The present case seems to me to be clearly one for the application of these principles. We were referred to the case of *Whyte* v. *Whyte*, and to the decision of Lord Stowell which was there followed. Those were divorce cases; and some of what is said by Lord Stowell seems to rest on grounds peculiar to cases of matrimonial injuries. If, and in so far as, Lord Stowell's ruling had a wider application, I can only say that it does not appear to represent the present state of English practice, for the case of *Tolman* v. *Johnstone*, decided in 1860, 2 F. & F. 66, seems to be a case directly in point, and if followed would exclude the evidence now sought to be adduced.

I am for adhering to the interlocutor of the Sheriff. It may be right to add that, while the three articles are struck out of the record, this does not preclude the defender from being cross-examined about those two matters, for his credibility may be tested on matters going to character, although not relevant to the issues. Whatever his answer may be, however, it will not be competent for the pursuer to lead evidence on the subject.

LORD M'LAREN—I am of the same opinion. If we were to hold that the statements as to indecent assaults on other women were relevant topics of proof, it would necessarily follow that in an action of fraud it would be legitimate to allow the pursuer to prove that the defender had defrauded other persons under equivalent circumstances. So in an action of damages for negligence, it would be competent for the pursuer to prove neglect of duty by the defender under similar circumstances but affecting entirely different persons and interests. The proposal therefore involves a wide extension of the limits of investigation in actions of damages. It may also be observed that in this particular case the interests of third parties are affected by the proposed inquiry. Supposing the statements in question to be true, the publicity proposed to be given to them, and the examination of the women alleged to be assaulted, would be a cruel aggravation of the wrong already suffered, without any corresponding benefit to the pursuer's case, because, after all, the facts could only prove that it was probable that the defender committed the wrong alleged to have been done to this pursuer.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor of the Sheriff dated 12th December 1894, in so far as it finds that the averments in the second paragraph of article 2 and in articles 5 and 6 of the condescendence for the pursuer are to be held as deleted from the record as irrelevant, and are not allowed to be remitted to probation: Approve of the said issues as adjusted and settled, and appoint the same to be the issues for the trial of the cause: Find the defender entitled to the expenses of the discussion upon the relevancy,' &c.

Counsel for the Pursuer—W. Thompson. Agents—Douglas & Miller, W.S.

Counsel for the Defender—Glegg. Agents—Macpherson & Mackay, W.S.

Tuesday, February 26.

FIRST DIVISION.

[Lord Low, Ordinary.

STEWART *v.* GREIG AND OTHERS.

Heritable and Moveable—Succession—Conversion—Division and Sale.

J, the owner of a *pro indiviso* share of heritable subjects in Scotland, went to America, where he disappeared in 1873. In 1876 an action for division and sale of the common property was raised by one of the co-proprietors, in which a factor *loco absentis*, who was appointed to J, appeared on his behalf. The property was ultimately sold by the direction of the Court, and J's share of the proceeds handed over to the factor *loco absentis*. A petition was subsequently presented under the Presumption of Life Limitation Act 1891, in which it was found that J. must be presumed to have died in 1880.

In a competition between J's heir-at-law and heirs *in mobilibus*, *held* (*aff.* judgment of Lord Low) that the effect of the sale was to convert J's *pro indiviso* right of property into a right to a sum of money, which on his death fell to his heirs *in mobilibus*.

John Macfarlane was the owner of one-sixth part *pro indiviso* of heritable subjects in Bridgeton and Gallowgate, and of one-seventh part *pro indiviso* of heritable subjects in Robertson Street and Commerce Street, Glasgow. In 1871 he went to America, and was not heard of again after 7th April 1873. He was never married, and in a petition presented in 1873 under the Presumption of Life Limitation Act 1891 it was found that "Macfarlane shall be presumed to have died on 7th April 1880."

In 1876 an action for division and sale of the common property in which John Macfarlane was interested was raised by John Hay Clarke, one of the co-proprietors.

Alexander Stewart, accountant, Glasgow, was thereafter appointed factor *loco absentis* to John Macfarlane, and he appeared in the action of sale and division. In 1877 the properties were sold by order of the Court, and the proceeds divided among the joint-proprietors, the amount due to the factor *loco absentis* being fixed at £2292, 8s. 3d.

Before John Macfarlane left the country he had authorised Alexander Stewart, who was then managing the properties, to pay over his share of the rents to his mother Mrs Macfarlane.

Alexander Stewart accordingly after the

sale, having uplifted the share of the price due to John Macfarlane, invested it, and paid the interest to Mrs Macfarlane till her death on 4th February 1893.

On 12th January 1894 Alexander Stewart, the factor *loco absentis*, died, and Archibald Stewart was appointed judicial factor on the estate.

Questions having arisen between the heir-at-law and the heirs *in mobilibus* of John Macfarlane, as to whether the sum of money invested as above narrated fell to be treated as heritable or moveable for succession purposes, an action of multiplepoinding was raised by the judicial factor against them.

Claims to the fund were lodged by William Stocks Macfarlane, as heir-at-law of John Macfarlane, and by Jane Stocks Macfarlane or Greig and others, as his heirs *in mobilibus*.

On 17th November 1894 the Lord Ordinary (Low) found "(1) that the interest of John Macfarlane, sometime clerk or warehouseman in Glasgow, thereafter residing in Boston, in the United States of America, in the *pro indiviso* shares of the properties mentioned on record was, in virtue of the sale which took place under the process of division and sale also referred to on record, converted from heritable into moveable estate, and now falls to be divided among his heirs *in mobilibus* as accords of law," &c.

"*Opinion.*—John Macfarlane, whose heir-at-law and next of kin are the claimants in this action, was in right, as heir-at-law of his deceased father, to one-sixth part *pro indiviso* of certain house property in Glasgow.

"Macfarlane went to America in 1871, where he disappeared in 1873. It has been found in a petition presented under the Presumption of Life Limitation Act of 1891, that Macfarlane 'shall be presumed to have died on 7th April 1880.'

"In 1876 an action for division and sale of the common property was raised by one of the co-proprietors. A factor *loco absentis* was appointed to Macfarlane, and entered appearance in the action. The property was ultimately sold under the orders of the Court, and the price divided. The share falling to Macfarlane amounted to £2292.

"The question now is, whether Macfarlane being presumed to be dead, his share of the price of the common property goes to his heir-at-law, or falls to be divided among his next of kin.

"The heir-at-law argued that a compulsory sale of the property, carried through after Macfarlane had disappeared, could not affect the character of his right *quoad* succession, and that the share of the price must be dealt with as a *surrogatum* for the right to the property.

"The next of kin on the other hand argued that the property having been converted into money by a compulsory sale, Macfarlane thereafter became entitled to a sum of money and to nothing more, and that the succession to him is a succession to a sum of money and to nothing else.

"The two authorities chiefly relied on by the heir were the cases of *Gardiner* v. *Spalding*, M. 730, and *Garland* v. *Stewart*, 4 D. 1.

"The report of the former case is very meagre, but the circumstances of the case and the true import of the judgment will be found in the opinions of The Lord Justice-Clerk and Lord Ardmillan in the case of *Heron* v. *Espie*, 18 D. pp. 930 and 954.

"It appears that the creditors of David Spalding, who was infeft in certain lands, brought an action for judicial sale of these lands. Before the sale was carried out David died, leaving as his heir-at-law a son, Daniel, who was an idiot. The lands were sold during the lifetime of Daniel, who was possesssing on apparency. There was a surplus after paying the creditors, at whose instance the action of sale had been brought, and a creditor who had not ranked in the process, being a personal creditor, arrested the balance of the price. The only question appears to have been whether the arrestment was a competent diligence to attach the fund, and the Court held that it was not. The ground of the decision appears to have been that there having been no sale, and therefore no conversion when David died, and Daniel having then acquired the right of an heir possessing on apparency, the creditor could only get at the reversion by adjudging the heir's title.

"Now, it seems to me that a decision pronounced in such circumstances, and upon such a question, has no bearing upon the present case. Creditors, bringing an action of ranking and sale, have a right to sell only for the purpose, and to the effect, of paying their debts. As the action was seldom resorted to unless the debtor was hopelessly insolvent, I apprehend that a reversion after payment of the debts was a rare occurrence. If, however, the debts were fully paid by the sale of a portion only of the lands, it is clear that the creditors would not be entitled to proceed further, but that the unsold lands would revert to the debtor. I rather think that the Court in the case of *Gardiner* regarded the surplus of the price as representing so much of the lands as did not require to be sold in order to pay the debts and which therefore the creditors had no title to sell. If, however, the judgment was intended to affirm that, in the ordinary case, a compulsory sale of lands does not convert the lands into money so as to pass to executors or next of kin, unless the proprietor has in some way indicated his intention that such shall be the result, I am of opinion that it is not consistent with the later decisions, and especially that of *Heron* v. *Espie*.

"The case of *Garland* v. *Stewart* was also a very special case, and I cannot look upon it as an authority in favour of the heir's contention, although some of the *dicta* of the learned judges may be regarded as favouring the view that the price of land belonging to an absent person, which is sold compulsorily under Act of Parliament, is a *surrogatum* for the land and passes to the heir.

"The considerations, however, upon which the judgment seems chiefly to have

turned, were (1) the terms of the Act of Parliament under which the lands were taken, and which the Lord President said 'preserves the interests of parties, and prevents the right from being innovated, and therefore the property must be considered as heritable;' (2) the circumstances were such that the Court held the presumption to be that the absentee died soon after 1804, and in that case the heir (who claimed the price) must have succeeded prior to the sale, which did not take place till 1812; and (3) the heir offered caution to repeat.

"Turning now to the authorities relied on by the next-of-kin, there is first the case of *Graham* v. *Earl of Hopetoun*, M. 5599. Lord Hopetoun was tutor-dative to the Marquis of Annandale, who was insane, and was also his heir-at-law. Upon the death of the Marquis, his executors brought an action of accounting against Lord Hopetoun. One of the questions raised (the fifth in the report) was whether Lord Hopetoun or the executors had right to the price of teinds of which the Marquis had been titular, and which the heritors had purchased under a decree of sale of the Teind Court. Lord Hopetoun contended that the succession to a lunatic could not be altered by compulsory sale of his property, but the Court preferred the executors, giving effect to the argument that 'the subject in question was rendered moveable by the operation of a general law, from which the estates of pupils or fatuous persons are not exempt.' That case appears to me to be an authority clearly in favour of the next-of-kin.

"Then in the case of *Lord James Stewart*, 17 D. 376, Lord Benholme stated the law thus:—'When a part of the property of a fee-simple proprietor is carried away from his heir by the act of the law for a price or consideration, that latter is not held to any effect as a *surrogatum* for the former.' His Lordship then referred to the case of *Graham* as an authority in point.

"Lord Benholme's statement of the law in that case may be said to be merely *obiter dictum*, as the question was not directly raised in the case, but I quote it because it appears to me to be a very succinct statement of what was decided a year afterwards in the leading case of *Heron* v. *Espie*.

"I am therefore of opinion that when the joint-estate was sold at the instance of one of the common proprietors, Macfarlane's *pro indiviso* right of property was converted into a right to a sum of money, which, upon his death, fell to his heirs *in mobilibus ab intestato*, and not to his heir-at-law." . . .

The claimant, William Stocks Macfarlane, reclaimed, and argued—Where the owner of property was absent or *incapax*, and thus unable to give his consent or opposition to its sale, the proceeds were treated as *surrogatum* of the property and went as it would have gone. There was thus no conversion, and the price obtained must be treated as heritable and go to the heir-at-law. The case of *Gardiner* v. *Spalding*, 1779, M. 730, supported this proposition directly. In that case the heir-at-law was an idiot with a tutor, and it was held that the surplus of the sale of lands after the payment of creditors could not be attached by arrestment, that is to say, there was no conversion, the owner being *incapax*, and the tutor not being able to operate conversion by his consent. The case was analogous to the present one, and the Lord Ordinary's criticism of it was inapplicable. The case of *Garland* v. *Stewart*, November 12, 1841, 4 D. 1, was also directly in favour of the reclaimer's view. The Lord Ordinary's three points against its authority were not applicable, for (1) the statute there did not touch the question at all, the rights of heir and executor being left as they were when the sale took place; (2) there was no warrant in the opinions of the judges for the statement by the Lord Ordinary, that they founded their judgment on the idea that the heir must have succeeded before the sale took place; and (3) the fact that the heir offered caution to repeat disproved this second proposition as he would never have been asked to do so if the Court had been satisfied that his predecessor was dead. There was nothing in the case of *Heron* v. *Espie*, June 3, 1856, 18 D. 917, to displace this authority. There the sale was absolutely compulsory, and the owner took no steps to reconvert the proceeds into heritage, but acquiesced in the change. Here the sale was not absolutely compulsory, in the sense that the proprietor, if he had had the chance, might have bought in his co-owners' shares, and so preserved his own in a heritable form. He was thus in a different position from the ward in the *Earl of Hopetoun's* case or the proprietor in *Heron* v. *Espie*. The *dictum* of Lord Benholme in the case of *Lord James Stewart*, February 10, 1855, 17 D. 378, was true in the case of a proprietor who was present or represented at the sale but did not apply here.

Argued for the respondents—The general rule in law was that if property was sold compulsorily during the life of the proprietor, the question as to intestate succession to it was to be settled as at the time of his death. Here it was moveable at that time, and therefore it must go to his next-of-kin. The *onus* of showing any case to be an exception to the ordinary rule lay upon anyone disputing it. The exception to the rule was the case of a tutor selling the property of a ward which did not operate conversion, but that did not apply here. Thus in *Kennedy* v. *Kennedy*, November 15, 1893, 6 D. 40, the voluntary act of a curator did not affect conversion, because it was not an act which could not be resisted by law. Here, on the other hand, the sale was a compulsory one, and the proprietor could not really have resisted it—*Graham* v. *Earl of Hopetoun*, M. 5599. The cases quoted by the reclaimer were inapplicable for the reasons given by the Lord Ordinary. The case of *Lord James Stewart*, as commented on and explained in *Heron* v. *Espie*, supported this argument. Moreover, the presumed intention of the proprietor could not affect the question of succession—*Ram-*

say v. *Ramsay*, November 15, 1887, 15 R. 25.

At advising—

LORD M'LAREN—The Lord Ordinary in my opinion has rightly decided this case, and on right principles, and I should be content to rest my judgment on his Lordship's opinion. But the case is interesting as presenting a new application of principles which have been much discussed, and as to which there is a considerable body of authority, and it is proper that I should state the facts and arguments which lead to the conclusion in which I concur.

The question is between the heir and the executors of the deceased John Macfarlane, who each claim to be entitled to the price of certain heritable subjects in Glasgow, which were sold in virtue of a decree pronounced in a process of division and sale. John Macfarlane went to America in 1871, and it has been found, in a petition presented under the Presumption of Life Limitation Act of 1891, that Macfarlane "shall be presumed to have died on 7th April 1880." In 1876 an action for the division and sale of the common property was raised by one of the coproprietors. A factor *loco absentis* was appointed on Macfarlane's estate, and the property was judicially sold. Macfarlane's share of the price (£2292) is the subject of the competition in the present action of multiplepoinding. It will thus be seen that the death of Macfarlane is presumed to have taken place after the sale, and the case must be treated as that of an involuntary sale by a factor *loco absentis* for a person in life.

The next-of-kin claim the price as being moveable estate of the deceased at the time of his death; the heir contends that this is a case of conversion by a person having only an administrative title to estate, and that such conversion ought not to have the effect of altering the quality of the estate for the purposes of succession.

Where heritable property is sold by the direct act of the owner, his succession, of course, depends on the quality of the right which he had in the subject of the succession at his death. Accordingly, where the contract of sale has not been followed by a conveyance, the heir is under obligation to convey the estate in implement of the contract, while the executor is entitled to receive the price which by contract was vested in the seller. To this rule I think there is no exception. The case of *Heron* v. *Espie* determined that the rule applies to involuntary as well as to voluntary sales, and, while the case certainly gave rise to differences of opinion on the bench, I think it has been generally recognised that the case was well decided, and that the circumstance that the sale was effected under the compulsory powers of the Lands Clauses Act was no reason for depriving the executor of the right to the price, which was the only right remaining in his ancestor after the contract of sale had taken effect. I need hardly point out that the principle of *Heron* v. *Espie* would regulate the rights of the heirs and the executors in the case of a sale under a process of division and sale, because this is just a particular case of an involuntary sale.

The present case, however, is said to contain a new element, because the decree of sale was granted in a process in which Macfarlane was not represented directly, but only through a judicial factor. Now, this appears to me to be at best a very shadowy and unsubstantial distinction, because, if Macfarlane had known of the case and had instructed counsel to attend to his interests, they could not have done anything more for him than was done by the judicial factor. They could not have disputed the right of the co-proprietor to have the estate realised with a view to the division of the price, and the only difference in the result would be that in the case supposed Macfarlane's share of the price would have been paid to himself instead of being invested under the order of the Court, and possibly the sum extant at Macfarlane's death might have been less than it actually is. How this distinction, if it be one, can raise any right in the person of the heir is hard to understand?

If we consider the case of conversion by representative persons in a more general aspect, we find a large body of authority relating to sales by the trustees of deceased persons acting under limited powers, and a smaller but very instructive and consistent series of cases relating to sales by tutors, curators, and trustees for persons in life, the management of whose estates has for some good reason passed into other hands. The ruling principle in all such cases is, that the trustee or administrator has no authority to alter the succession of the person whose estate he administers or holds in trust. He has no more right to put the heritable estate into the channel of moveable succession by turning it into money, than he would have to make a will for his constituent. Accordingly, any conversion arising out of his act is presumed to be done for administrative purposes only, usually for purposes of investment, and sometimes to provide funds for the payment of debts. But, whatever be the motive of the sale, the price or the balance remaining after the debts are paid is treated as heritage for the purposes of succession. This is trite law, but the principle has a very wide application, and I think that the Lord Ordinary has rightly regarded it as furnishing the true explanation of the case of *Gardiner* v. *Spalding*, where estate had been sold under a process of judicial sale instituted by creditors, and the balance of the price was held to be heritable. It must be admitted that creditors who make use of the diligence of the law to sell a larger quantity of their debtor's estate than is necessary to satisfy their claims, are in no different position than that of administrators as regards the right to the surplus. If the creditors sell through the intervention of a trustee, that is just the ordinary case of a sale by a trustee for administrative purposes, where, as I have observed, the quality of the succession in relation to the surplus is unchanged. Now, it ought not to make any difference that

the sale is effected by a common agent in a process of judicial sale, who is virtually a trustee for all concerned, and has been so treated in questions as to powers and disability. The surplus being heritable, it was rightly held that the *jus crediti* could not be attached by arrestment, which is the point actually decided by the case of *Gardiner*.

The principle that succession is not affected by the act of a trustee or administrator is an exception to what is, I think, the otherwise universal rule, that rights of succession depend on the quality of the estate at the ancestor's death. Now, in the present case the sale was not the act of the judicial factor. He did not institute the process of division; he was purely passive. The fact that the estate was under the management of a factor had no influence whatever on the result of the process of division, and the estate was in fact moveable at the time when the succession opened.

If authority be needed in such a question, the case of *Graham* v. *The Earl of Hopetoun*, which is considered in the Lord Ordinary's opinion, appears to be very much in point. In an accounting between the heir and the executors of a deceased proprietor, whose estates were under curatory, it was held that the price of teinds (being the proceeds of a compulsory sale under the authority of the Court of Teinds) belonged to the executors. The *ratio* of the decision is very distinctly stated in the sentence quoted by the Lord Ordinary from the report—"The subject in question was rendered moveable by the operation of a general law, from which the estates of pupils or fatuous persons are not exempt." In the same case the principle that the act of the curator cannot affect the succession was recognised, because it was held that the curator (who was also the heir-at-law of his ward) was not entitled to take credit for money lent out on heritable bonds, unless he should convey such bonds to the next-of-kin. Another important point decided in this case was the question whether the curator and heir was entitled to take credit for payments of heritable debt made out of the rents. Opinions may differ as to whether the principle was rightly applied on this question. But it would be out of place to discuss the question here; because the decision on the matter of the price of the teinds is directly in point, and is, I venture to think, demonstrably sound.

Before concluding I wish merely to mention the case of *Garland* v. *Stewart*. I agree with the Lord Ordinary that this case was decided on the terms of the Act of Parliament authorising the compulsory acquisition of the lands in question. The Act of Parliament was brought under our notice by counsel, and it was found to contain a direction that the proceeds of sale should be applied towards the redemption of heritable debt, or in the purchase of other lands. Thus it appears that the price was by Act of Parliament impressed with a trust for reconversion into heritable estate, and in such circumstances the Court, proceeding doubtless on the analogy of testamentary estates impressed with a trust for conversion, held that the price was heritable. It is obvious that the case of *Garland* lends no support to the argument of the reclaimer on the present question. I am, accordingly, for adhering to the interlocutor under review.

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Reclaimer, the Heir-at-law—Ure—J. B. Young. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Respondents, the Next-of-kin—Burnet—Cook. Agents—Simpson & Marwick, W.S.

Saturday, March 2.

FIRST DIVISION.

[Sheriff Court of Edinburgh.

NIDDRIE AND BENHAR COAL COMPANY *v.* YOUNG.

Process—Appeal—Competency—Consignation—Notice of Appeal to Respondent—Summary Prosecutions Appeals (Scotland) Act 1875 (38 *and* 39 *Vict. c.* 62), *sec.* 3, *sub-secs.* 1 *and* 5.

Objections were taken to the competency of an appeal under the Summary Prosecutions Appeals Act of 1875, on the ground that the appellants had failed to comply with the provisions of section 3 of the Act, in respect (1) that they had not consigned a sum to cover the costs of the appeal within three days after the Sheriff's decision, and (2) that notice of the appeal had not been given to the respondent.

The appellants explained (1) that they had lodged a minute within the statutory period craving the Sheriff to fix the amount to be consigned, but that owing to the illness of the Sheriff the amount had not been fixed and consigned until the day after the statutory period had elapsed; and (2) that notice of the appeal had been given to the respondent's agent.

The Court *dismissed* the appeal as incompetent, on the ground that intimation to the respondent's agent was not a sufficient compliance with the Act, which provides that notice shall be given "to the respondent."

Observed by Lord M'Laren that, the appellants having done all in their power to carry out the statutory requirements with regard to timeous consignation, he would not have been prepared to sustain the first objection had it been necessary to consider it.

Opinion on this point reserved by Lord Adam and Lord Kinnear.

The Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62) pro-