macph. 837; *Ferguson* v. *Thomson*, January 30, 1877, 14 S.L.R. 277; Fraser on Husband and Wife, p. 1223. The Married Women's Property Act 1877, while it protected a wife's earnings in a business carried on by herself, did not transfer to her or protect stock in trade belonging to her husband, and used by her in her business—*Ferguson's Trustee* v. *Willis, Nelson, & Company*, December 11, 1883, 11 R. 261. Though the Court have frequently protected a wife's earnings in cases like the present, they have never gone the length of giving her back the capital.

Argued for the defender—The pursuer really deserted the defender, and it was the pursuer's intention that the separation should be permanent. Though no formal deed passed between the spouses, it was the full understanding of parties that the husband was to give up his rights in his wife's estates in return for being relieved of the burden of supporting her. When a husband left his wife in possession of articles belonging to him, and when he contributed nothing to her support, there was a presumption in favour of donation by him to her—*Rust* v. *Smith*, January 14, 1865, 3 Macph. 378; *Galloway* v. *Craig*, 4 Macq. 267. It was impossible for the husband now to plead that he was not aware of his rights at the date of the desertion, and that he left his wife in possession of the property now claimed through ignorance. The understanding between the spouses was acted upon for several years, and the pursuer could not now resile.

At advising—

Lord President—The parties were married on 17th February 1881. The pursuer was a blacksmith, carrying on apparently a thriving trade, while the defender was the widow of a person who had kept an inn at Whiteness in Aberdeenshire, and who also occupied a small farm of from 40 to 50 acres. It appears that he died in embarrassed circumstances, and left his widow nothing, but she contrived to buy from his executor the crop, stocking, and implements of the farm, and the furniture and spirits in the inn.

She thereafter continued to carry on

the same business as her late husband did in the inn and farm, and was engaged in doing this at the date of her marriage to the pursuer.

As the law stood at that date it cannot be disputed that the effect of the marriage was to transfer from the defender to the pursuer the property in the stock of the inn and farm, and consequently after the marriage that property belonged to the husband exclusively.

The next circumstance calling for notice is the separation of the spouses which occurred in November 1882, and it appears to me that the Lord Ordinary has taken rather an erroneous view of this occurrence. He deals with it as if it were a wilful desertion of the wife by her husband. I think that it was not so. On the contrary, it appears to me that it was a voluntary separation, and later events fully bear out this view, for in the subsequent mutual actions of divorce which were conjoined, and in which Lord Lee pronounced judgment on the 22nd June 1888, the allegations of desertion which were contained in the summons at the instance of the defender against her husband were found not proven, and the action was dismissed so far as laid on that ground. I think therefore it must be assumed that what occurred in November 1882 was not a wilful desertion of his wife by the husband, but a voluntary separation agreed upon between the parties. What followed upon this may be stated very shortly. The defender continued to occupy the inn and farm, and derived a profit from both, and it is not disputed that her earnings derived from this source belonged to herself, secured to her by the law as it then stood under the Conjugal Rights Act of 1861.

The object, however, of the present action is to recover from the defender the property of the stock of the inn and farm which belonged to her previous to her second marriage, but which became the property of her second husband in virtue of his marriage. It is now urged by the defender that because the pursuer allowed her to occupy the inn and farm, and therefore necessarily to use the stock and plenishing in these subjects for the purpose of earning a livelihood, he thereby re-transferred to her the property in them which was hers before her marriage to him. Now, I find no evidence of such intention on his part to re-transfer; indeed, I think the facts and circumstances all point directly to the opposite. I do not think he even contemplated such a thing. No doubt there were a series of communications carried on by Mr Raeburn, who seems to have acted for the defender, but also on the face of the evidence to have acted as a kind of friendly go-between between the parties. He appears to have urged on the pursuer the propriety of executing a deed under section 4 of the Married Women's (Scotland) Act of 1881. If he had done this, then no doubt the property would have been retransferred. Unfortunately for the defender the Act of 1881 only came into operation in July 1881, and the marriage took place in the preceding February. She therefore cannot be said to have taken any benefit from the statute unless by the consent of her husband, and by a deed executed in terms of section 4 of the statute, and that deed was not executed. On the contrary, the pursuer refused to execute it, and the reason he assigned for his refusal was, that he feared he might be called upon to support her in the event of her at any time being reduced to poverty. How is it, then, to be inferred that there was a re-transfer from the husband to the wife between 1882 and 1888 when the spouses were divorced? I am quite unable to find any evidence of such an intention on the part of the husband, and must therefore come to a different conclusion from that arrived at by the Lord Ordinary.

LORD SHAND—The amount claimed here by the pursuer is not very definitely stated, but I do not think that he can make out more to be due to him than £230. Upon the case as a whole I am of the opinion expressed by your Lordship, though I would willingly have taken the view the Lord Ordinary has done if I thought the grounds stated by him warranted his conclusions. Had the defender been married to the pursuer after the passing of the Act of 1881 no such claim as we have now to deal with could possibly have been urged. The Legislature considering it a hardship that property which belonged to a wife at the date of her marriage should go to her husband, amended this, and provided that on and after 18th July 1881 it should remain her own. We must, however, take the case as one in which upon her marriage in February 1881 everything belonging to the defender became the property of her husband. The question is, whether in consequence of the separation at the end of 1882, and of anything following upon it during the interval between that event and the date of the judgment in the mutual actions of divorce, anything occurred which had the effect of re-transferring, by arrangement or otherwise, the right to the crop and stocking of the farm and the furniture in the inn from the pursuer to the defender? I can find nothing in the evidence to lead me to this conclusion.

With reference to the cases, the only ones cited which have a bearing on the question are *Davidson* v. *Davidson*, 5 Macph. 710, which came before me as Sheriff of Kincardine, and *Jameson* v. *Houston*, M. 5898. In the latter case the spouses were separated from each other, and the wife, acquiring certain funds, was found entitled to keep them as her own property. In the former case the rents of a small subject, the property of a wife separated from her husband, were found to be an alimentary provision to the wife, and not attachable by the husband's creditors. It is easy to hold in the present case that earnings should go to a wife instead of an allowance for aliment, but we are asked to go a step further, and it is proposed that we should hold that the

wife here is entitled not only to retain the profits of a business which was so remunerative that she was able to lay by about £100, but that we should also infer from the circumstances of the case that the pursuer intended to re-transfer the capital by which this income was produced.

I cannot see from the facts of this case anything to warrant this inference. No doubt there was a clearing up of certain small accounts between the parties, and it was then arranged that the wife should carry on the inn and farm, and the husband his business as a blacksmith, and that the accounts of the different businesses should be kept separate. It was never suggested that the property of the subjects was in the wife; all that the pursuer did was to leave the furniture and the crop, stocking, and implements on the farm in order that the defender might from these sources earn enough to aliment herself.

I do not think that there was in this case anything like wilful desertion on the part of the husband; only a separation on the footing that the wife should aliment herself with the income which she should derive from the subjects. No doubt section 4 of the Married Women's Property Act 1881 allows parties married before the passing of the Act, if so disposed, to make a mutual deed declaring that the wife's whole estate, including such as may have come to the husband in right of his wife, shall belong to the wife, and upon the registration of such a deed the wife's estate becomes vested in her. The spouses had it in their power to execute such a deed if any transfer of the wife's property had been seriously contemplated. No such deed was ever executed, and in these circumstances I am of opinion upon the whole matter that the Lord Ordinary has come to a wrong conclusion, and that his interlocutor should be recalled.

LORD ADAM—Only one of the findings of the Lord Ordinary has been matter of discussion, and it is in these terms—"Finds, as regards the said furniture and stock, that it must be held that the pursuer when he left the defender as aforesaid renounced or abandoned his right thereto, and to the earnings in the said business, and agreed that they should remain with and belong to the defender as an alimentary provision." It appears to me that this finding is partly right and partly wrong. It is right in so far as it says that the pursuer renounced his right to the defender's earnings, but wrong in affirming his renunciation of the right to the property of the furniture or stock.

Upon the facts I do not think that the pursuer really knew of the existence of his rights till some time after the divorce proceedings. He did not know that by the law of Scotland he had a right to the moveable property which belonged to his wife at the date of the marriage. That, however, is immaterial, for I can find nothing to show that he intended to abandon his right to the property of the furniture and stocking. The defender was allowed by the pursuer to make use of them in order that she might earn her livelihood, and that he might be relieved from the burden of alimenting her, but it does not appear to me that he ever intended to make any re-transfer of the property of them to his wife.

I therefore agree with your Lordships that the Lord Ordinary's interlocutor should be recalled.

The Court recalled the interlocutor reclaimed against, repelled the defences, and decerned against the defender for £230.

Counsel for the Pursuer—Sol.-Gen. Darling, Q.C.—Rhind. Agent—Wm. Officer, S.S.C.

Counsel for the Defender—Young—Salvesen. Agent—D. Howard Smith, Solicitor.

Friday, October 25.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

INNES *v.* ADAMSON.

Reparation — Slander — Police Officer — Privilege—Malice.

A police constable raised an action of damages against a Chief Constable, stating that in the presence of two police officials the defender had maliciously and without probable cause slandered him by saying that he had given in a false report, that the said report was a lie, and that instead of attending to his duties he had merely been putting off his time.

Held that the defender was within his duty in admonishing his inferior officer in regard to the report made by him, and that as the pursuer failed to state facts and circumstances from which malice could be inferred, his averments were irrelevant.

Reparation — Wrongous Dismissal—Chief Constable—Police (Scotland) Act 1857 (20 *and* 21 *Vict. cap.* 72), *sec.* 6.

The Police (Scotland) Act 1857, sec. 6, provides—"The chief constable shall, subject to the approval of the police committee, appoint the other constables to be appointed for the county, and a superintendent to be at the head of the constables in each division of the county, and may dismiss all or any of them, and shall have the general disposition and government of all the constables so to be appointed, subject to such lawful orders as he may receive from the sheriff, or from the justices of the peace in general or quarter sessions assembled, and to the rules established for the government of the force in terms of this Act."

A police constable tendered his resignation to the Chief Constable of his district, who thereupon dismissed him from the force. Upon application to the Police Committee the constable was allowed to resign, and his salary