process as a Special Case enabled the parents to get a decree *in foro*, because having as guardians of their minor children compelled them to be parties to the Special Case, as soon as the dissentient interest emerged to the cognisance of the Court a curator *ad litem* was of course appointed. Accordingly I think it is not in the parents' mouths to complain if he is put in funds to fight the case to the end.

So far I have had no difficulty. The only difficulty I have had has been one of form. It is a mere accident that we have anything before us on which to write. Had decree been extracted we should not have had anything, but as it is, the process being still before us, I think it is within our power to pronounce an order upon the trustees. I propose that the order should be framed rather thus—to order the trustees to advance a sum of money to the curator. What I mean is that we wish to leave it to the House of Lords, after they have heard the case, to decide whether the expenses should come out of the general fund or out of a portion of the fund, and, if out of a portion, which portion? That is a question which may be affected by the ultimate decision of the case, and which ought not to be concluded by any order of this Court.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Ordain the first parties to the case to make payment to the *curator ad litem* of the sum of £300 to enable him to present and prosecute an appeal to the House of Lords on behalf of his wards against the judgment of this Court, the beneficial interest against which the said sum may be ultimately charged being subject to the direction of the House of Lords under appeal."

Counsel for the Curator *ad litem*—Macmillan. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Trustees and the Rev. Paget Lambert Bayly—Moncrieff. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Successful Parties—Leadbetter. Agents—W. & J. Cook, W.S.

Wednesday, July 20.

FIRST DIVISION.

[Lord Dewar, Ordinary on the Bills.

PAULL *v.* SMITH.

Bankruptcy—Husband and Wife—Statute—Notour Bankruptcy—Constitution of Notour Bankruptcy of Married Woman—Expiry of Charge without Payment—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. cap.* 34), *sec.* 6.

Held (*diss.* Lord Johnston) that the mode of constituting notour bankruptcy given in the Debtors (Scotland) Act 1880, sec. 6, applied to every individual, even although exempt from imprisonment prior to the Act, and applied therefore to a married woman.

Harvie v. *Smith*, 1908 S.C. 474, 45 S.L.R. 387, *followed* and *approved*; *Stewart's Trustees* v. *Salvesen & Company*, June 12, 1900, 2 F. 983, 37 S.L.R. 772, *distinguished*.

The Debtors (Scotland) Act 1880 (43 and 44 Vict. cap. 34), enacts, sec. 4—"With the exceptions hereinafter mentioned, no person shall, after the commencement of this Act, be apprehended or imprisoned on account of any civil debt. . . ."

Section 6—"In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by expiry of the days of charge without payment. . . ."

Mrs Matilda Edwards or Paull, wife of Alexander Paull, both residing at Torphichen Street, Edinburgh, with her husband's consent and concurrence as her curator and administrator-in-law, presented a petition to the Lord Ordinary on the Bills for recal of sequestration awarded on the petition of Sir James Brown Smith of Clifford Park, Stirling.

The petition stated that the petitioner since her marriage had resided in Edinburgh with her husband without intermission, and had not at any time entered into or carried on business. On 11th July 1908 the petitioner, with her husband's consent and concurrence, raised an action in the Sheriff Court at Stirling against the respondent in which she claimed the sum of £100 as damages in respect of the sequestration by the respondent of "the household furniture and plenishings belonging to the pursuer in the house occupied by her at No. 2 Newhouse, Stirling, in security of the rent due by her to defender at Whitsunday 1908." This action was finally decided against the petitioner, and she was found liable to the respondent in expenses, which were taxed at £70, 8s. 5d. The petitioner averred that on 5th March 1910 the respondent charged her on this decree to pay the same within seven days, and that on 7th March he executed an arrestment in the hands of William Forbes, the tenant of a house in Edinburgh, the rent of which she averred was due to her husband and not to her, and that therefore the arrestment attached nothing. The respondent thereafter presented a petition for sequestration, which was awarded on 5th May 1910.

On 11th June 1910 the Lord Ordinary on the Bills (DEWAR) refused the prayer of the petition.

The petitioner reclaimed, and argued—Notour bankruptcy had not been validly constituted. The petitioner was a married woman, and therefore to render her notour bankrupt the procedure to be followed must be that prescribed by the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 7, and not by the Debtors (Scotland) Act

1880 (43 and 44 Vict. cap. 44), sec. 6. The latter Act only applied to cases where imprisonment was rendered incompetent by its provisions, and *stante matrimonio* the imprisonment of a married woman was always incompetent—*Craig* v. *Macdonald*, July 25, 1905, 13 S.L.T. 411. The words "rendered incompetent" in the Act meant "rendered incompetent for the first time" —*Black* v. *Watson*, November 29, 1881, 9 R. 167, 19 S.L.R. 141; *Stewart's Trustee* v. *Salvesen & Company*, June 12, 1900, 2 F. 983, 37 S.L.R. 772. A married woman was in the same position as the company in the latter case, and the case of *Harvie* v. *Smith*, 1908 S.C. 474, 45 S.L.R. 387, which dealt, not with personal exemption from imprisonment, but with the sufficiency of the debt as ground therefor, did not apply. In any event, the case of *Stewart's Trustee* v. *Salvesen & Company* (*cit. sup.*) was not cited to the Court in *Harvie* v. *Smith* (*cit. sup.*), and could not be regarded as overruled. The only competent method, therefore, of constituting notour bankruptcy in the case of a married woman was that prescribed by the Bankruptcy (Scotland) Act 1856. But that method had not been followed in the present case, (1) because arrestment must follow expiry of the days of charge, and that was not the case here, and (2) because the arrestment attached nothing.

Argued for the respondent—The present case was ruled by the decision in *Harvie* v. *Smith* (*cit. sup.*), which decided that section 6 of the Debtors (Scotland) Act 1880 applied to all cases of individual debtors whether imprisonment was competent before that Act or not. *Stewart's Trustee* v. *Salvesen & Company* (*cit. sup.*) on the other hand, only decided that the Act did not apply to the case of a company, because it was clear on the face of the Act that it had nothing to do with such a case, a company *suæ naturæ* not being capable of imprisonment. It could not be maintained that a woman, *suæ naturæ*, was not capable of imprisonment. *Prima facie*, she was in the same position as a man. Before and after marriage, and in certain cases during marriage—*e.g.*, if she carried on business on her own account or lived separate—she was liable to imprisonment, though during marriage her liability was suspended—*Gray* v. *Wylie*, June 26, 1840, 2 D. 1205. It was, therefore, correct to say that the Debtors (Scotland) Act 1880 abolished imprisonment in her case also. If this were so, then arrestment was not necessary, but in any event the arrestment was good.

At advising—

LORD PRESIDENT—In this petition for recal of sequestration one general question has been argued which if decided in one way precludes consideration of the others. The petitioner is a married woman, and she asks for recal of sequestration on the ground that it was pronounced when there was no notour bankruptcy. Admittedly there was a charge with failure to pay within the days which elapsed, and accordingly, if section 6 of the Debtors Act of 1880 applies, there was unquestionably notour bankruptcy. The whole question is whether this is a case where under section 6 imprisonment is "rendered incompetent." It was argued that it is not, because it would have been incompetent at common law. The precise point was decided in this Division so recently as 1908 in the case of *Harvie* v. *Smith* (1908 S.C. 474), which would be conclusive were it not that the fact that the case of *Stewart's Trustee* v. *Salvesen & Com-* (2 F. 983), decided in the Second Division, was not then quoted to us. *Stewart's* case decided that the 1880 Act did not apply to a company, but in the course of the judgment there were expressions used which point to an opinion of the Judges that "rendered incompetent" meant "rendered incompetent for the first time." Similar expressions were used in *Black* v *Watson* (9 R. 167).

Under these circumstances, I have reconsidered my opinion in *Harvie* v. *Smith*, but I have come to the conclusion that it is sound and does not conflict with the opinion in *Stewart's* case, though no doubt it does conflict with some of the expressions of opinion used by the learned Judges. My view is that the Debtors Act of 1880 abolished imprisonment for civil debt with certain exceptions, and it was therefore necessary to create a new method for constituting notour bankruptcy; accordingly section 6 was passed. My reading of the opening words of the section is —"In any case to which this Act applies." Does the Act apply to a married woman? Yes; she is a "person." A married woman before the Act was passed was in the normal case free from imprisonment, but not in all cases—not, for instance, if her husband deserted her, nor if she carried on business on her own account. Under the Act of 1880 her position is different—inasmuch as she is a "person" she cannot be imprisoned even under those circumstances.

Section 6 of the Act only speaks after section 4 has spoken. Section 4 cannot apply to a company; the persons to which it refers are living persons, not legal *personæ*. Accordingly, so far as companies are concerned, the Act is silent altogether, and they are left as they were under the Bankruptcy Act of 1856, and I think the decision in *Stewart's* case was right.

I have only said so much to show that I have considered the matter carefully. If I thought that *Stewart* v. *Salvesen* was inconsistent with *Harvie* v. *Smith* I should not have countenanced a different rule of practice in the two Divisions, and should have sent the case to a larger Court, but as there is no real contradiction in the decisions, and as the case is one of urgency, I think your Lordships ought to give judgment without delay. In some future case the Second Division may on reconsideration of their own judgment see fit to send the matter to a tribunal of Seven Judges. I am for adhering to the Lord Ordinary's judgment.

The LORD PRESIDENT intimated that Lord KINNEAR, who was absent at the

advising, had reconsidered his opinion in *Harvie* v. *Smith*, and adhered to the view there expressed, and consequently that his Lordship concurred in the judgment proposed in the present case.

LORD JOHNSTON—This is an application for recal of sequestration, and the question raised for consideration is whether notour bankruptcy was constituted. This question depends on the application of the Debtors Act 1880, section 6, in conjunction with the Bankruptcy Act 1856, section 7. The same matter came before me in the Bill Chamber in *Craig* v. *Macdonald* in 1905, 13 S.L.T. 411, and I have committed myself to a definite view on the subject prior to your Lordships' decision in *Harvie* v. *Smith* (1908, S.C. 474), but subsequent to the decision of the Second Division of the Court in *Stewart's Trustee* v. *Salvesen & Co.* (1900, 2 F. 983.) At the time I was not aware of the decision in *Stewart's Trustee's* case, and apparently that case was not cited to this Division in *Harvie* v. *Smith*. The view which I took independently in *Craig* v. *Macdonald* is consistent with that of the Second Division in *Stewart's Trustee*, but not with that of this Division in *Harvie* v. *Smith*. I would not for one moment have thought proper to maintain my opinion against a judgment of this Division, which would have been binding on me, but that I find I have the support of three Judges of the Second Division. It is quite true that the opinions expressed in *Stewart's* case may be said not to have been necessary for the decision of the case, and that it can be otherwise explained and supported, but I cannot read the report in that case without concluding that the learned Judges expressed them not as *obiter* but as the grounds of their judgment. If I were critically to examine the report in *Harvie* v. *Smith* I should be disposed to say that there also the views expressed were not necessary for the disposal of the case though they were more than *obiter*. In these circumstances, I cannot at present abandon the opinion to which I came in *Craig* v. *Macdonald's* case, and I think that the matter, before it is conclusively settled, will have to be determined by a larger Court. It may be unfortunate should it turn out that there is a hiatus in the Debtors Act of 1880. The expression used at least makes that possible. It says—"In any case under this Act in which imprisonment is rendered incompetent." On a *prima facie* reading it is difficult to say that a matter is rendered incompetent by an Act passed in 1880 which already was incompetent before the date of the Act, and did not require the Act to render it incompetent. And if there is such a hiatus I do not think the Court can by judicial decision obviate that hiatus.

[*His Lordship then went on to deal with the validity of the arrestment.*]

LORD SALVESEN—In this case I confess that I was a good deal impressed at first with the argument submitted on behalf of the petitioner, but on consideration I have come to be of opinion that the Lord Ordinary's interlocutor is right. The only important point raised is as to the meaning of section 6 of the Debtors Act 1880. The petitioner is a married woman, and as such it is conceded that under the old law she was not liable to imprisonment for debt; and that accordingly notour bankruptcy could only have been constituted against her under the provisions of the Bankruptcy (Scotland) Act 1856. This was, however, a personal privilege ceasing whenever the marriage came to an end, or even under certain circumstances when the spouses had permanently separated. It was argued that section 6 of the Debtors Act did not apply to such a case, but only to cases in which by the provisions of that Act imprisonment was rendered incompetent, and that therefore notour bankruptcy was not constituted in her case by insolvency concurring with a duly executed charge for payment followed by expiry of the days of charge without payment. I am unable to read the section in that sense. I think it must be construed as having a general application to all cases of civil debt for which imprisonment became incompetent under the Debtors Act. The debt upon which the petitioner was charged was one of this nature, and accordingly I think the section applies. In other words, I hold that the section was not dealing with individual or personal privileges, but was introducing a new mode of constituting notour bankruptcy where the debt on which the creditor founded was an ordinary civil debt on which imprisonment cannot now competently follow. The result of so construing the section is to place all debtors in ordinary civil debts on the same footing, whether or not by reason of their being married women or because of some privilege enacted by statute or existing at common law they could not be imprisoned for debt under the law which existed prior to 1880.

It follows that the decision in the case of *Harvie* v. *Smith* which we were asked to reconsider is in my opinion sound, and I do not think it conflicts in any way with the decision of the Second Division to which we were referred.

The Court adhered.

Counsel for Petitioner (Appellant)—Gentles. Agent—D. Howard Smith, Solicitor.

Counsel for Respondent—T. B. Morrison, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.