as it relates to the particular crime in question, in the case of *Dingwall*, and to the part of the Schedule A applicable to that crime. The charge here is that the accused did guiltily do, or fail to do, certain acts libelled. The prosecutor undertakes to prove, according to what is required by law, the guilty character of the acts alleged to have been done. It is important to observe that it is the responsible public prosecutor alone to whom the privilege of thus libelling is given. He, on his responsibility, indicts and accuses of crime. The statute declares that the acts he specifies are to be read as being alleged to be done contrary to the criminal law of the country, and that if the charge with certain words read in would have been sufficient under the former law to make a relevant accusation, then they should be read in. Obeying the statute, I read them in here. It is not disputed that if these words were written in, the indictment would be relevant. The statute says they should be implied. That means, that for the purposes of relevancy they are in the indictment.

I have only to add on the question of relevancy that Lord M'Laren refers to one case in which the qualifying word "wilfully" is used in the schedule in support of his view. He refers to the schedule, which gives an instance of the charge of fire-raising, thus—"You did set fire to a warehouse . . . and the fire took effect on said warehouse, and this you did wilfully (or culpably and recklessly)." But that very exception proves the rule, instead of being, as his Lordship suggests, an illustration of the application of the rule as he understands it. There are but few cases where the same Acts described in the same words may fall into one or other of two categories of crime, where a description in ordinary words without adjectives will not set forth the difference clearly enough—as, for example, between murder and causing death without murderous intent. But there are certain cases in which general words will not indicate any difference. The case of crime by raising fire is one of these. To say that a man set fire to a house gives him no notice whether he is accused of malicious crime or only of criminal carelessness. In such a case, therefore, where the same general words apply equally to an offence of great malignity and deliberate criminality and to an offence in which there was no wicked intent but only punishable carelessness, the schedule indicates that if the higher offence is to be charged this intention shall be given notice of. But here in this case, and in most other cases, no such ambiguity exists, and there is no need for the specification given in the case of fire-raising. That case, by its exceptional character, brings into relief other cases in the schedule in which no such words are used, and the statute expressly declares that these forms may be used. I hold that the prosecutor has properly applied the schedule in this case, and repel the objections to the relevancy.

The panels pleaded not guilty.

COMRIE THOMSON then moved for a separation of the trials, on the ground that the interests of the panels being necessarily conflicting, the panel Parker might suffer serious prejudice from being tried along with Barrie, as witnesses might be called by Barrie for his defence whom he could neither cross-examine nor contradict.—*Burke and Macdougall*, 24th December 1828, Syme's Rep. 345 (Lord Pitmilly at p. 351), and Hume, ii. 519; *Kettle and Others*, 10th June 1831, Bell's Notes 182; *Clancy and Others*, 3rd May 1834, Bell's Notes 183; *Cleary and Others*, 26th January 1846, Ark. 7. The case of *Rowbotham and Others*, 15th March 1855, 2 Irv. 89, 95, was distinguished from this case by the fact that the persons there accused together all contributed to one act of negligence, those who contributed to another act of negligence leading to the same accident being tried under a separate indictment—*Macintosh* v. *Wilson*, 17th March 1855, 2 Irv. 136.

The Solicitor-General did not consent.

The motion was refused.

Counsel for the Crown—The Solicitor-General, Q.C.—Wallace, A.-D. Agent—Crown Agent.

Counsel for Parker — Comrie Thomson — M'Lennan. Agents—

Counsel for Barrie—C. S. Dickson—Younger. Agents—J. & J. Ross, W.S.

COURT OF SESSION.

Tuesday, November 6.

FIRST DIVISION.

STORRAR AND OTHERS *v.* SMAIL AND OTHERS.

Succession—Testament—Implied Revocation.

A testatrix by general disposition and settlement conveyed to her niece her whole heritable and moveable estate, under burden of debts and legacies, on the condition that her niece should pay any other legacies which the testatrix might think proper to leave by any writing under her hand, clearly indicative of her intention, although not formally executed. She appointed her niece her executrix. By a codicil to this will she revoked the conveyance of her moveable estate, and conveyed the same to other executors, directing them to fulfil any testamentary instructions left for them under her hand, and providing that any surplus of the moveable estate, after meeting debts and bequests, should be paid to her niece, but that any deficiency thereof should form a burden on her heritable estate. By a holograph document, addressed to her niece of date intermediate between the settlement and codicil, she directed that her heritable property should be sold, and that the price thereof, together with any surplus after payment of expenses, should be deposited in bank for behoof of her niece in liferent and certain others in fee. *Held* that the holograph writing was inconsistent with, and therefore impliedly revoked by the codicil, which was of later date.

Miss Lillias Smail died on 21st September 1885, leaving the following testamentary writings—1. A general disposition and settlement dated 29th May 1883, to which was appended a codicil,

written on the same paper, dated 3rd August 1885. 2. A holograph writing addressed to "my niece Margaret Smail," and bearing date 3rd September 1884.

By her disposition and settlement she conveyed her whole estate and effects, heritable and moveable, to her niece Margaret Smail, and her heirs and assignees, under burden of payment of her debts and various small legacies, and also under the condition that her niece Margaret Smail should "also make payment of any other legacies or bequests which I may think proper to leave by any writing under my hand, clearly indicative of my intention, although not formally executed." Margaret Smail was appointed sole executrix under this deed.

By the codicil dated 3rd August 1885 the testatrix, on the narrative that she had resolved to make sundry alterations on her settlement, recalled the appointment of Margaret Smail as her executor. She revoked the conveyance of her moveable means and estate to her niece, and appointed other parties to be her executors, and conveyed to them her whole moveable means, estate, and effects. The codicil proceeds further—"I authorise and direct my executors to implement and carry into effect any instructions or bequests which I may think proper to leave for them by any letter or document signed by me, although not legally tested; and in case there be a surplus of my moveable estate after meeting the debts and bequests herein and before written (excepting the legacy hereby revoked), I direct my executors to pay over the same to the said Margaret Smail, my niece; and, on the other hand, in the event of there being a shortcoming, I declare and provide that the same shall be a burden on my heritable estate conveyed to her, and be payable and paid by her accordingly."

The holograph writing was addressed "To my niece Margaret Smail," and referred *in gremio* to "my will." After providing for the disposal of sundry articles of furniture, trinkets, and books, it proceeds—"My house to be sold as soon as possible, and if there is any money over paying all expenses is to be added to whatever is recieved for the house, and depositted in the Agra Bank for a small income to you for life. at your death the the capital to be equally devided amongst your sisters for there families." This writing had been left by the deceased in a sealed packet in the custody of a friend six months before her death, with whom it remained till after that event, which occurred on 21st September 1885, and therefore it was clearly of date between the settlement of 29th May 1883 and the codicil of 3rd August 1885.

In these circumstances questions arose as to the validity of the holograph writing, and its effect on the distribution of the estate of the deceased if it were a valid and subsisting document, and a Special Case was presented to the Court to have these questions decided. No questions, however, were raised as to the provisions in the holograph writing for the disposal of the various articles of furniture, trinkets, and books.

The first parties thereto were the executors under the codicil of 3rd September 1885; the second party was Miss Margaret Smail, niece of the testatrix, and disponee under the settlement; and the third parties were Margaret Smail's surviving sisters and the families of two deceased sisters.

The questions submitted to the Court were—"(1) Is the holograph writing dated 3rd September 1884 revoked by the codicil, or is it a valid and subsisting testamentary document? (2) If the first part of the first question be answered in the negative, are the first parties bound to sell the said heritage, and to deposit the proceeds, along with the amount of the free moveable estate, in the Agra Bank on a receipt in favour of the second party in liferent, for her liferent use allenarly, and her sisters for their families in fee; or in what terms should the deposit-receipt be taken?"

The second party argued — The holograph writing was not a valid and subsisting document. Its terms were incompatible with the codicil of later date, and so it was impliedly revoked by that deed—*Bertram's Trustees* v. *Mathieson's Trustees*, March 10, 1888, 15 R. 572.

The third parties argued—No doubt it was difficult to reconcile the terms of the holograph writing with those of the codicil, but it was not impossible, and mere difficulty in reconciling them was not enough. The holograph writing had not been expressly revoked, and in the absence of impossibility of reconciling its terms with the codicil, it must be held that it was not impliedly revoked, and was therefore a valid and subsisting document.

At advising—

LORD PRESIDENT—In this case the trust-disposition and settlement by the testatrix was dated on the 29th of May 1883. It is a tested instrument, and therefore there is no question of its date. In like manner there is no question about the date of an attested codicil appended to the deed and written upon the same paper, and which is dated on the 3rd August 1885. Now, the holograph writing founded on by some of the parties, and which of course does not prove its own date, bears to be dated 3rd September 1884. Although the date of that writing cannot be proved by the writing itself, it is established, by a clear admission in the case stated, that the document must have been written some time between the trust-disposition and the codicil of 3rd August 1885. It is said that at the date of the deceased's death the holograph writing was in the possession of David Storrar, and that the deceased had been in the habit, when she went from home, of leaving a sealed packet with Mr Storrar, which was given back to her on her return home. Several months before her death, when she was leaving home, she gave a sealed packet to Mr Storrar to be retained till her return. On her return the packet was allowed to remain in Mr Storrar's custody, and at the date of her death it had been in his possession for about six months. Now, the death of the testator occurred on the 21st September 1885, and as the codicil is dated 3rd August 1885, there is a very short interval between the date of the codicil and of the death of the testatrix, and therefore the holograph writing must have been out of her possession and in David Storrar's hands for some months before her death, and consequently before the codicil of 3rd August 1885 was made.

On the face of the codicil itself it is quite plain that it was intended to operate as an alteration of the original settlement. The effect of

this original settlement was very much in favour of Miss Margaret Smail. The codicil is less favourable to her, but the intervening holograph writing, as we are I think entitled to call it, is still more unfavourable.

In these circumstances the question comes to be, whether the codicil necessarily from its terms operates as a revocation of the holograph writing executed in the interval between the original settlement and the codicil? It seems to me that the conclusion which we must adopt is that it does so operate. If the holograph writing was to receive effect, it would deprive Margaret Smail altogether of the heritable property, for if that holograph writing was to be brought into operation she would not have the disposal of that property at all, as the testatrix has there left a direction that it should be sold, and that Margaret Smail should have a liferent of the balance left after the payment of expenses.

Now, the codicil of 3rd August 1885 is quite inconsistent with that direction. That codicil assumes that Margaret Smail is to be proprietor of the heritable estate, and directs that certain things shall be payable out of the heritable estate. The two things are incompatible, and the natural conclusion is that the later deed must receive effect, operating as a revocation of the principal part of the holograph writing. I am therefore of opinion that we should answer the first branch of the first question in the affirmative.

Lord Mure—It appears to me that the holograph writing which was handed over to David Storrar is plainly dated before the codicil of 3rd August 1885. When I look at that codicil I cannot think it consistent with the holograph writing, because the material alteration in the settlement made in the holograph writing is completely superseded by the directions in the codicil. Miss Margaret Smail is left as executrix by the holograph writing, and is directed to sell the house, and after payment of expenses she is to have a liferent of the balance. In the codicil the moveable estate is conveyed to other executors; there is a revocation of her appointment as executrix, an appointment of new executors, and she remains as the disponee in the heritable estate. In the codicil the testatrix says—"I authorise and direct my executors to implement and carry into effect any instructions or bequests which I may think proper to leave for them by any letter or document signed by me although not legally tested: And in case there be a surplus of my moveable estate after meeting the debts and bequests herein and before written (excepting the legacy hereby revoked), I direct my executors to pay over the same to the said Margaret Smail, my niece, and, on the other hand, in the event of there being a shortcoming, I declare and provide that the same shall be a burden on my heritable estate conveyed to her, and be payable and paid by her accordingly." Now, I think that the holograph writing clashes with these directions in the codicil, and as the latter is of later date the holograph writing is impliedly revoked by it.

Lord Adam—We have here three deeds to construe—the original trust-disposition and settlement, the holograph writing, and the codicil. There is no doubt that the holograph writing is of earlier date than the codicil, and therefore as it is inconsistent with the provisions of that codicil, these provisions must prevail.

In my opinion the testatrix intended her whole estate, heritable and moveable, to be disposed of by the trust-disposition and settlement and codicil. These two deeds do dispose of all her estate, heritable and moveable. Therefore we cannot sustain the holograph writing because it is inconsistent with that view. By the trust-disposition and settlement the testatrix left the whole of her estate to Margaret Smail. As I read the codicil she did not alter her disposition of the heritable property to Margaret Smail. She altered her disposition of the moveable property and appointed other executors to carry out her intentions, but in this codicil, which is the last deed, she disposed of the whole of her moveable estate to the executors appointed, who were directed—[*His Lordship here read the terms of the codicil quoted above*]. Here there is a clear instruction to follow—to pay to Margaret Smail after meeting "the debts and bequests herein and before written," and nothing more. Margaret Smail is to get the surplus when the moveable estate is disposed of. The other side wish to incorporate something else into the clause, namely, after meeting the debts and bequests "herein and in another document before written," where there is an instruction to pay other debts and bequests, and to pay the surplus to her niece. The testatrix has in the codicil disposed of her whole moveable estate, and directed the surplus to be paid to Margaret Smail, and therefore Margaret Smail is to get the benefit of that, although her appointment as executrix is recalled. The reading we are asked to adopt is, that after meeting certain debts and bequests the moveable estate is to be paid to her for distribution in terms of the instructions in the holograph writing, and lastly that the surplus is to be paid to Margaret Smail for her own use. If the testatrix had wanted these things paid she would have directed her executors to pay them.

When we come to deal with the heritable estate it is clear that we cannot read the codicil without seeing that the disposition of the heritable property to Margaret Smail must stand, because the testatrix in her codicil directs—"And on the other hand, in the event of there being a shortcoming, I declare and provide that the same shall be a burden on my heritable estate conveyed to her, and be payable and paid by her accordingly." Here there is a burden laid on the heritable estate conveyed to Margaret Smail. If effect is to be given to the holograph writing there is a burden on nobody. Margaret Smail is there directed to sell the heritable estate, and to pay this and other debts, and the balance is to remain moveable estate. If we were to give effect to the holograph writing that would be the result, and quite contrary to the provisions of the codicil. The direction in the holograph writing to convert and deposit the balance in bank is quite opposed to the direction in the codicil that, in the event of there being a shortcoming, "the same shall be a burden on my heritable estate." The codicil clearly recognises that the property is to remain the property of

Margaret Smail subject to the burden I have mentioned, and I humbly think that the codicil must receive effect.

LORD SHAND was absent.

The Court answered the first branch of the first question in the affirmative.

Counsel for First and Third Parties—Macfarlane Agents—H. & H. Tod, W.S.

Counsel for the Second Party — Guthrie. Agents—Tait & Crichton, W.S.

Thursday, November 8.

SECOND DIVISION.

[Lord Lee, Ordinary.

HENDERSON *v.* HENDERSON.

Expenses—Husband and Wife—Divorce—Wife's Expenses of Reclaiming-note.

Held (*diss.* Lord Young) that a wife who had unsuccessfully reclaimed against a decree of divorce on the ground of adultery, and who had by her own earnings acquired separate estate to the extent of £500, was bound to pay her own expenses in both the Outer and the Inner House.

Upon 25th January 1888 Isabella Middler Burd or Henderson, wife of Andrew Henderson, blacksmith, Little Collieston, Slains, Aberdeenshire, brought an action of divorce against her husband on the ground of adultery, and upon 12th March 1888 the said Andrew Henderson brought an action of divorce against his said wife also on the ground of adultery. These actions were conjoined, and after hearing evidence the Lord Ordinary (LEE) upon 22nd June 1888 pronounced decree of divorce in both actions, and with regard to expenses found the wife entitled to the expenses incurred by her in the action at her instance, and *quoad ultra* found neither party entitled to expenses. The wife reclaimed to the Second Division, but unsuccessfully.

It was admitted that for some years the husband had absented himself from his wife, and had not contributed anything to her support; that the wife had maintained herself by carrying on business as a farmer and innkeeper, and that by her earnings she had amassed a sum of £500, which was her own separate estate.

Upon the question of expenses it was argued by the reclaimer—She was entitled, in accordance with a well-established rule, to her expenses in both Courts, even in the action in which she was defender. In the case of *Hoey*, June 6, 1884, 11 R. 905, the wife, although unsuccessful, was found entitled to the expenses of her reclaiming-note, and that too from a perfectly innocent husband. It was only where a reclaiming-note was manifestly hopeless that expenses were refused. Here the evidence was such as to justify a reclaiming-note.

Argued by the respondent—If the rule was well fixed, the exception was as well established, that a wife with estate of her own must litigate at her own expense, and this specially applied to the case of a guilty wife reclaiming with a judgment of the Lord Ordinary against her—Fraser on Husband and Wife, 1231, 1235.

At advising—

LORD YOUNG — It is my opinion that the general rule is as stated by Mr Young, that where a husband raises an action of divorce against his wife he must pay not only his own expenses but hers also, even although her defence has been unsuccessful. That is the general rule, and it was stated with some emphasis by the Lord President in a recent case cited to us, where a wife had reclaimed against a judgment which was against her. She had unsuccessfully defended the action; she had unsuccessfully reclaimed; and yet she was held entitled to get her whole expenses in both Courts, and that too in a case where she alone had been the guilty party. I understand an exception will be allowed where a wife has separate estate — that is, where she has independent means, but I would be loth to bring under that exception, which only may and not necessarily must be acted upon, a case where the wife has maintained herself for so many years, and where all her separate estate is due to her own earnings and savings. If out of this little account of savings she were to pay her expenses in this action, it would leave her practically with nothing to live upon. I think that because of a balance in the bank in her favour from the fruits of her own industry we should not take this case out of the general rule. But I look also to the behaviour of the husband, who has never performed towards her the duty of a husband. I think he ought to be subjected to the whole expenses of this action, which will have the effect, not that she will get one farthing out of him, but that her earnings will be protected from his claims.

LORD RUTHERFURD CLARK—I have no doubt about the general rule. Even although guilty of adultery a wife is entitled to her expenses in the Outer House, and in the Inner House also if there are reasonable grounds for her reclaiming. The question here is, whether this case should be brought under the exception to this rule. The ground for so bringing it is that the wife has separate estate of her own to the extent of £500, and on that ground the Lord Ordinary did not find the husband liable to the wife for the expenses incurred by her in the Outer House. I am not disposed to hold that a wife when she has such estate of her own, and is guilty of adultery, should be allowed to throw all the expense of the action upon her husband. I am therefore for affirming the Lord Ordinary's interlocutor as regards the expenses in the Outer House, and for finding no expenses due to or by either party in the Inner House.

LORD LEE—I concur with Lord Rutherfurd Clark.

LORD JUSTICE-CLERK — I concur with the majority of your Lordships. I think there is not much room here for sympathy with either party. The wife has separate estate, she is in