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

leave the country and went to Spain, where he remained for a time. He failed to appear at the diet for his examination on 22nd February 1888, but subsequently appeared and was examined on 16th October 1888. He was discharged without composition on 3rd April 1890. 3. When the petitioner's husband left the country in February 1888 the petitioner, who up till then had resided with her husband, returned to her father's house, where she has since resided. She was greatly distressed by her husband's conduct, and decided to have no further relations with him. Shortly after his discharge, the petitioner's husband, in July 1890, raised an action of adherence against the petitioner, although he had then no home to offer her and was unable to support either himself or her. The petitioner, however, did not defend the action, and her husband obtained decree of adherence against her. Since he left her in February 1888, petitioner's husband has contributed nothing to her support. 4. The petitioner's father, Mr John Marshall of Caldergrove, hereinafter called 'the testator,' died on 24th September 1910. The amount of his personal estate as given up in the inventory thereof was £142,821, 5s. 2d, consisting to the extent of £67,250 of bonds and dispositions in security, and he was also possessed of heritable estate of considerable value. . . . The testator left a trust-disposition and settlement dated 29th September 1892, with relative codicil dated 16th October 1905, both registered in the Books of Council and Session on 30th September 1910. . . . 5. By his said trust-disposition and settlement the testator, *inter alia*, bequeathed to his wife, who survived him, and is now eighty-seven years of age, the liferent of his estate. Upon the death of his wife the testator in the third place directed his trustees to convey his estate of Caldergrove, which is approximately of the value of £10,000, with the furniture, &c., in Caldergrove House, and the whole effects on the estate, to his son Robert, whom failing to Robert's children in fee, whom failing to the petitioner in liferent and his son David, whom failing David's children, in fee. The testator adjected to this bequest a declaration that the petitioner's husband should have no right or title to the said liferent in her favour, which should be exclusive of the *jus mariti* and right of administration of her husband, and that if the petitioner should return to her husband's society, regarding which the testator expressed no opinion whatever, the liferent conferred on her should *eo ipso* cease and determine; and further, that any part of the rents which her husband might have claimed on the dissolution of their marriage by decree of Court or death should not belong or be payable to the petitioner or her representatives or her husband, but should become payable to the testator's son David, whom failing David's children. The testator's son Robert is alive and has one child. 6. By the fourth purpose of his said trust-disposition and settlement the testator directed his trustees on the death of his wife to set aside and retain the sum of £20,000 and to pay the interest or income thereof to the petitioner during all the days and years of her life excepting any period she might live with her husband, should she return to his society, for her liferent alimentary use allenarly, and exclusive of the *jus mariti* and right of administration of her husband. Further provisions were inserted by the testator excluding the petitioner's husband from any participation in the said liferent. The testator also conferred on the petitioner, in the event of her being the last survivor of his children, power to dispose by testamentary writing of the whole capital of the said sum of £20,000, and any additions thereto. By his codicil of 15th October 1905 the testator increased the said sum to £30,000, and excluded the petitioner from participation in the residue of his estate. The testator in his said trust-disposition and settlement declared that the whole provisions thereby made, so far as in favour of females, should be exclusive of the *jus mariti* and right of administration of any husbands they had married or might marry, and that the provisions made by him in favour of his wife and children should be in full satisfaction of their legal rights, and that in the event of any of his children claiming his or her legal rights, the child so claiming should forfeit all right under his will. 7. The petitioner is desirous of accepting the conventional provisions in her favour contained in the testator's trust-disposition and settlement and codicil, and of renouncing her right to legitim. She is of opinion that it is to her interest to do so, and she has had the advice in the matter of independent agents and also of counsel. The testator having been survived by his wife and five children, the petitioner would be entitled to one-fifth of one-third of the testator's free moveable estate in name of legitim. If her eldest brother did not elect to collate the heritage, her legitim would amount to £5528, 7s. 4d. or thereby, but if her eldest brother were to collate the heritage her legitim would amount to £6026, 9s. 11d or thereby. Reference is made to the letter of 9th March 1911 by the petitioner's agents to the petitioner's husband contained in the correspondence printed in the appendix. That letter contains a statement of the legitim fund. 8. On 2nd November 1910 the petitioner's husband served upon her a summons of divorce on the ground of desertion. The petitioner did not lodge defences, but her husband has meantime delayed proceeding with the action. A diet of proof was fixed some time ago, but was subsequently discharged on his motion. 9. The petitioner's agents on 9th March 1911 wrote to the petitioner's husband requesting his consent to the petitioner's acceptance of her father's testamentary provisions in her favour and enclosing a deed of consent to her election for his signature, at the same time fully explaining the position of matters. A correspondence ensued. . . . The petitioner's husband has declined to give his consent to the peti-

tioner's election to accept her conventional provisions. 10. The testator's trustees are not in safety to proceed with the administration of the trust estate and to implement the provisions in favour of the petitioner without obtaining a valid acceptance by her with her husband's consent of her conventional provisions in lieu of her legal rights, and the trust adminstration has accordingly been brought to a standstill by the refusal of the petitioner's husband to consent to her election. In withholding his consent the petitioner's husband is not acting in the *bona fide* exercise of his curatorial rights as the petitioner's curator and administrator-in-law, or for her benefit, but on the contrary is using his position as her curator to her prejudice and to serve some ulterior personal object of his own. He has given no reason for refusing his consent. He has, moreover, delayed proceeding with his action of divorce against the petitioner in order that she may not be released by decree in that action from his curatorial control and so be in a position to make her election without his consent."

Answers were lodged for John Alexander Sillars, which set forth — "1. Admitted. 2. It is admitted that the firm of M'Guffie, Sillars, & Company was sequestrated in 1888, and that the petitioner, who was a partner of that firm, was also sequestrated as such and as an individual. No irregularities of any kind took place in connection with the said business, and the respondent's residence in Spain was not connected in any way with the sequestration. He appeared for examination on his return in October 1888 and was discharged on 3rd April 1890. 3. It is admitted that the petitioner went to reside with her father in February 1888. He had for some years prior thereto, in connection with business matters, taken a violent dislike to the respondent and endeavoured to injure him at every turn. In pursuance of that scheme he took every step in his power to alienate the petitioner from her husband, and on the respondent's return from Spain declined to let her live with her husband, keeping her practically a prisoner in his house. He also spread slanderous and untrue reports among the respondent's friends in regard to the respondent's domestic life, and threatened him if he did not agree to a voluntary separation he would see that steps were taken by his wife to get a judicial separation. The respondent thereupon in 1890, to vindicate his position, raised an action of adherence against the petitioner, and after proof was led decree of adherence was granted. A charge was given on said decree, but the petitioner was not allowed by her father to obey the order of the Court and resume cohabitation with her husband. The respondent all along has had a comfortable home to offer the petitioner and was anxious she should return to him, and wrote frequently to the petitioner stating this to her and requesting her to return. No notice was taken of these letters, many of which were intercepted by the petitioner's said father, with whom she was residing. It is admitted the respondent has paid nothing to his father-in-law in respect of the maintenance of his wife, the reason being that she was being detained by her father against the respondent's wishes. It is also explained that when the petitioner abandoned her home and went to reside with her father it was partly to take the place of housekeeper for him, the last of his daughters being then married, and when she went to reside there she was handsomely provided by the respondent with both money and furniture. 4. It is admitted the petitioner's father died on 24th September 1910, his will being referred to for its terms, and it is also admitted that the respondent served a summons of divorce on the petitioner on the ground of desertion. It is explained further that he had not then seen the said will, and on applying to the trustees for a perusal of same was refused all information in regard thereto. 5. The respondent has all along desired that the petitioner should return to him as his wife, and also be guided by him in regard to the provisions in her favour under her father's will. He is no way affected in this matter by the extraordinary provisions in the will which purport to deprive the petitioner of all rights in her father's estate if she resumes cohabitation with her husband, although possibly that provision is *contra bonos mores* and could not be enforced. The will is further evidence of the continuation of the blind prejudice and dislike the said John Marshall had for the respondent. 6. The petitioner, who deserted the respondent, is living apart from him contrary to his wishes and without his consent. He is in no way abusing the exercise of his curatorial right as the petitioner's curator, and is willing and anxious to advise her in regard to the provisions in her father's will, and offers to take her back as his wife notwithstanding the fact that she comes to him penniless if her father's will is to stand."

Argued for the petitioner—The petition was presented under the *nobile officium* of the Court, for it was not covered by section 5 of the Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21). *Dunnachie*, 1910 S.C. 115, 47 S.L.R. 46, apparently had been presented under section 5, but probably it also came rather under the *nobile officium*, as suggested by the head words. It was necessary for the trustees to protect themselves here. Either the husband's consent was not necessary at all, or it was unreasonably withheld, and the Court should dispense with his consent. On the question whether the husband's consent was necessary to the wife's election, reference was made to Lord M'Laren on Wills, 3rd ed., vol. i, pp. 248-249, and the cases there discussed, viz., *Lowson* v. *Young*, July 15, 1854, 16 D. 1098; *Stevenson* v. *Hamilton*, December 7, 1838, 1 D. 181, with the remarks thereon by Lord Benholme in *Macdougall* v. *Wilson*, February 20, 1858,

20 D. 658, at 660; and *Miller* v. *Galbraith's Trustees*, March 16, 1886, 13 R. 764, 23 S.L.R. 533. The last was the only case which seemed to be against the view that the husband's consent was not essential. [The LORD PRESIDENT pointed out that in that case the wives had changed their minds.] Reference was also made to *Bryce's Trustee*, March 2, 1878, 5 R. 722, Lord Gifford at 728, 15 S.L.R. 412, and to Fraser on Husband and Wife, vol. i, p. 798.

Argued for the respondent—The husband was not abusing his curatorial power. Until the husband knew whether the condition on which the bequest was to be forfeited was or was not invalid, as being *contra bonos mores*, it was really impossible for him to consider the question. The Court should not aid the wife in refusing to adhere. [The Court asked counsel for the respondent whether if it were judicially decided that the condition of forfeiture was of no effect the respondent would be willing to give his consent to the acceptance of the conventional provisions, and the petition was continued to next day, when a minute to the above effect was put in.]

LORD PRESIDENT — This is an application to the Court to dispense with the consent of a husband to an election which his wife wishes to make between the testamentary provisions left to her under the will of her father and her legal rights to a share of the legitim fund.

The position is decidedly peculiar. The relations between the husband and the wife have not been happy, and that was known to the father. The testamentary provision which has been left by the father to the wife is hampered by certain conditions of forfeiture which are certainly, to put it mildly, antagonistic to the interests of her husband. On the other hand there is little doubt that from a purely pecuniary point of view there is a great advantage in the testamentary provisions compared with the legal rights. There is also a question, which is quite obvious on the face of the document, whether these conditions, which I have called antagonistic to the husband, are not such conditions as the Court would refuse to give effect to if the question were litigated.

Mr Macmillan for the petitioner argued that in this case consent is not necessary. I am not prepared to go that length. It is quite true that the position of affairs has been greatly altered by the Married Women's Property Act; and I cannot doubt that the older authorities which were quoted to us were, if not entirely based upon, at least strongly tinged by, the doctrine that the husband had not only a curatorial power but had also a *jus mariti*.

Now although the *jus mariti* was abolished by the Married Women's Property Act, the curatorial power was not abolished. No doubt, so far as regards such an election by a wife, when the *jus mariti* is gone there is not very much left; but still I think that there is this left, that an election by a wife must be an election by an advised wife and not by an unadvised wife; and so long as the husband is there with a curatorial power he is the natural and proper adviser. Therefore I think the position taken up by the testamentary trustees is a perfectly proper position—namely, that they could not accept as final an election which was made by the wife alone without the consent and concurrence of her curator, the husband.

For the reasons that I have stated it is quite evident that this husband is in such a peculiar position that it is really asking him to do more than anybody should be asked to do—to ask him, namely, to consider this question of his wife's patrimonial interests entirely apart from the effect which the election in one direction might have upon the relations between his wife and himself. I think that would be putting him to a test which it is unfair to put him to.

I think, therefore, that in these peculiar circumstances we should appoint a curator *ad litem* to the wife. She will then be in the position of an advised wife, for she can have advice from the curator as to the election which she should intimate to the trustees. I propose, therefore, that we should appoint Mr James A. Fleming, K.C., as curator *ad litem* to the wife for the purposes of the election.

LORD KINNEAR—I concur.

LORD MACKENZIE — I am of the same opinion.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

> "20*th June* 1911— . . . Appoint Mr James A. Fleming, Advocate, to be curator *ad litem* to Mrs Jessie Reid Marshall or Sillars, the petitioner, for the purposes of the election by her between the conventional provisions in her favour contained in the trust-disposition and settlement and codicil of her father and her claim for legitim."

On July 13 Mr Fleming lodged this report:—"My Lords—Following upon your Lordships' interlocutor appointing me curator *ad litem* to the petitioner, I had an interview with her. I was asked to see her husband also, but owing to his business engagements he has only of this date, 12th July 1911, been able to meet me.

"I saw the petitioner alone, and found her fully conversant with the whole question. She appreciates the respective advantages and disadvantages of the provisions, one of which she is called upon to elect, and has a very decided opinion in favour of taking the provision made for her by her father's will.

"I have examined the trust-disposition and settlement and codicil of the petitioner's father and the inventory of his estate, and have considered the matter myself. I am of opinion that the choice which the petitioner prefers is in her interest, and one which I could advise her to make. In forming this opinion I have had in view the effect of the condition as

to her non-residence with her husband which is contained in the father's provision, and also the possibility, if the pending proceedings at the instance of her husband for divorce on the ground of desertion should result in a decree, of a claim being thereby created either on the provision or on the legitim.

"I also met the respondent alone and heard his views. He informed me that if the petitioner desires to take her father's provision he does not wish to oppose, but he regrets that she does not see her way, even at some pecuniary sacrifice, to return to her married life and position.

"I am prepared as curator to give consent to the election by the petitioner of her conventional provision in lieu of her legal rights should your Lordships so direct me and think such a course necessary. I would, however, venture to suggest for your Lordships' consideration whether it would not be sufficient for your Lordships to approve of this report, and in respect thereof to grant the prayer of the petition."

On July 14 the Court approved of the report and granted the prayer of the petition.

Counsel for the Petitioner—Macmillan. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondent—Hon. Wm. Watson. Agents — Dove, Lockhart, & Smart, S.S.C.

Friday, June 9.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CARLIN *v.* ALEXANDER STEPHEN & SONS, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I, sec.* 16—*Review of Weekly Payment—Finding that Workman Fit for Light Work, and that Employers had Offered such Light Work—No Finding as to Wages that could be so Earned—Diminution of Weekly Payment.*

In an arbitration under the Workmen's Compensation Act 1906, in which the employers craved a review of the weekly payment payable by them to an injured workman, in respect of total incapacity, the arbitrator found in fact (1) that the workman was able for certain specified light work, (2) that the employers had offered him such light work, and (3) that there was no evidence to show how much the workman might earn by such light work.

Held that to found an award diminishing the weekly payment, a finding that the workman was able to earn a specific weekly wage at work which he was able to do was not necessary, and that such an award might proceed on (1) the finding as to the workman's capacity, and (2) the offer of light work by the employers.

Per Lord Salvesen—"I must not be understood as holding that the diminution of the compensation might not well have proceeded on the first finding alone. The moment it is established as a matter of fact that total incapacity has ceased, and that only partial incapacity is present, the employer has made out a *prima facie* case for having the award as for total incapacity diminished.

Cardiff Corporation v. *Hall*, [1911] 1 K.B. 1009, and *Proctor & Sons* v. *Robinson*, [1911] 1 K.B. 1004, *considered.*

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in the Sheriff Court at Glasgow, between Hugh Carlin, *appellant*, and Alexander Stephen & Sons, Limited, *respondents*, the interim Sheriff-Substitute (WELSH) diminished the weekly payment payable by Stephen & Sons to Carlin, and at the request of the latter stated a Case for appeal.

The Case set forth:—"The following *facts* were admitted or proved—(1) That on or about 13th August 1909 the appellant, while in the employment of the respondents at Govan Graving Dock as a labourer, suffered injury to his left ankle through strain by accident arising out of and in the course of his employment, caused by his having turned round while his foot was caught between two planks of wood. (2) That he was then totally incapacitated for work as a result of said accident. . . . (9) That the appellant is no longer totally incapacitated for work, but is able for light work such as that of a messenger or light porter or other occupation where he would not require to do the heavy work of a labourer. (10) That the appellant was on 31st May 1910 offered on behalf of the respondents light work as a labourer, which he refused, on the allegation that he was not then fit to undertake such work. (11) That at that time the condition of his ankle was such that he was able to undertake light work, if he had endeavoured to do so. (12) That no evidence was led at the proof to show how much the appellant was capable of earning as a messenger or light porter, or in any other occupation where he would not require to do the heavy work of a labourer; that the respondents founded on their offer of 31st May, and their law agent on being asked by me at the diet of debate whether said offer was still open, stated that it was, and that a minute would be lodged in process repeating said offer. (13) That the respondents accordingly, on 27th December 1910, lodged in process a minute repeating said offer of light work made to the appellant as aforesaid, said minute being in the following terms—'The respondents hereby repeat the offer made to the claimant in May last (which offer is referred to in process) of employment in their repair works at light labouring work, the wages applicable to such work being 20s. 3d. per week.' (14) That the respondents agreed to pay,