The king determines by the exercise of the royal prerogative the scale of precedence. The duty of the Lyon King of Arms is ministerial—to see that the order is observed and kept.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Lord Lyon King of Arms dated 12th April 1911: Find that he has no jurisdiction: Therefore dismiss the petition, and decern."

Counsel for Petitioners (Appellants)—Clyde, K.C.—Horne, K.C.—J. H. Stevenson. Agent—A. Gray Muir, W.S.

Counsel for Respondents—Dean of Faculty (Scott Dickson, K.C.)—Macphail, K.C.—Hamilton Grierson. Agent—James Robertson, Solicitor.

Friday, June 9.

SECOND DIVISION.

CURRIE'S EXECUTORS *v.* CURRIE'S TRUSTEES.

Succession—Construction of Testamentary Writings—Erroneous Belief of Testator—Provision in Will for Executors to Receive Price on an Arranged Sale of Heritage Held by Separate Testamentary Trustees when, as Matter of Fact, no such Arrangement.

A testator, by separate trust-disposition confirmed by his will, conveyed to trustees a certain heritable estate. His will conveyed his general estate to his executors, and in a codicil to it he directed them—"I direct and empower my executors to pay for the fishing rights which I have agreed to purchase from Mr Ian Bullough of Meggernie, and I authorise them to receive for my estate the amount to be paid by Mr Ian Bullough for the farms of Cashlie and Dalchoirlich." The fishing was wanted for, and the farms were part of, the heritable estate conveyed by the separate trust-disposition, which, however, contained no reference to the proposed transaction. The testator was in the belief he had completed a binding agreement for it. As matter of fact he had not done so. The other party to the proposed transaction remained, however, willing to carry it out, and the trustees holding the heritable estate under the separate trust-disposition subsequently did so with the consent of the Court.

Held, in a question between the executors and the trustees of the heritable estate, that the former were not entitled to the balance fund receivable on the completion of the transaction, but that the latter were bound to hold it as a *surrogatum pro tanto* for the farms disponed.

A Special Case for the opinion and judgment of the Court was presented by (1) David Martin Currie and others, as executors under will in English form and two relative codicils of the late Sir Donald Currie, *first parties*, and (2) the said David Martin Currie and others, as trustees under a certain trust-disposition by the said Sir Donald Currie, *second parties*, dealing with a fund received by the second parties on the completion of a purchase of fishings and the sale of certain farms forming part of the trust estate administered by them.

The following *narrative* of the *facts* is taken from the opinion of Lord Dundas—"Sir Donald Currie died on 13th April 1909 possessed of large estate, both heritable and moveable. He was survived by his widow and by three daughters, one of whom is Mrs Wisely. His testamentary writings consisted of (1) a will in English form, dated 1st June 1908, and two codicils, of which only the later, dated 2nd April 1909, is material to the case; and (2) four *mortis causa* dispositions of separate heritable estates, which were expressly confirmed by his will, only one of which, dated 24th August 1904, need here be considered. It conveyed to trustees (who are the second parties—the first parties being Sir Donald's executors under the will and codicils) the truster's estate of Chesthill in Perthshire, and directed them to pay the free annual rents and income thereof to his widow during her lifetime for her liferent alimentary use allenarly, and on her death to Mrs Wisely during her lifetime; and on the death of the longest liver of these ladies, and on the only son of Mrs Wisely attaining twenty-one, to convey the estate to him and the heirs of his body, whom failing as therein set forth. Sir Donald acquired the estate of Chesthill in 1903 from its then proprietor, Mr Stewart Menzies, and he afterwards re-sold to Mr Menzies the mansion-house and certain ground in its immediate vicinity, subject to a right of pre-emption in favour of himself and his heirs in the estate of Chesthill, if Mr Menzies should come to offer these subjects for sale. Reference is made to Chesthill in two clauses of the codicil of 2nd April 1909, which may here be mentioned. Clause 6 narrates the said option to re-purchase, and directs the trustees under the will, in the event of such opportunity arising, to raise and pay the price of the subjects to be repurchased out of the trust funds in their hands forming part of the residuary estate, on the footing that the subjects should be conveyed to and vested in the trustees acting under the disposition of the Chesthill estate. The seventh clause (to be more particularly afterwards referred to) is as follows—'7. I direct and empower my executors to pay for the fishing rights which I have agreed to purchase from Mr Ian Bullough of Meggernie; and I authorise them to receive for my estate the amount arranged to be paid by Mr Ian Bullough for the farms of Cashlie and Dalchoirlich.' These two farms were part of Chesthill. It seems, therefore, that in one contingency Sir Donald intended (by the sixth clause) an enlargement of the Chesthill estate at the cost of

his general residue; and in another (by clause 7) a diminution of that estate—as the facts to be narrated will show—with corresponding benefit to the said residue.

"The *facts* out of which this case arises are as follows—The salmon fishings in the river Lyon, so far as it passes through or bounds the estate of Chesthill, belonged in 1903 to Mr Ian Bullough of Meggernie, while Chesthill included two outlying and detached farms, Cashlie and Dalchoirlich (some eight miles distant from the main part of it), which completely intersected the estate of Meggernie. The case states (Art. 5) that "in view of the fact that the acquisition of these salmon fishings would greatly increase the amenity and value of the Chesthill estate, Sir Donald Currie had for some time before his death been in communication with Mr Bullough with the view of completing an arrangement under which, *inter alia*, Sir Donald Currie should sell to him the said two outlying farms at the price of £12,000, and acquire from him the said salmon fishings at the price of £2000. A minute of agreement had practically been adjusted, and Sir Donald Currie was, before 2nd April 1909, and until the date of his death, under the impression that a binding agreement had been entered into to that effect. The parties hereto are, however, advised, and for the purposes of this case are agreed, that no agreement was in fact completed which was in law binding on either Sir Donald Currie or Mr Bullough.'

The contentions in the case relate to the sum of £10,000, being the balance between the said price of the Chesthill farms (£12,000) and that of the Meggernie salmon fishings (£2000). The first parties (Sir Donald's executors) maintain that the seventh clause of the codicil, above quoted, effectually directed payment of the disputed sum to be made to them on the completion of the combined sale and excambion—at all events as in a question between them and the second parties (the Chesthill trustees), and that as the transaction has now been actually carried through, in the manner to be immediately explained, they are now entitled to such payment. The Chesthill trustees, on the other hand, contend that the directions in the codicil having been made by Sir Donald under misapprehension of fact, are of no force or effect, at all events so far as they are concerned, and that the disputed sum should be treated as a *surrogatum pro tanto* for the farms, and held by them as such in trust accordingly.

The question (which I have found a difficult one) depends primarily on Sir Donald Currie's intention as it may be gathered from his testamentary writings, and is very little affected by what has actually occurred in the matter since his death. As already stated, parties are at one that no agreement was in fact completed in Sir Donald's life which was in law binding either on him or on Mr Bullough. It is clear, therefore, that if Mr Bullough had chosen to repudiate the arrangement he could have done so and the matter would have been at an end. But it appears that Mr Bullough maintained the legal validity of the arrangement, and he was all along willing and anxious that it should be carried out in the exact terms which Sir Donald believed to have been binding upon the parties. No practical difficulty therefore arose in carrying out the bargain from the attitude assumed by Mr Bullough, but, on the other hand, the mere fact of his willingness could not, I apprehend, be of itself conclusive of the legal position as between the executors and the Chesthill trustees, and it is there that the difficulty of the case emerges.

"As matter of fact, the Chesthill trustees went to the Court after Sir Donald's death with two petitions. The first was for authority to sell the two farms to Mr Bullough for £12,000 on condition that he should sell the salmon fishings to the petitioners for £2000. To this petition the executors lodged answers, stating that while they did not dispute the propriety of the proposed transaction, they claimed that the balance of the price of the farms, after deducting that of the fishings, viz., £10,000, ought to be paid over to them by the petitioners, and submitting that the prayer of the petition should only be granted on condition of such payment being made. After sundry procedure the Lord Ordinary granted the prayer, but expressly reserved for future determination the questions raised by the answers. By the second petition the Chesthill trustees sought, and in due course obtained, power to buy the salmon fishings. The trustees have carried out the double transaction with Mr Bullough, and the disputed balance of £10,000, less expenses, &c., is now in their hands; but parties are agreed that this fact is in no way to prejudice their legal rights to it *hinc inde*. I do not, however, think that all this procedure has much bearing upon the question now to be decided, which indeed was expressly reserved by the Lord Ordinary, except of course that if the transaction had in fact come to nothing there would be no room for the first parties' argument."

The *contentions* of the parties were—"12. The parties are agreed, that in the event of its being held that the said balance falls to be paid over to the first parties, the whole expenses of and incidental to the sale of the said farms and the acquisition of the salmon fishings, including the expenses of the petitions referred to, ought to be paid by the first parties out of the said balance. But a question has arisen as to whether, in the event of its being held that the said balance ought to be retained by the second parties, the said expenses fall to be paid out of the said balance or form a charge against the general estate of Sir Donald Currie. 13. The first parties contend that by the codicil of 2nd April 1909 Sir Donald Currie validly provided that on the sale of the farms of Cashlie and Dalchoirlich to Mr Bullough being completed, in pursuance of the contemplated agreement with him, the price should be paid to his executors for behoof of his general estate,

they on the other hand paying out of his general estate the price of the salmon fishings to be acquired from Mr Bullough; that said provision is binding on the second parties; and that the first parties are accordingly entitled to receive from the second parties the excess of the price received for the farms over the price paid for the salmon fishings. Alternatively they contend that in the event of the second parties being found entitled to retain said excess of price, the expense of carrying through the purchase and sale must be paid out of said excess, and does not form a proper charge against the general estate. 14. The second parties contend that the directions in the seventh article of the said codicil, having been executed by Sir Donald Currie in consequence of a misapprehension of fact, have no force or effect, at all events so far as they are concerned, and that the balance of the said price falls to be treated as a *surrogatum pro tanto* for the said farms of Cashlie and Dalchoirlich, and to be held by them for the purposes set forth in the trust-disposition. Further, they contend that the said expenses of carrying through the purchase and sales, having been incurred in consequence of the actings of Sir Donald Currie, form a proper charge against his general estate."

The *questions of law* for the opinion of the Court were—"(1) Does the said balance of the price fall to be paid over to the first parties? or (2) Are the second parties (*a*) bound or (*b*) entitled to hold the same for the purposes set forth in the said trust-disposition? (3) In the event of the first question being answered in the negative, (*a*) do the said expenses fall to be paid by the second parties, or (*b*) do they form a good charge against Sir Donald Currie's general estate?"

Argued for the first parties—If such a question as this arose in connection with an intestate succession, the sole consideration, of course, would be whether a binding agreement to sell had been concluded. If so, then the heir would receive the estate, but would have to transfer it in implement of the agreement, and the executors would receive the price—*Chiesley*, 1704, M. 5531. Conversely, if a bargain to buy had been concluded, the heir would be entitled to delivery and the executors bound to pay the price. Again, in testate succession, if a binding agreement to sell had been concluded, the heir would be entitled to receive the property under burden of transferring it in implement, and would be entitled to the price—*Pollock's Trustees* v. *Anderson*, January 22, 1902, 4 F. 455, 39 S.L.R. 324; *M'Arthur's Executors* v. *Guild*, 1908 S.C. 743, 45 S.L.R. 551. In such cases the question was one of ademption, while here there was no question of ademption, and the intention of the testator could alone be looked to. There could be no doubt here as to the intention of the testator to benefit his general estate at the expense of Chesthill, and the agreement which the testator thought binding having now been implemented there was no difficulty in giving effect to the testator's intention. The Court would be the more ready to give effect to the testator's intention in a question between beneficiaries—*per* Lord Kinnear (Ordinary) in *Bell's Trustees* v. *Bell, &c.*, November 8, 1884, 12 R. 84, 22 S.L.R. 59, at p. 90, p. 63. Further, the natural corollary of granting authority to the transaction was to find that the first parties were entitled to the balance in dispute.

Argued for the second parties — The seventh clause in the codicil proceeded on an erroneous impression as to fact, and could not be founded on to the effect contended for by the first parties without reading into it something that was not there, namely, an obligation on the second parties to hand over to the first parties the price of subjects which the second parties alone could sell and had sold. Though the efficacy of a testamentary direction might depend on the testator's knowledge of a fact—M'Laren, Wills and Succession (3rd ed.), i, p. 390—it was well settled that a legacy or revocation of a legacy, if clearly expressed, would not be held invalid because it proceeded on the narrative of a false cause—*Spiers* v. *Graham*, December 18, 1829, 8 S. 268; *Grant* v. *Grant*, July 9, 1846, 8 D. 1077; *Barclay* v. *Maskelyne*, 1858, 1 John. 124; *Armit* v. *Hipkins*, 1873, 28 L.T., N.S. 222—and the Court would not allow conjecture as to what the testator might have done had he known the facts to render a valid direction invalid. Similarly the Court would not be influenced by conjecture to amend and so render effectual an ineffectual direction proceeding on an erroneous impression on the part of a testator. The subsequent sale by the trustees could not affect the question—*Macfarlane* v. *Greig*, February 26, 1895, 22 R. 405, 32 S.L.R. 299 (*per* Lord M'Laren, at p. 409, p. 382) — nor the fact that the Court had sanctioned the transaction which Sir Donald thought had been agreed on, for that sanction was based, not on the intention of the testator, but on the advantage to the estate.

At advising—

Lord Dundas—[*After narrative quoted supra*]—The bargain which Sir Donald Currie believed he had firmly made with Mr Bullough has thus been in exact terms executed; but the question remains as to the legal right of parties to the disputed sum. The bargain is the same as that which Sir Donald thought he had effected, but it is urged that the conditions of, and the parties to, its execution are different, and that what has been concluded is, in legal result, a new and distinct bargain. The conditions, it is maintained, are different, because Sir Donald's "impression," on the basis of which alone he expressed any intention or direction, was admittedly erroneous, and the parties (though this distinction seems to be slender) are no longer Sir Donald or his executors and Mr Bullough, but the latter gentleman and the Chesthill trustees. It seems to me that the true and final test of the matter is whether or not these trustees

could, after Sir Donald's death, have been compelled by the executors or by Mr Bullough to carry out the bargain if they had declined to do so. I have come to the conclusion that they could not. It seems clear that Mr Bullough could not have so compelled the trustees, for (*ex hypothesi* of the case) no binding bargain existed. But, Mr Bullough being willing to go on with the matter, could the executors have enforced the bargain against the Chesthill trustees? I think not. Sir Donald clearly intended that, in terms of the agreement he believed was concluded, the balance of £10,000 should be paid to his executors for the benefit of his residuary estate, and not to the Chesthill trustees for the benefit of the Chesthill beneficiaries. But if he had been made aware that the agreement was not absolutely concluded, I am afraid it is impossible to affirm with certainty, though probabilities, perhaps strong probabilities, may occur to one's mind, what provision, if any, he would have made by way of codicil. On Sir Donald's death the Chesthill trustees (not the executors) were *in titulo* to dispone the farms; there is no express direction to convey them on any terms; and I can see no sufficient ground, though I confess I was not indisposed to find one if I could, for holding that the *mortis causa* conveyance to the trustees of the estate of Chesthill was effectually limited or modified by the seventh clause of the codicil, so as to impose, as a condition of the bequest of the estate, that the Chesthill trustees should do everything in their power to carry through this transaction, and on its completion hand over the £10,000 to the executors. In my opinion, therefore, we must answer the first question put to us in the negative, and the second (in which, by the way, the words, "or entitled" are plainly inappropriate) in the affirmative.

As to the third question, it is clear that branch (*a*) should be answered in the affirmative, and branch (*b*) in the negative. The second parties' argument to the contrary was not, I think, ultimately persisted in.

LORD SALVESEN—I am of the same opinion. The seventh head of the codicil, the effect of which is in question here, was written by the testator under the belief that he had concluded a valid contract of purchase and sale with Mr Bullough. We are informed by the parties that this belief was erroneous, and that in point of fact the contract had not been completed so as to be enforceable by either. It may be conjectured that the testator, had he been aware of the actual facts, might have given equivalent directions, but the provisions of the seventh head of the codicil as framed are quite inapplicable to the facts as they existed when it took effect. Had Mr Bullough refused to implement the provisional agreement, as he was entitled to do, no effect whatever could be given to the testator's wishes, for as it stands there are no express directions to the Chesthill trustees to sell a portion of the estate conveyed to them by the separate trust-disposition and to pay over to the general estate the balance of £10,000 which is in question here. Unless, therefore, we can treat this seventh head as equivalent to such a direction we cannot sustain the contention of the executors, and I am quite unable to do so.

I leave out of account all that happened in connection with the petitions for obtaining the authority of the Court to carry out a similar transaction to that which the testator believed to have been completed by himself. As the Lord Ordinary before whom the two petitions came for disposal and by whom the authority was granted, I should not have felt myself at liberty to authorise the Chesthill trustees to sell any part of the estate vested in them if such sale were to result in a diminution in value of the property administered by them to the extent of £10,000. The transaction, which was in fact entered into under the authority of the Court, must thus be treated as an entirely new one, and the authority of the Court must be held to have been granted entirely with a view to the ultimate benefit of the beneficiaries under the Chesthill trust. For these reasons, and, I confess, without the difficulty which Lord Dundas has felt, I agree in thinking that the questions in this case must be answered as he proposes. The gift of the whole lands comprised in the Chesthill estate is unqualified and unrevoked; and I see no ground (and this is, I think, the true test) on which the executors could have successfully pursued an action of declarator to the effect either that the Chesthill trustees were bound to sell to Mr Bullough the two farms in question if he were willing to implement the proposed agreement and to denude themselves of £10,000 of the purchase price, or if they made such a sale, that they were bound to account to the general estate for this part of the purchase money.

LORD JUSTICE-CLERK—I concur in what your Lordships have said. Lord Dundas has so clearly set forth the situation that it is unnecessary to repeat. There was, as your Lordships have said, no agreement such as is expressed in the seventh clause of the codicil, and accordingly Sir Donald was proceeding on an erroneous view and giving a direction on a wrong assumption. The fact that what he contemplated as regards the sale of the farms and the purchase of the salmon fishings is now the actual situation cannot affect the determination of the question put to us. It is what Sir Donald intended that is in question, and this as regards the time of his death, and no regard can be paid to events which have happened since. Now his intention was that a certain agreement being, as he believed, complete and binding, certain things should be done as a sequence to the completed transaction. It was in that view that he expressed his mind. What, then, was the legal position at his death? Must it not be held that as when that event occurred the position was that neither he nor Mr Bullough was bound, the legal position

was not the same as it would have been if he had left behind him an enforceable agreement—enforceable by those in his right or by Mr Bullough? Can it be said that after Sir Donald's death there could have been any legal right in those who represented him to enforce the bargain which Sir Donald supposed he had made but had not in fact made? To me it seems to be very clear that neither could they have enforced any demand on Mr Bullough, nor could he have made good any demand upon them. That being so, how can it be said to be a matter certain that if Sir Donald had been aware that neither party was bound he would have given the directions he did in clause 7 of the codicil? And if the case be so, how can the directions of that clause have any effect as imposing a duty on his trustees, who on his death were in right of the farms and under no obligation to Mr Bullough to convey them to him? The directory part of the clause depended for its effect upon the correctness of the preliminary part, under which, if it was correct in stating a concluded agreement under which he was entitled to receive £10,000 from Mr Bullough, then the direction would be effectual. But as on Sir Donald's death it appeared that there had been no right in him to that effect, there could be no obligation upon them to do what was only ordered on the erroneous assumption. It may be very likely that if Sir Donald had correctly appreciated the situation he might have given directions which would have led to some result equivalent to that which he contemplated. But not appreciating the situation he did not do so. To answer the questions as proposed by the first parties would be to make a decision for Sir Donald which, had he understood the position, he might not have made, which of course a court cannot do. I therefore concur in answering the questions in the Special Case as proposed by Lord Dundas.

LORD ARDWALL was absent.

The Court answered the first question in the negative; the second question, head (*a*), in the affirmative; and the third question, head (*a*), in the affirmative, and head (*b*) in the negative.

Counsel for First Parties—M'Clure, K.C.—Chree. Agents—MacRitchie, Bayley, & Henderson, W.S.

Counsel for Second Parties—Macphail, K.C.—Burn Murdoch. Agents—Mackenzie & Kermack, W.S.

Friday, July 14.

FIRST DIVISION.

SILLARS, PETITIONER.

Husband and Wife—Jus administrationis—Wife Living Separate without Husband's Consent—Election of Wife between Legal and Conventional Provisions—Husband Unable or Unwilling to Consent—Nobile Officium.

A wife who refused to live with her husband presented a petition for the authority of the Court to dispense with her husband's consent to her election between the provisions made for her by her father's settlement and her legal rights. The provisions in the settlement were subject to a clause of forfeiture in the event of her returning to her husband. The wife desired to choose the conventional provisions, which, apart from the clause of forfeiture, appeared to be in her interest. The husband refused to give his consent to the election unless and until it were judicially determined that the clause of forfeiture was invalid. The wife presented a petition to the Court to dispense with the husband's consent.

The Court *appointed* a curator *ad litem* for the purposes of the election by the petitioner between the provisions in her favour in her father's settlement and her claim to legitim, and on his report dispensed with her husband's consent.

Mrs Jessie Reid Marshall or Pillans, residing at Caldergrove, Newton, Lanarkshire, wife of John Alexander Sillars, hydraulic engineer, Campbell Street, Govan, Glasgow, presented a petition to the Court for authority "to dispense with the consent of the said John Alexander Sillars to the petitioner's election to accept the conventional provisions in her favour contained in the said trust-disposition and settlement and codicil of her father, the said deceased John Marshall, in lieu of claiming her legal rights, and to any deed or deeds necessary for declaring or recording her election as aforesaid."

The petition set forth—"1. That the petitioner is the wife of the said John Alexander Sillars, to whom she was married on 14th August 1884. There are no children of the marriage. The spouses did not enter into any antenuptial contract of marriage. 2. On 26th January 1888 the estates of the petitioner's husband, the said John Alexander Sillars, who was then a partner of the firm of M'Guffie, Sillars, & Company, bonded store proprietors, Glasgow, as such partner and as an individual, were sequestrated. On 3rd February 1888 sequestration was awarded of the estates of the said firm and of Alexander M'Guffie, the only other partner thereof, as such partner and as an individual. In view of the irregular nature of certain transactions in which the said firm and its partners had been engaged, the petitioner's husband thought fit to