far as this Court is concerned the weight of authority is too strong for him. I am therefore for adhering to the interlocutor reclaimed against.

LORD GUTHRIE—I think with Lord Dundas that, so far as we are concerned, the case is ruled by authority.

The Court refused the reclaiming note and adhered to the interlocutor of the Lord Ordinary.

Counsel for Defenders and Reclaimers—Sandeman, K.C.—Hunter. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Pursuers and Respondents—Moncrieff, K.C.—J. A. Maclaren. Agents—Macpherson & Mackay, S.S.C.

Saturday, November 23.

SECOND DIVISION.

[Lord Dewar, Ordinary.
[Lord Sands, Ordinary.

BARKER AND OTHERS *v.* WATSON'S TRUSTEES AND OTHERS.

Succession — Legacy — Condition — "Living Together as Husband and Wife"—Construction—Impossible Condition.

A testator by a codicil to his will provided that if at the date of his death his daughter should not be reconciled to her husband, the provision which he had made in favour of her children should suffer abatement. By a subsequent codicil he provided that they were not to be regarded as reconciled "unless they are living together as husband and wife." At the date of the second codicil and also at the date of his death his daughter by her husband's desire was undergoing treatment for the drug habit in a home. There was one child by the marriage and, the daughter having been subsequently divorced and having re-married, two children by her second marriage. *Circumstances* in which, in an action of declarator at the instance of the daughter and her former and present husbands as guardians of her children against the testamentary trustees and the other beneficiaries, *held*, after a proof (*reversing* judgment of Lord Sands, Ordinary, *dis.* Lord Salvesen) (1) that the spouses were not living together as husband and wife at the date of his death in the sense of the codicils, and (2) that the condition was not an impossible one.

Francis James Barker, doctor of medicine, London, as guardian of his infant child Margaret Frances Shelley Barker; Sydney Thornton Darrell, as guardian of his infant children Lionel Charles Thornton Darrell and Hubert Watson Darrell; and Mrs Elizabeth Mary Watson or Barker now Darrell, for her interest as the mother of the infant children and as an individual, *pursuers*, brought an action against Thomas Watson M'Nab Watson, C.A., Glasgow, and others as the trustees acting under the holograph trust-disposition and settlement of Mrs Darrell's father, the late John Ebenezer Watson, Glasgow, and against Thomas Watson M'Nab Watson as an individual and curator and tutor to his two children, and against Mrs Margaret Watson or Campbell and Mrs Isabella Lilburn Watson or M'Cowan, daughters of the testator, and their husbands as their curators and administrators-in-law, *defenders*. The pursuers sought to have it found and declared that the provisions made by the testator in his holograph trust-disposition and settlement with regard to the disposal of the fee of the residue of his estate were not validly revoked, cancelled, or altered in any way by his codicil dated 21st March 1900 and his codicil dated 12th July 1900, or by either of such codicils; or alternatively that at the time of the death of the testator his daughter Mrs Elizabeth Mary Watson or Barker now Darrell was reconciled to her husband Francis James Barker, that they were living together as husband and wife within the meaning of the testator as expressed in the codicils, and that accordingly the codicils in so far as they purported to revoke, cancel, or alter the rights and interests of Mrs Darrell's children as beneficiaries under the holograph trust-disposition and settlement in the fee of the said residue of his estate never became operative.

By his trust-disposition and settlement the testator directed his trustees to divide the whole residue of his estate, which amounted to about £72,000, equally among his children, one son and three daughters, and their issue as follows:—The share falling to his son to be paid to him absolutely, and the shares falling to his daughters to be held by his trustees for their liferent use and their children in fee *per stirpes*, with a reversion in default of issue for surviving children and the issue of predeceasers. By the two codicils of which reduction was sought the testator provided, *inter alia*, as follows:—

"21st March 1900.

"I hereby declare and provide with regard to my daughter Elizabeth Mary (Mrs Barker) that if at the time of my death she should not be reconciled to her husband she is to have the liferent use of her share of the estate as before provided, but at her death the sum of £5000 shall be set aside by my trustees, the yearly interest of which shall be paid to her child or children equally, if more than one, in liferent, and to their children *per stirpes* in fee. . . . The difference between the said £5000 and the share liferented in my said daughter shall be added to the capital of my estate and divided among my son and other daughters and their descendants as provided with respect to the other portion of my estate."

"12th July 1900.

"I don't consider Frank and Bee (Mrs Barker) reconciled as referred to in codicil to my settlement unless they are living together as husband and wife."

The defenders *pleaded*—"2. The pursuers' averments being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. 3. Upon a sound construction of the testamentary writings of the testator, the provisions made by him with regard to the disposal of the residue of his estate in favour of the children of Mrs Darrell were validly revoked, cancelled, or altered by his codicil dated 21st March 1900 (being the second codicil of that date), and his codicil dated 12th July 1900, or by either of said codicils, and the defenders ought to be assoilzied from the first declaratory conclusions of the summons. 4. The averments of the pursuers, so far as material, being unfounded in fact, the defenders are entitled to absolvitor. 5. The contingency upon which the testator provided that his said codicil of 21st March 1900 should operate having occurred, the defenders ought to be assoilzied from the alternative conclusions of the summons."

On 28th February 1917 the Lord Ordinary (DEWAR) assoilzied the defenders from the conclusions of the summons.

Opinion.—. . . "The testator's intention, read in the light of the admitted facts, is, I think, quite clear. By the first codicil he provides that if at the date of his death his daughter should not be 'reconciled' to her husband the provision which he had made in favour of her children should suffer abatement. He apparently anticipated that there might be doubt as to what he meant by the word 'reconciled,' and he therefore explains in the second codicil precisely what it means. These spouses were then living apart. He obviously disapproved of that, and provided that they are not to be regarded as reconciled 'unless they are living together as husband and wife.' The plain meaning of that appears to me to be, that if at the time of his death his daughter was still living apart from her husband, as she had been during his life, then the codicil should take effect. The test is not whether they were on affectionate terms, but whether they had resumed family life and were occupying the same residence. As they admittedly were not, I am of opinion that the contingency has occurred, and that the defenders are entitled to be assoilzied from the conclusions of the summons, with expenses."

The pursuers reclaimed, and on 30th May 1917 the Second Division recalled the Lord Ordinary's interlocutor, allowed parties a proof of their averments on record, and remitted to the Lord Ordinary to take the proof.

The *facts* of the case and the *import* of the evidence appear from the opinion of Lord SANDS (Ordinary), who on 5th March 1918 pronounced the following interlocutor—"Finds that at the date of the death, upon 18th April 1901, of John Ebenezer Watson, the testator, the state of the health of his daughter, the pursuer Mrs Elizabeth Mary Watson or Barker now Darrell, precluded her and her husband living together as husband and wife in terms of the condition contained in the testator's codicil of 12th July 1900 to his holograph trust-disposition and settlement, and that the condition was therefore an impossible one and cannot be given effect to: Finds that at the date of the testator's death Mrs Barker was reconciled to her husband in the sense in which in relation to the surrounding circumstances the word 'reconciled' in the testator's codicil of 21st March 1900 falls to be construed. Therefore finds and declares that the said codicils, in so far as they purported to revoke, cancel, or alter the rights and interests of the children of the pursuer, the said Mrs Elizabeth Mary Watson or Barker now Darrell, as beneficiaries under his said holograph trust-disposition and settlement in the fee of the residue of his estate, never became operative, and did not in fact revoke, cancel, or alter their rights and interests to any extent or effect, and that the defenders, the trustees of the testator, are bound to hold and administer the trust estate of the testator upon the footing that the said codicils are of no force or effect in so far as they purported to revoke, cancel, or alter the rights and interests of the children of the said Mrs Elizabeth Mary Watson or Barker now Darrell. . ."

Opinion.—. . . "At the date of the first codicil his daughter (Mrs Barker) had one child. Certain differences had arisen between Dr and Mrs Barker, and the object of the codicil was to secure that whilst the claims of blood should not be wholly ignored, Dr Barker's daughter, in case these differences were not composed, should not be an heiress. In the light of the evidence I am quite unable to accept the suggestion, which the opening words might seem to encourage, that the provision was directed against the daughter as the party to blame for the conjugal differences. The provision was an ill-considered one. Mrs Barker was a young woman. The events which have actually happened are not such as a father might have contemplated, but there were other not improbable contingencies. Dr Barker might have died young, in which case vicarious punishment through his daughter (Mr Watson's own grandchild) was hardly reasonable, and even if feeling against Dr Barker ran so high, in the case of a second marriage of Mrs Barker and consequent issue, the operation of the clause would have been absurd.

"A clause of disinherison of this kind must be narrowly construed. Doubtless effect is not to be denied to it because the circumstances are such as the testator presumably omitted to contemplate, but on the other hand there is no room for any liberal interpretation which would seek to give effect to presumed intentions of the truster in framing the clause, albeit these might have been somewhat inadequately expressed.

"The married life of Dr and Mrs Barker seems to have begun happily enough. But it was not long before he discovered that his wife had contracted the laudanum habit. This caused much trouble and distress, and after the birth of the child led to some painful and pitiful domestic scenes. Eventually it was arranged that Mrs Barker should go to Glasgow on a visit to her father, who knew nothing of the matter,

and consult Dr Samson Gemmell, an old friend of the husband. The spouses parted on the most affectionate terms, and Dr Barker sent most loving and encouraging letters to his wife. But shortly after she left home Dr Barker was informed by a lady—a friend and neighbour, and presumably a patient—that Mrs Barker had made certain statements to her of a painful and indelicate character concerning their matrimonial relations. The discovery of the circulation of these stories, which Dr Barker thought, and as the sequel proved rightly thought, would be injurious to his practice, had an extraordinary effect on his mind. He appears to have made no allowance for the morbid condition of his wife, the remembrance of all the past injuries was renewed, and he wrote to her and continued, notwithstanding all her touching pleadings with him, to write to her in a tone of the utmost harshness. Temporary irritation, and even indignation, would not have been surprising, but the persistent bitterness and hardness which replaced the warm affection in his tone and attitude almost tempts one who studies the correspondence to discard modern scientific preconceptions and to fall back upon the old belief that the Devil may take possession of a man. I am unable to accept the suggestion that Dr Barker's attitude was a mere posture of firmness to secure that the wife should enter a Home. There was real bitterness in it, the source of which seems to have been his professional pride and ambition and his absorption in his practice which he felt would be injured.

"The evidence shows, and this consideration constitutes in my view one of the chief difficulties in the case, that Dr Barker never wholly got over this impression. There were different phases, ups and downs, in his future relations with his wife, but the bitter impression always lingered.

"The matter came to the knowledge of Mr Watson during his daughter's visit, and he was deeply distressed about it. He was reluctant to believe that there was anything seriously wrong with his daughter, still more reluctant to believe that it was necessary for her to enter a home. His consuming desire was not so much to restore complete harmony, though no doubt he would gladly have done so, as to get the parties to resume cohabitation and avoid the scandal of any open separation. Dr Barker was unbending in the position that he would not resume cohabitation under existing conditions, but that his wife must enter a home for treatment. It was in these circumstances that the first codicil was written. Correspondence and negotiations followed, and eventually Mrs Barker, after much shilly-shallying, agreed to enter a home. In the end of June, at a meeting between the spouses and Mr Thomas Watson, a brother of Mr Watson's, in London, it was arranged that she should enter a home in Leicester. I hold it to be proved that she entered the home on the footing, agreed to eagerly by her, somewhat coldly and sceptically by the husband, that they should resume cohabitation on the expiry of her confinement if the treatment proved successful.

"Mr John Watson was not in London when the arrangement was made, and he did not meet either Dr Barker or his daughter at the time. He learned that she had agreed to meet her husband's wishes by entering a home. This pleased him, as avoiding a separation and as affording the prospect of a renewal of cohabitation on which he was set, but it is not clear that he himself regarded the step as really necessary in his daughter's own interest, or as being other than an enforced and humiliating compliance with the demand of an unreasonable husband. It was in this state of matters that Mr Watson wrote the second codicil. As already indicated, he was extremely anxious that his daughter should resume cohabitation with her husband. He may very well have thought that this must be the first step towards the restoration of mutual confidence and affection. But I think that this consideration does not wholly explain his attitude. For reasons which are quite intelligible, though everybody may not sympathise with them, he attached more importance to the avoidance of a separation than to any question of the feelings Dr Barker might entertain towards his wife, or any opinion he had formed as to the character and conduct of Dr Barker or the likelihood of domestic felicity in the union. Brooding over the matter he seems to have said to himself—'My daughter has done this to meet her husband's wishes, but I do not know that I have got to the bottom of the difference between her and this obstinate and queer-tempered man, or that he really means to take her back to live with him. If he doesn't mean to do so I do not mean his child to have her share of my money. "Reconcile" may be an ambulatory word. I shall provide a definite test—cohabitation, the thing to which I really attach importance.' The second codicil, like the first, seems to have been written hurriedly, and without looking round and considering all contingencies. At the time when this codicil was written, and down to the date of the testator's death, cohabitation was impossible. It is not clear, as has already been indicated, that the testator realised this, and did not, on the contrary, regard confinement in the home as an indignity which might be terminated at any time by Dr Barker's will. But on the assumption that he did realise it, I think that the codicil is explicable in two ways—either (1) that the testator did not expect his daughter to be very long confined, and overlooked the contingency of his dying before cohabitation became possible, or what is perhaps more likely, (2) that he overlooked that the date of his death was the *punctum temporis* under the first codicil, or did not realise that as regards the date the codicil would be strictly interpreted. Had he taken advice, and had the position been fully explained to him, I think it probable that he would have explained that what he desired to provide was that the clause should be operative if cohabitation had not been resumed before

his death, or was not resumed after the period of confinement in the home, should he die before its expiry. According to Mr Thomas Watson, the son, this last was the view he himself took of the effect of the provision when he first heard of it. I am not sure that it would be illegitimate to give effect to such a view in circumstances where the result would be to make operative a liberal provision which would otherwise fail. But I do not think it legitimate to give this liberal construction to a clause of adverse discrimination or disinherison, which, taken literally, was inapplicable in the circumstances that existed at the date of death.

"I hold it to be proved that the course insisted in by Dr Barker, of his wife entering a home, was a proper one; that such confinement was essential to her recovery, and that the successful treatment proved her salvation. Accordingly I hold that at the date of the testator's death Dr and Mrs Barker could not have been 'living together as husband and wife' without gross disregard of what Mrs Barker's health required.

"I am accordingly of opinion that if the second codicil be taken by itself as importing a condition that the spouses should be cohabiting at the date of the testator's death, this condition in the circumstances which occurred was an impossible one and falls to be disregarded. I recognise that there might be circumstances where such a clause might be operative even though at the exact date cohabitation were impossible. If, for example, spouses had been living separate, and down to the date of death of the testator there had been no resumption of cohabitation, I do not think the fact that this date found one of the spouses in an hospital or on military service would render such a condition void. But the circumstances of the present case render it impossible to regard the confinement in the home at the date of the testator's death as a mere temporary incident in an established state of non-cohabitation. This view was pressed on the representation that Mrs Barker was really separate before she entered the home and did not leave her husband's house to enter it. But I cannot regard the position during the months when Mrs Barker was at her father's house in Glasgow as a period of separation to this effect. It was a period of suspense and negotiation, and throughout from the first unpleasantness the going to the home was the primary matter of discussion.

"But if the second codicil fails there remains the important question whether the second codicil supersedes the first by prescribing a sole condition. I think it supersedes it to this effect, that if the parties had been living together, no matter how unhappily, the first codicil could not have been founded upon as importing a further condition. But although the touchstone provided by the second codicil failed I am of opinion that the first codicil cannot be disregarded. If Mrs Barker had declined to comply with her husband's wish and enter a home, and without arriving at any understanding with her husband had taken other advice and started on a long sea voyage for her health, I think the first codicil might have been operative, although the second might not have been applicable. I proceed therefore to consider whether the first codicil can be held to have been satisfied as at the date of the testator's death. In considering this question, however, I do not think that the second codicil even if inoperative can be wholly disregarded as interpretative of the testator's mind.

"Further, I think the consideration is of importance that apart altogether from the terms of the second codicil resumption of cohabitation is the most satisfactory symbol of reconciliation, and that up to the date of the testator's death it was impossible.

"The facts at the date of the testator's death were these—The cause of difference between the spouses had been the wife's drug habit and certain very unfortunate episodes attributable thereto. The husband had insisted, and rightly insisted, as a condition of the establishment of normal domestic relations that the wife should go into a home. To this the wife had agreed after much reluctance, and she was now quite satisfied that it had been a wise thing to do. At the date of this agreement both parties contemplated and understood that normal domestic relations should be resumed as soon as the wife's health rendered it practicable. There remained, however, in the mind of the husband a certain sense of bitterness owing to the injury which his wife's drug habit had done him, and this deprived the wife of his full affection.

"As regards the father, he was extremely glad that an understanding had been arrived at. He disliked his daughter being in a home, but he was content that she should be there if it was to satisfy her husband and lead to a resumption of domestic life. But he was not a party to the later negotiations. He did not know all the circumstances. He had not seen either Dr Barker or his daughter since the arrangement took place. He recognised that there had been some sort of understanding arrived at, but he was not sure how far it went. He regarded Dr Barker as a man of curious and uncertain temper, and he was apprehensive that things might still go wrong and no resumption of cohabitation take place. It was in this state of mind that he wrote his second codicil.

"These, I think, were the circumstances. On these facts I think that if Mrs Barker had raised the present action immediately after her father's death she would have succeeded, provided, of course, that I am right in my view of the effect, or rather non-effect in the circumstances, of the second codicil.

"Her narrative would have been that a serious difference had arisen between her and her husband owing to her having contracted the opium habit, the untoward consequences thereof, and her refusal to go into a home. That apart from this there had been no cause of difference between them, that she had at last agreed to comply with her husband's wishes and go into a home, and that they had mutually agreed to resume domestic life as soon as her health

was restored. Upon these facts I have no doubt that it would have been held that the condition was satisfied. The issue to be tried in the present action is the same as in the action I have figured. The rights of Mrs Barker's children and the consequential rights of other children and grandchildren were determined under the codicil as at the date of the testator's death. But against all this it may be urged—That may very well be so, but no such action as is figured was raised, and although what happened afterwards cannot alter the facts as they stood at the father's death, the action being raised now, it is legitimate to show by what subsequently happened, that the inference which might have been drawn would have been quite erroneous, and that in fact there was no reconciliation. That appears to me to be a legitimate contention. But great care must be exercised in applying it. The subsequent conduct of parties may have been influenced by conditions which emerged subsequent to the father's death. In so far as this was the case the conduct must be disregarded. I think that such conditions were operative. There was first of all simply the lapse of further time during which the parties were not together. It is notorious, I think, that where spouses are for a long time living apart after a difference distance does not make the heart grow tender. The one may become less and less necessary to the other. Then Dr Barker had come to realise that the grievous injury done to his practice and standing was not a mere temporary set back. He brooded much over this, and he had a hard struggle, which not unnaturally kept his wife before his mind in an unpleasant aspect. The child had been stricken by a terrible infirmity necessitating frequent operations and rendering any disturbance of domestic arrangements a matter of acute anxiety, and in his view, with which I sympathise, rendering it most inexpedient that his wife should resume control so long as any doubt existed as to her complete restoration. Both spouses had come fully to realise when the problem was faced in October 1901 that Mrs. Barker could not return to Warrington Crescent, and Dr Barker found that his practice had so suffered that he could not dispose of it at the time without losing the money he had paid for it. For these reasons I do not think that the fact that the parties did not resume cohabitation immediately after Mrs Barker's return to London is negative of the conditions she maintains existed as at the date of her father's death. An acute difference had arisen owing to her drug habit and her refusal to go into a home. That difference had been settled by her going into a home. She entered the home on the footing that the parties were to resume cohabitation as soon as circumstances rendered it possible. Even Dr Riley, the most adverse witness to the pursuers in the case, puts that clearly. What happened afterwards, either by way of dispute or of living together, becomes of less and less importance, for reasons I have already indicated, as each month passed away. The evidence of occasional connubial coming together, however, shows that at all events down to 1905 there was no such repugnance as was inconsistent with the renewal of domestic life. It cannot therefore be suggested that at the date of the father's death there were any such conditions as rendered the carrying out of what was contemplated when Mrs Barker entered the home impossible or even improbable.

"The most adverse circumstance to the pursuers is perhaps the correspondence which followed upon the termination of Mrs Barker's life in the home. In my view, however, that correspondence does not quite accurately represent the relations of parties at the time. The recourse to the law agent at Glasgow was an isolated and petulant incident, and I am satisfied that there was no denial of access to the child, though the child's wretched health and the difficulty about Mrs Barker coming to the house where her sister-in-law was mistress and in charge of the child made it not an altogether easy matter. It is due to the sister-in-law to say that she impressed me most favourably, and her position was a most delicate one as she did not even know Mrs Barker. And the Watson family do not appear to have regarded the Barkers with any favour.

"By this time I think Mrs Barker herself realised that she could not return to Warrington Crescent. I do not think that she had the old strong desire to do so. But her position was no doubt a trying one, and it is not remarkable if she was discontented and unsettled. Whilst neither she nor her husband were now earnestly yearning to resume domestic life, I believe that they still both contemplated and intended it as soon as circumstances permitted. But the husband was not prepared to subordinate every other consideration to this, or hurriedly to throw away the small bird he had in his hand, in the shape of his practice, to seek one with his wife in the bush.

"That I think was the attitude of the spouses after the wife left the home, and it does not appear to me to displace the inferences which without this light would have been drawn as to the relations of parties at the date of the father's death. The conditions as regards the difficulties about the practice, the child's health, and the lapse of time which contributed to create that attitude had not then developed or were not fully realised.

"Stress, I should notice, is laid upon Dr Barker's attitude towards his wife before this when she was in the home. Some allowance must be made for Dr Barker's extreme poverty and professional anxiety at this time. But certainly he was not solicitous in his attention to his wife. The evidence of his conduct at this time, however, cuts both ways. He visited his wife several times. It is undeniable that his old strong affection had cooled, and it was not this feeling that constrained him. Had the spouses been separate it is improbable, I think, that he would have visited her at all. He visited her, as I think, because she was his wife from whom he was not separated, and

with whom, if matters went well as regards her health, he was to resume cohabitation. The attitude of Mrs Barker's own family when she left the home is not, I think, without some significance as throwing light upon the understanding of the footing on which she was there. Although they were on affectionate terms with her, and with one exception greatly disliked her husband, there was no suggestion of arranging for her or receiving her. They expected her to resume cohabitation at once and were much surprised and annoyed when this did not take place.

"Construed in the light of all the surrounding circumstances, I am of opinion that the testator's two codicils were directed against separation. At the time when the first codicil was written Dr Barker refused cohabitation, insisting upon definite separation unless his wife agreed to certain conditions with which she was unwilling to comply. At the dates of the second codicil and of his death the testator was not sure whether the spouses were separate or not. In fact, however, the spouses were not separate, and there was no question of separation between them, or contemplated by either if the wife recovered. Accordingly, in my view, the disinherison in the codicils fails.

"There is an alternative view of the case which leads to the same result, viz., that the first codicil fails for the same reason as the second, viz., that the condition was in the circumstances impossible of fulfilment having regard to the date at which the testator died. If reconciliation, as the testator thought—and Dr Riley uses the word, as he explains, in the same sense—means or necessarily implies the resumption of domestic life, this was impossible from the date of the first codicil down to the date of the testator's death. Having regard to Dr Barker's position as a medical man, and the fact that there was a young infant in the house, I think it was impossible—though the testator did not realise this—for him to have received his wife back into his house at any time subsequent to his discovery of the aberrations disclosed by Mrs Niven a few days after his wife left home. In this view, consideration of anything that happened after the testator's death would be irrelevant. I prefer, however, to rest my judgment upon the ground that the bar to renewal of domestic life, so far as dependent upon the will of the parties, was removed when Mrs Barker agreed to comply with her husband's wishes and enter the home."

The defenders reclaimed, and argued—The will and codicils read together in their natural sense imposed a condition which was perfectly clear, and even though it might be prejudicial should receive effect, viz., that unless the spouses at the time of the testator's death had a personal physical residence together, the children of the wife should only take the restricted provision of the codicil. This was a condition-precedent, and was in no sense an impossible condition —*Priestley* v. *Holgate*, 1857, 3 Kay & J. 286; *Egerton* v. *Earl Brownlow and Others*, 1853, 4 Cl. (H.L.) 1, *per* Lord Cranworth at p. 22, and *per* Baron Parke at p. 120; *Bedborough* v. *Bedborough*, 1865, 34 Beav. 286; *Shewell* v. *Dwarris*, 1858, John. 172; *Von Scheffler* v. *Shuldham*, [1912] 1 I.R. 288; *Caldwell* v. *Cresswell*, 1870, 6 Ch. 278; *Thomas* v. *Howell*, 1 Salk. 170, quoted in Jarman on Wills (6th ed.), ii, 1483; Halsbury, The Laws of England, v., 28, p. 590; *Reids* v. *M'Phedran*, 1881, 9 R. 80, 19 S.L.R. 51; *Forbes* v. *Forbes' Trustees*, 1882, 9 R. 675, 19 S.L.R. 453. There was no difference between the laws of England and Scotland in this matter, and, as the cases cited showed, conditions attached to bequests were strictly interpreted, and the words imposing them must be construed in their natural meaning. The cases cited *contra* were not in point, and showed that the construction given to impossible conditions was confined to acts in the nature of the thing impossible.

Argued for the respondents—The condition imposed by the codicils was open to construction, and on a true construction it had been satisfied by the wife going into a home with a view to the ultimate resumption of conjugal relations, and thus terminating the sole cause of quarrel between them. To read the words literally was to make the condition an impossible one, and the Court would not construe general words in a will so as to impute to the testator an unreasonable intention—*M'Gibbon* v. *Abbott*, 1885, L.R., 10 A.C. 653, *per* Sir Barnes Peacock at p. 658. Possibility must be construed with reference to the subject of the condition, *i.e.*, the domestic circumstances of the case, and held satisfied if everything had been done that reasonably could be done to fulfil them, or—if read literally as meaning actual cohabitation—should be treated *pro non scripto*—M'Laren, Wills and Succession, section 1094; Erskine, iii, 3, 85; *Fraser* v. *Rose*, 1849, 11 D. 1466, *per* Lord Cuninghame at p. 1468; *Pirie* v. *Pirie*, 1873, 11 Macph. 941, *per* Lord Justice-Clerk Moncreiff at pp. 947-8, and *per* Lord Neaves at p. 953, 10 S.L.R. 127; Bell's Prin., sections 49 and 1785; *Woods* v. *Townley*, 1853, 11 Hare 314; *Murphy & Linehan* v. *Broder*, 1875, 9 I.R. C.L. 123; *in re Adair*, [1909] 1 I.R. 311; Dig. xxxv, i, 81. Where, as in the present case, the circumstances canvassed had been created by the testator himself, who had provided the money by which the wife had gone into the home, they would be disregarded—*Gath* v. *Burton*, 1839, 1 Beav. 478, *per* Langdale, M.R., at p. 480; *Darley* v. *Langworthy*, 1774, 3 Bro. P.C. 359; *Walker* v. *Walker*, 1860, 2 De G. F. & J. 255; *Wedgwood* v. *Denton*, 1871, L.R., 12 Eq. 290; Jarman on Wills (6th ed.) p. 1481; Halsbury, The Laws of England, v. 28, p. 591. If the condition was to be read as involving actual cohabitation at the date of the testator's death, it could also, in the peculiar circumstances of the parties at the time, be disregarded as *contra bonos mores*—*Wilkinson* v. *Wilkinson*, 1871, L.R., 12 Eq. 604. The case of *Priestley* v. *Holgate* (*cit. sup.*), founded on by the reclaimer, was not in point, because there the testator's words were not open to construction as here. The condition was personal to the legatees, and not as here to the parents of the legatees, and the clause was not a penalty or forfeiture

clause as in the present case. If this was correctly regarded as a forfeiture clause, it could not be enforced in the absence of evidence that the spouses knew of the condition, and there was no such evidence—*Rodgers' Trustees* v. *Allfrey*, 1910 S.C. 1015, 47 S.L.R. 869.

At advising—

LORD JUSTICE-CLERK — The question in this case depends on the construction and effect of the two codicils of 21st March and 12th July 1900. Under the settlement itself, though the point was not argued before us, in my opinion nothing has yet vested in the truster's grandchildren by any of his daughters, and in particular nothing has vested in the children of Mrs Darrell by either of her marriages, and nothing may ever vest in any of them.

At the date of the first codicil Dr and Mrs Barker were in fact living apart — he in London and she in Glasgow—and Dr Barker had taken up the position that until she had accepted his conditions as to her treatment and been "cured" resumption of ordinary married life between him and his wife could not take place. In these circumstances the codicil of March was written, under which participation of the children of Dr and Mrs Barker to the fullest extent contemplated by the truster was made conditional on the reconciliation of the spouses. At this time the only child of the marriage was a few months old. Towards the end of June 1900 Dr and Mrs Barker met in London along with her uncle Mr Thomas Watson and Mr Riley, and it was arranged that she should go to Mr Riley's Home at Leicester, where it was contemplated she would probably remain for a year. I do not think Mrs Barker consented to this very willingly, and while the truster Mr Watson agreed to pay the necessary expenses of his daughter being in the home, this was, I think, more because of Dr Barker's inflexible insistence on his wife going to the home, and because the doctor was unable himself to bear the expense, than because Mr Watson approved of the course which had been resolved on. Mrs Barker went to the home on 2nd July 1900.

Mr Watson's testamentary writings are, I understand, all holograph. The two codicils in question at anyrate are holograph. He was evidently greatly concerned at his daughter having gone to a home, and anxious lest any misunderstanding should arise as to the meaning of the term "reconciled" which he had used in his codicil of March. Accordingly he wrote the codicil of July, by which in my opinion he gave his interpretation as at that date (12th July) of the word "reconciled" in the codicil of March, to the effect that the codicil should be read as if he had repeated it in July in these words—"If at the time of my death Frank and Bee are not living together as husband and wife," &c.

Mr Watson died in April 1901, and at that date Mrs Barker was still residing at the home at Leicester. I am of opinion that Dr and Mrs Barker cannot be held to have been in any sense of the words living together as husband and wife at the time of Mr Watson's death. I do not think they could even be held to have been reconciled in any proper sense of the word. *Prima facie* therefore in my opinion the codicils construed as I have suggested ought to receive effect, the result being that the defenders should be assoilzied.

It is urged by the pursuers that this result ought not to follow, because such a result is based on an unsound construction of the codicils which brings about consequences which were characterised as so unreasonable as to be "monstrous," that the codicils were so expressed as to import a bequest subject to a condition which if the defenders' contentions were adopted was impossible or eugenically unwise or improper, and had been made impossible by a state of things which the truster was himself a party to bringing about, and that therefore the codicils should be disregarded so that the only bequest in the trust-disposition and settlement should be restored free from any qualification contained in the codicils.

Mr Watson did not communicate the terms of his codicils to any of the parties interested. In my opinion he intended the larger benefits which might accrue, *inter alios*, to Mrs Barker's children to depend on the existence of a particular state of things at his death. If the required state of things did not exist at his death, then in my opinion the legal result is that the provision for these larger benefits was not to become and did not become operative.

I do not think it is legitimate to say that the truster cannot in the circumstances have meant the codicils to be read as meaning that the state of things must exist at the time of his death, because according to the arrangement which had been made Mrs Barker was to be in the home for a year, and he must be held to have written his codicils on the footing that they would not come to be construed till that year had expired. I cannot accept this reasoning. Mrs Barker's residence in the home was entirely voluntary, and could have been terminated by her at any moment either with or without her husband's consent.

The codicils are not in my opinion conditional in the ordinary sense of the term. They were not dealing with rights already vested, or which would become in my opinion vested at death, or contemplating what was to happen after death. They merely provided that if a certain state of facts existed at death certain testamentary provisions might ultimately accrue to Mrs Barker's children. In my opinion the requirement of the existence of such a state of things was in no proper sense impossible and in no sense objectionable. Indeed, in Mr Riley's view, as I understand his evidence, complete conjugal intercourse was desirable at all events in the interests of the patient. But I do not think we require to consider whether such intercourse while Mrs Barker was in the home was necessary to enable Dr and Mrs Barker to live together as husband and wife in the sense of the codicils.

In my opinion Mr Watson provided that

if at his death his daughter and her husband were living together as husband and wife certain bequests were to take effect. They were not so living together, and accordingly effect must be given to the codicils with the consequent effect on the bequests.

We were referred to several authorities, most of them derived from the law of England, but I do not think we can safely refer to that law in the present case, which falls to be determined according to the law of Scotland, which in material respects appeared to me to differ from that of England—see *Sturrock* v. *Rankin's Trustees*, 1875, 2 R. 850.

In my opinion the Lord Ordinary's interlocutor should be recalled and the defenders assoilzied.

LORD DUNDAS—I think the Lord Ordinary's interlocutor is wrong. I have come to the conclusion originally arrived at by Lord Dewar, but I do not at all repent of having been a party to the recall of his judgment and the allowance of proof, for I think it would have been very rash to decide this case without having the facts and circumstances fully before us, particularly those which were within the testator's knowledge when he wrote the codicils of 21st March and 12th July 1900. We must endeavour to ascertain the testator's intention as it may be gathered from the language he has used. In order to do so we must, I apprehend, read his testamentary writings together, and construe them, as at the date of his death, in the light of the facts which were within his contemplation.

The material circumstances immediately preceding the execution of the first codicil were briefly these. Dr Barker was deeply distressed about the laudanum habit unfortunately acquired by his wife, and also about certain stories of a scandalous and injurious character which she, doubtless owing to that habit, had circulated about him. He insisted that she must go into a home and submit to regular treatment for at least a year. On 22nd February he wrote that he must have an undertaking from her that she would "not return here *unless and until I am absolutely satisfied that the laudanum habit is broken for ever. Your return uncured is impossible.*" In the event of non-compliance Dr Barker threatened proceedings for a separation. Mrs Barker, on the other hand, was reluctant to enter a home, at all events for more than a period of six or eight weeks. Her father, who was not then fully aware how far the habit had taken hold of his daughter, was adverse to the idea of her entering a home, thought such a step unnecessary, and was disposed to think Dr Barker's attitude unreasonable. In these circumstances he wrote the codicil of 21st March, providing that "if at the time of my death she should not be reconciled to her husband" certain consequences should follow. I see no reason for holding that when he wrote these words the testator had in view merely that the spouses should have adjusted their dispute as to Mrs Barker's treatment and should be at peace concerning the scandalous stories. I think he contemplated—what indeed he afterwards expressed in his later codicil—that they should at his death have resumed family life, and be living together as husband and wife in a reasonable sense of these words.

On 11th April the testator wrote to Dr Barker a letter in which he said that his sole motive was to try and make peace between his daughter and her husband. Dr Barker curtly replied on the 14th that "it is impossible for me to correspond further about the state of affairs existing between B. and myself," but that he was prepared "to run north towards the end of next week and see you in presence of my agent Mr Binnie, either in his office or yours." He did come to Glasgow but left without seeing his wife. No. 97 of process is the draft of a somewhat harsh letter by Dr Barker to his wife written apparently from Mr Binnie's office. On 9th May she wrote to tell him she was willing "for Baby's and your sake" to put herself unreservedly under the care of Drs Gemmell and Anderson and to do whatever they agreed should be done to make her cure complete. To this letter Dr Barker replied that he had already asked Mrs Barker to address him through his agent, and was surprised that she persisted in neglecting his request. A correspondence followed between their respective law agents. On 27th June the testator wrote to his brother Thomas Watson, since deceased—"Unfortunately Frank has taken umbrage at me, and I have no influence with him. I understand he is on good terms with you, and if you could do anything to bring about an arrangement I would be obliged more than I can say." To his daughter he wrote on 29th June the despondent letter of a sick man, urging her not to go on "dilly-dallying" with her husband. On the 30th a meeting took place at the Hotel Metropole in London, which is described in the evidence. Dr and Mrs Barker both depone that at this meeting they were fully reconciled to one another, so far as any reconciliation was required, and on 2nd July Mrs Barker entered Mr Riley's Home at Leicester. It is immaterial whether the spouses were at this time really "reconciled" in the ordinary sense of that word. I should hardly have thought they were, looking to the contemporaneous correspondence and the course of after-events. But what is material is that, if I read aright the testator's second codicil, he obviously did not consider that Dr and Mrs Barker were "reconciled" in the sense in which he used that word. On 12th July he wrote his second codicil—"I don't consider Frank and Bee (Mrs Barker) reconciled as referred to in codicil to my settlement unless they are living together as husband and wife." I cannot read these words otherwise than as exegetical of what was intended by the earlier codicil, and as indicating that when he wrote them the testator considered that the spouses were not then "reconciled," and that they would not be so at his death unless they were living together as husband and wife.

If the testator's hope was to see his daughter and her husband reconciled before

his death in the sense of maintaining a family life together in the same house, his hope was disappointed. He died on 18th April 1901. At that date Mrs Barker was living at Leicester, Dr Barker in London. I am unable to see how it can be reasonably affirmed that they were then "living together," within the meaning of the testator's codicil, or in any feasible sense. "Living together" is no doubt a flexible phrase, open to reasonable construction. I have no desire, nor is it necessary, to attempt an exhaustive definition of it as applicable to the present case. One readily concedes that the terms of the codicil would not be rigidly interpreted in the event of some merely temporary or accidental absence of one or both of the spouses at the testator's death from a home they were in the habit of occupying together. Nor would one investigate too closely their intimate domestic relations to one another. But one must, I think; at least postulate that in order to avoid the operation of the codicils Dr and Mrs Barker would require to be at the testator's death in the occupation (either actually, or at all events constructively in a reasonable sense) of a common residence. They were not in fact in such occupation, nor, in my judgment, can they be held to have been so upon any rational construction.

The Lord Advocate, however, contended that upon a just construction of the testator's words, in the light of the whole history of the case, these spouses were living together at the date in question. His theory of the matter, as I understood it, was that the reconciliation postulated by the first codicil involved no more than that at the testator's death agreement should have been arrived at and peace restored between husband and wife as to the question of Mrs Barker's treatment and as to the matter of the scandalous stories; that such reconciliation had in fact been effected before the second codicil was written; that that codicil recognising the existing state of reconciliation merely provided for the contingency that it might cease before the testator's death; that all therefore that was required in order to satisfy the language of the codicils was that Dr and Mrs Barker should remain at the testator's death as they were at 12th July 1900, "reconciled" in the sense explained, and that they were at his death constructively if not actually "living together," seeing that there was then no impediment of a conjugal nature to their occupation of a single home. I confess I cannot accept this theory at all. The Lord Advocate's view comes very near, I think, to depriving the second codicil of all meaning and effect, for as there was no material change of circumstances between 12th July and the testator's death if we are to hold that the spouses were living together at the latter date, they were equally doing so at the former. But apart from this observation I must reject the Lord Advocate's theory as being speculative and quite inadmissible as matter of construction applied to the circumstances of the case. As already said, I see no reason to limit the intention of the first codicil in the manner suggested, and I regard the second codicil as purely exegetical of the first. It is, I think, just as if the testator had not written the first codicil, but had on 12th July provided that "if at the time of my death she should not be reconciled to her husband, that is to say, unless they are living together as husband and wife," then such and such results should ensue. The very language of the second codicil seems to me clearly to indicate that the spouses were not in the testator's view reconciled at that date in the sense in which he desired reconciliation to be effected. If the Lord Advocate's theory be correct it would have been very easy for the testator—a man, I take it, possessed of a clear mind and a good power of expression—to put his meaning in distinct and unmistakable language. The words he has used seem to me to be incapable of bearing the suggested interpretation, if indeed they do not contradict it.

The Lord Advocate argued alternatively on the assumption that he was wrong, as I hold him to be, on the matter of construction that there is here an impossible condition, which must accordingly be held to be void and inoperative. I do not think this argument will do. The doctrine to which the Lord Advocate appeals is in my judgment inapplicable, because it is confined to conditions in the nature of things impossible. It is true that "impossibilis conditio in institutionibus et legatis . . . pro non scripto habetur"—Just. Inst. ii, 14, de hæredibus instituendis, section 10—but one also finds that "conditionum duo sunt genera; aut enim possibilis est aut impossibilis. Possibilis est quæ per rerum naturam admitti potest; impossibilis quæ non potest"—Paulus, Sent., iii, 4, de institutione hæredum, sections 1, 2. Things illegal or *contra bonos mores* were considered as impossible as those "quæ per rerum naturam admitti non possunt"—see also Dig., xxviii, 7, 1, 9, 14, xxxv, 1, 3; Bell's Prin., section 1785, and *cf. Egerton*, 1853, 4 Clark (H.L.), *per* Lord Cranworth, L.C., at p. 22; Theobald on Wills (7th ed.), p. 568. There is not here any impossible condition in the sense which makes such conditions void. There was nothing to render it impossible for Dr and Mrs Barker to occupy the same residence as husband and wife at the date of the testator's death. They could have done so at Leicester or anywhere else. Mr Riley's view is that it would have been rather beneficial than otherwise to Mrs Barker's health if her husband had stayed with her. It was urged that sexual connection between the spouses at that time would have been improper and wrong, but assuming this to be so they might certainly in my judgment have fulfilled the test of "living together" without actual intercourse of that sort. It might not have suited Dr Barker's convenience, looking to the interests of his practice and otherwise, to have his wife with him under the same roof. But such considerations do not affect the possibility of the spouses living together in any sense that should render void the postulate of the testator's codicil. It may be doubtful, though the matter is probably one of words rather than of sub-

stance, whether the terms of the codicil amount to a condition at all—"Words descriptive of the place or mode of life of a person at the date of the death of the testator do not, properly speaking, create a condition"—Jarman on Wills (6th ed.), p. 1464. In any view, however, there is here, I think, no potestative condition—for the terms of the codicils were not known to Dr or Mrs Barker during the testator's life—but at most a purely casual condition, the effect of which must, I apprehend, be determined by the state of matters as they happened to stand at the testator's death—*cf.* M'Laren on Wills (3rd ed.), p. 596, section 1085; *Waddell*, 1738, M. 6366; *Roberton*, 1833, 11 S. 297; *Priestley*, 1857, 3 K. & J. 286. At that date Dr and Mrs Barker were not in my judgment living together according to any ordinary or feasible meaning of the words, and the language of the codicils must take effect. The provision so far as I see is neither impossible, illegal, nor contrary to public policy or morals.

It was urged by the Lord Advocate that if we should decide the case as I propose the result would be manifestly unreasonable and unjust. I am not persuaded that this is so. I think the testator was anxious above all that his daughter and her husband should come together again and live as husband and wife. His codicils were not, I apprehend, intended to induce this end, for it appears that their contents were not made known to the spouses. I do not, however, regard their object as being (as was intended) to punish Dr Barker through his child for what he had done. But it may well be that the testator thought that if this married pair drifted apart they might remain so permanently, and may have resolved (not unreasonably) to make in that event a comparatively small provision for the issue of the marriage. One cannot, however, affirm that this was so, any more than one may conjecture what the testator's attitude would have been if he had lived to see the course of after-events, including Mrs Barker's re-marriage and the birth of a second family. But even if the provision be unreasonable I do not think that would concern this Court so long as it is a legal one for the testator to have made.

For these reasons I am of opinion that the Lord Ordinary was wrong in finding (1) that the condition was impossible and cannot be given effect to, and (2) that at the date of the testator's death Mrs Barker was reconciled to her husband in the sense in which in relation to the surrounding circumstances the word "reconciled" in the testator's codicil of 21st March 1900 falls to be construed. We ought, in my judgment, to recal the interlocutor and assoilzie the defenders.

LORD SALVESEN—The pecuniary interests at stake in this litigation are considerable. By his trust-disposition and settlement of 11th March 1896 the late John E. Watson provided that the whole residue of his estate, amounting to about £72,000, should be divided equally among his children, one son and three daughters, and their issue. The share falling to his son, who is the defender Thomas Watson M'Nab Watson, was to be paid to him absolutely, whereas the shares falling to his daughters were to be held by the trustees for their liferent use and for their children in fee *per stirpes*. All the daughters are married, but only one of them, who is a pursuer in this case, has children. If the two codicils which are the subject of construction in this case have the effect contended for by the defenders, not merely will the share of the pursuers' children be restricted to a sum of £5000, but they will have no right to participate in the succession to the shares liferented by their two childless aunts. Assuming that the share of each of John E. Watson's four children was of the value of £18,000, the defender Thomas Watson, or his issue, will succeed to £13,000 on the death of Mrs Barker (now Darrell), and also to the whole shares liferented by Mrs Campbell and Mrs M'Cowan, amounting to £36,000.

The material facts in the case, as they have now been elucidated by evidence, may be shortly stated. Dr Barker married Miss Elizabeth Mary Watson, one of the three daughters of John E. Watson, on 6th April 1898. At the time of the marriage Dr Barker had no money of his own, and had to borrow a sum of £800 from his father-in-law to enable him to acquire a practice in the suburbs of London. The Watson family regarded him with disfavour, partly no doubt because of his lack of means, and partly because they regarded him as in a lower social scale. The marriage, however, was permitted by Mr John E. Watson and was undoubtedly a marriage of affection. The spouses lived together in London, and a child was born on 6th April 1899. Shortly after the birth of the child, which suffered from congenital hip-disease and was for many years a helpless cripple, Dr Barker became aware that his wife had contracted a habit of taking laudanum. It is probable that the habit had commenced before marriage, but it had certainly been continued during the greater part of the married life. As usual in such cases, the victim concealed the fact of her taking the drug, and it was only in the autumn of 1899 that Dr Barker definitely ascertained the cause of his wife's ill-health and peculiar conduct. The seriousness of the situation became at once apparent to him as a medical man. The habit once acquired is difficult to break, and the persistence in it results in nothing short of moral destruction. In Dr Barker's view immediate and drastic steps required to be taken if his wife were to be freed from what Professor Gemmell in his letter of 20th February 1899 describes as "an awful bondage."

Dr Barker's own view from the first was that the only method of effecting a complete cure was to have his wife put into a home where she could be effectually supervised, and would not be in a position to obtain any supplies of the drug to which she was addicted. Not unnaturally his wife shrank from the publicity as well as from the restraint of such treatment, and in this she was supported by her father, whose opinion as a layman was that she might be

broken off her habit through her husband's direct influence and while remaining as mistress in his house. In February 1900 it was arranged that the lady should go to her father's house in Glasgow. When the spouses parted I think it is proved that they were on affectionate terms, and that the only cause of disagreement was as to the best mode of effecting a cure in her case. While resident with her father Mrs Barker continued to take doses of laudanum without his knowledge and in such a way as not to present any marked symptoms of the evils, physical and moral, which usually attend it. She persuaded her father that her husband's view was distorted, and that she would be able to cure herself while resident with him under her sister's eye. In the meantime Dr Barker had discovered that under the influence of the drug his wife had spread horrible stories regarding him amongst his patients which had for the time being entirely ruined his practice. He accordingly became more insistent than ever that she must go into a home in order to effect a cure. His attitude is well expressed in his letter of 6th March 1900, and to gain his end he suggested that the only alternative to her complying with his wishes was a definite separation. Dr Barker has been blamed for the bitterness which some of his letters display, but allowance must be made for the fact that he had indeed been sorely tried. Added to the difficulties of matrimonial life with a woman whose powers of self-control were gone were the two tangible facts — (1) that her infant child was apparently a confirmed invalid, and (2) the ruin of his practice by the slanderous stories which she had spread amongst his patients regarding him. It is true that all these things resulted from the use of the drug, but the moral responsibility for having contracted the habit remained with her, and, as Dr Barker said in his evidence, it is "impossible to dissociate a thing like that from the person who is the victim of it."

Such was the position of matters when, on 21st March 1900 Mr John E. Watson wrote in his own hand the first of the two codicils which are in question here, and which provides that "if at the time of his death she (his daughter Elizabeth Mary) should not be reconciled to her husband she is to have the liferent use of her share of the estate as before provided," but at her death the sum of £5000 should represent the only provision for her child or children.

It is not easy to understand what object the testator thought to serve by making this codicil. If he had disclosed it to the parties concerned it might have been a powerful incentive towards their effecting a reconciliation. There is no evidence that he made it known to any person. Both pursuers say they were entirely ignorant of the codicil, and their evidence may be confidently accepted, for it was unknown to any of the members of Mr Watson's family. It is conjectured that the testator thought that if the spouses had not been reconciled at the time of his death their separation would be permanent, and that a provision of £5000 for the single child of their marriage would be adequate. This view gets colour from the expression in the testator's letter of 8th March, where he says, "If she gets over the habit you complain of, the cause of this difference will disappear and you may have a long happy life together, while separation would be final." This explanation is, however, scarcely consistent with the use of the words "child or children" in the codicil. In any case it is not easy to understand why the child should be penalised because its parents failed to agree.

As early as 8th March 1900, as the letter last referred to shows, Mrs Barker had indicated to her father that she was prepared to come to an arrangement with her husband on the terms he demanded, namely, that Dr Barker should get his cousins to stay with him and that she should go into a home. It was not, however, until 30th June, after a long correspondence, that Dr Barker ultimately carried his point, and that arrangements were made for his wife entering Mr Riley's home. Explanation of the delay is to be sought in the weakening of the lady's will-power under the influence of the drug. Although she had long been convinced that her only hope of cure lay along this line, it was only by constant pressure of the severest kind at the instance of Dr Barker and through the intervention of her uncle (now dead) that she made up her mind definitely to take the final step. When she complied with her husband's wish the only difference between them was composed, and I think they became reconciled in the sense that that word is used in the codicil of 21st March 1900.

It is obvious to my mind that the testator also took this view, or at all events realised that the fact of his daughter's going into a home marked a new era in the relations between her and her husband. Within ten days after his learning of the fact he wrote a second codicil in which he said — "I do not consider Frank and Bee reconciled as referred to in codicil to my settlement unless they are living together as husband and wife." This codicil, unlike the former one, does not expressly refer to the date of the testator's death, but it is common ground that the state of matters which existed at that date is alone to be considered, although subsequent events may have a bearing in determining what that state of matters actually was.

At the time when the codicil was written, although the testator was not in good health, there was no apprehension in his mind that his condition was serious. He became, however, dangerously ill in the spring of 1901, and died at his residence in Glasgow on 18th April. Some days before Mrs Barker had left the nursing home in which she had remained under treatment in order to see him on his deathbed. She did so at his desire. A few days afterwards she returned voluntarily to the nursing home and remained there until October 1901, by which time a complete cure of her illness had been effected. My conclusion from the evidence is that the situation as between husband and

wife remained substantially the same on 18th April 1901 as it had existed when the codicil was written on 12th July 1900. Dr Barker had visited his wife on several occasions at the home, although not so often as she appears to have wished during the early months of her treatment, when she was, no doubt, suffering from the depression caused by her enforced abstinence from the drug. He appears to have taken the view that in her interests it was desirable that he should not visit her at this time, but allow her to settle down in the home, as she gradually did, until when the effects of the drug habit had worn off she found her life there not merely comfortable but relatively happy. I do not find any evidence in the proof (and practically no correspondence has been preserved) to show that there was any change in the state of feeling between the spouses or their desire to resume cohabitation so soon as the cure had been completely effected. The suggestion that Dr Barker might have stayed with his wife at the home —for which the owner provided facilities— does not commend itself to my mind, and I think was in any view impracticable in the case of a man with a struggling practice which was mainly obstetrical. Even a visit for a day was probably not easily achieved, having regard to Dr Barker's economic position and his strenuous efforts to re-establish his ruined practice. That after the period for treatment had expired the spouses did not take up house together is, I think, fully explained by the impossibility of Dr Barker realising his practice and the obvious inexpediency of bringing his wife back to a circle of acquaintances where her infirmity had become notorious. I cannot doubt that both spouses intended throughout to resume cohabitation as soon after the cure was effected as was possible, and Dr Barker's insistence on his wife submitting herself to curative treatment and her reluctant acquiescence had no other object in view. The subsequent history of the spouses and the way in which they gradually drifted apart has in my judgment no bearing on the point which we have to determine in the present case.

Such being the facts, what meaning is to be attributed to the codicil of 12th July? If it is construed according to its literal meaning (and this, as I understand, is the defenders' primary contention) the pursuers were not then living together under the same roof, for Mrs Barker was attending her father's deathbed and Dr Barker was in London. I cannot attribute to the testator the fantastic intention that the pursuers' children should be disinherited because their parents at the precise date of the testator's death were not living in the same house. Married persons are not the less living together as husband and wife at a given date because at that time one of them may have had to go abroad on business or for health, or because under the advice of doctors one of them has gone to a home or hospital for treatment. The language of the codicil is therefore open to construction. Had the codicil been written before Mrs Barker's visit to her father in February 1900 I cannot doubt that its provisions would have been complied with although thereafter Mrs Barker had gone into a home for curative treatment and had remained in it until her father's death. The disease from which she was suffering was one of the mind and will, which was reacting upon her physical state, but it was not the less a disease which required treatment in a home apart from her husband. To my mind a precisely analogous case would have been if Mrs Barker had gone to a hospital under medical advice in order to undergo a serious operation and had remained there till the date of her father's death, or had been confined in a lunatic asylum on certificates that she was temporarily insane. The only difficulty in construing the codicil is that the condition of matters which existed at the testator's death was substantially the same as that on 12th July 1900, and it was forcibly argued that the testator cannot have meant that the spouses were at that time in his view living together as husband and wife. The answer appears to me to be that the testator was providing for a future condition of matters which might emerge after his daughter's curative treatment had been completed. He was apprehensive that after a year's separation she and her husband might not come together, either because the treatment had failed in effecting a cure or because their feelings towards each other had changed. I cannot impute to him the intention of penalising the pursuers' children because the mother loyally continued in a home in order that she might be restored to health and to the society of her husband. I read therefore into the codicil the implication that at the date of his death the conditions were such that it should be possible in a reasonable sense for the spouses to be living together under the same roof. That state of matters had not arisen when the succession opened. So far as the circumstances permitted the spouses were, I think, living together as husband and wife although temporarily residing apart owing to the condition of the wife's health. I prefer this ground of judgment to that of the Lord Ordinary, although if I had accepted his view of the construction of the codicil I should have agreed with him that the condition was an impossible one and falls to be disregarded.

LORD GUTHRIE—The question in this case is whether a certain testamentary condition prescribed by the late Mr John E. Watson in connection with his provision in favour of the children of his daughter Mrs Darrell, one of the pursuers, has been purified. The condition contained in two codicils dated respectively 21st March and 12th July 1910 was that his daughter and Dr Barker, then her husband, should at the time of the testator's death be "reconciled" in the sense explained by the testator in his second codicil, namely, that they should at that date be "living together as husband and wife."

I do not think that probabilities assist the decision of the case. In any view the condition would in easily forseeable circum-

stances have operated unfairly to the children, born and to be born, of the testator's daughter Elizabeth, the issue of her existing or of a future marriage, penalising them for supposed wrongdoing for which they had no conceivable responsibility. Nor do I think we are assisted by the fact that the condition would be more unfair in certain possible events under the defenders' than under the pursuers' contention.

In the end I understood it was not disputed, although the opposite was at first maintained by the defenders, that the word "reconciled" in both codicils and the phrase "living together as husband and wife" in the second codicil are capable of construction, and that in both cases the condition would be sufficiently satisfied if the parties were reconciled in the sense of living together as husband and wife to the extent to which their circumstances made such living together reasonably possible. But whether the parties are so agreed or not I propose to take the case on that footing.

On the terms of the testator's codicils it was argued that at their dates the testator must have considered that his daughter and her husband were not reconciled in the sense that they were not then living together as husband and wife. On the mere terms of the codicils I do not take that view. No doubt the words "should not be" instead of "is not" contained in the first and imported into the second codicil rather seem to favour the defenders' contention. But I think the words are reasonably capable of the view that while there had been alienation at one time and a failure to live together as husband and wife, the testator, treating the parties as then reconciled in the sense of living together as husband and wife, was providing for a possible rupture in the future occurring between the dates of his codicils and his death and subsisting at his death.

The oral and written evidence, however, convinces me that the testator did not at the dates of either of his codicils regard the parties as reconciled in any sense, and particularly that he did not regard them as then living together as husband and wife, and further that he was right in so thinking. As at the date of the first codicil it is obviously out of the question to say that spouses could be reconciled in any sense, including the sense of living together as husband and wife, when the husband was refusing to correspond with his wife except through his solicitor and a solicitor who had been instructed by the wife's father to act for her. But it is said this unhappy condition had ceased before the date of the second codicil and did not exist at the testator's death. I do not think this view is sound if regard be had to the true cause or causes which lay at the root of the original alienation—causes still operating, as I think, at the date of the second codicil and at the date of the testator's death.

The pursuers maintained that the only quarrel between the spouses had been caused by the wife's refusal to go into an inebriate home for the cure of her drug habit, and that, she having consented to go, and having gone into such a home before the date of the testator's second codicil, and having been actually or constructively an inmate of that home at the date of her father's death, it must be held that as at the latter date she was reconciled to her husband in the sense of living with him as his wife. But the wife's refusal to go into a home was a mere incident in the quarrel. The origin and ground of the quarrel was the wife's acquisition of a habit—taking laudanum habitually, contrary to medical orders, a habit always very difficult to cure—which unless permanently cured necessarily unfitted her for the duties of a wife and a mother and the head of a household, and by conduct on her part, arising from that habit, so outrageous, in its disregard of truth as well as of her husband's interests, her own interests, and the interests of her child, as to show complete perversion for the time of her moral nature. That quarrel could not possibly cease until, first, the wife had been so completely cured as to restore her fitness for her position and to render impossible any repetition of conduct on her part which had nearly ruined her husband's career, and until, second, the husband had accepted the cure as permanent and had actually taken his wife back, or at least agreed to take her back, as his wife and the head of his household. As Mr John E. Watson puts it in his letter to Dr Barker of 8th March 1900—"If she gets over the habit you complain of, the cause of this difference will disappear." As I read the evidence, the husband, as was not unnatural from his experience of and reading about such cases, was sceptical as to the possibility of his wife's cure, if not from the date when the habit was discovered, at all events from the time when the foul stories she was circulating about him among his patients came to his ears. At the date of the second, as well as of the first codicil, the essential cause of the quarrel still operated, and there was nothing more than a chance (what Dr Barker in his letter to his wife of 6th March 1900 calls a "straw of hope") that at some uncertain date it might be removed. The same state of things subsisted at the date of the testator's death. On 16th May 1901, a month after the testator's death, Dr Barker wrote to Mr T. W. M. Watson, his wife's brother—"You are mistaken in supposing that I named to Mr Tom Watson any time at which it would be possible for me to receive my wife back. I explained that it was impossible for me to give any definite undertaking."

The drug habit is not an ordinary disease which can be pronounced permanently cured as soon as the poison is out of the system. It is a habit, as well as a disease, and a habit cannot be said to be permanently abandoned until the subject of the habit, when no longer protected against himself, has proved that the habit has been completely mastered. As Mr Riley puts it in his letter of 22nd May 1901 to Mr T. W. M. Watson—"It is impossible for me to pronounce an opinion as to whether Mrs Barker is cured or not until she has passed through some term of probation sufficient to test the amount of

will power gained during the last twelve months. . . . She has been under constant supervision during the whole period of her stay, and therefore we cannot judge of results until that absolute supervision is removed." At the date of the second codicil Mrs Barker was actually, and at the date of the testator's death she was constructively, in the home, with a balance of the necessary twelve months' period of seclusion unexpired, and with the whole subsequent period of probation still to be gone through. In these circumstances the substantial cause of the quarrel being at the dates of both codicils and at the date of the testator's death unremoved, because it was at best only in course of possible removal, I am unable to see how the parties can be said at any of these dates to have been either reconciled or living together as husband and wife in any sense of the words, technical or popular, liberal or strict, inward or outward.

In coming to a conclusion on this matter, regard must of course be had to the exact relation between these two persons. Neighbours with a nodding acquaintance, when reconciled, may merely resume nodding acquaintance, instead of cutting each other as they did while the quarrel lasted. Friends when reconciled may merely resume the calling terms which they had dropped during the dispute. But when spouses are reconciled, they resume sexual relations and they live together in the same house, or if necessary causes prevent common residence for a time they meet whenever they can, and if even this is impossible they correspond in affectionate terms and show themselves solicitous about each other's comfort and happiness. If there are children and the circumstances of the necessarily absent spouse make personal access to the children impossible, the spouse who is in charge of the children keeps the other spouse constantly informed of the children's health and growing intelligence, and narrates the little incidents in their lives.

Instead of such features as I have mentioned, this case seems to me at all the three crucial dates to present most of the characteristic features of existing estrangement between the spouses, modified only by a steadily diminishing hope that these features might be ultimately removed at an uncertain date in a possible future.

The drug habit in a wife does not necessarily produce any estrangement between her and her husband. He may remain devoted to her. He may be very sorry for her and make excuses for her connected with illness and unwise medical advice. He may be confident that she has only to go into a home for a reasonable time to make permanent cure certain. In such a case, acting in concert with her own relatives, he will spare no trouble in making arrangements for her residence in the home, and he will grudge no money for her comfortable accommodation there. While she is in the home he visits her at every possible opportunity, taking the family with him when he can, and in the interval he sends her cheery letters and constant news of the children. In short, he does the utmost possible to keep up the family life so far as the circumstances permit. Had these been the facts of this case, I should not have hesitated to hold that the spouses were reconciled at the date of the testator's death in the sense of living together as husband and wife, even although the wife was at the time, and had been for months before, and intended to remain for months after, an inmate of the inebriate home. With Lord Salvesen I look upon her residence there as in the circumstances indistinguishable from residence in a hospital for physical disease or injury, being necessary for the cure of a moral disease.

But the facts of the present case are in every particular in sharp contrast with those above suggested. It is true that the mere discovery of the drug habit does not seem to have seriously affected Dr Barker's previously affectionate relations with his wife. But a bitter quarrel took place when Dr Barker heard about the vile stories his wife had been spreading about him among his patients, and as I read the evidence oral and documentary, this quarrel was never made up but became more embittered as Dr Barker brooded over his wrongs and found his practice disappearing. This appears by contrasting the affectionate tone of the letters of 11th and 14th February 1900, written before he heard what his wife had been doing, with the not unnaturally bitter tone of the letter of 17th February after his wife's conduct had come to his knowledge. So far as we know, the attitude taken up by Dr Barker towards his wife in the letter of 17th February had undergone no substantial change down to the testator's death. He was never confident of her cure. Even after she had been ten months in Mr Riley's Home, apparently without a lapse, Dr Barker wrote to Mr T. W. M. Watson on 19th May 1901, a month after the testator's death—"There can be no question of her return till it is quite clear to everybody that she is completely and permanently cured. I regret to say that there is no evidence at present of such a cure." He had had acrimonious discussions with her, her father and her brother, as to the necessity for her going into a home. It was not he but her father who made the arrangements for her residence in the home, and who paid for her there. His visits were necessarily infrequent, but he seems to have visited his wife only under a sense of compulsion, and only some three times during sixteen months. He wrote her very few letters, and these I think there is good reason to infer, were couched in the aggrieved and unsympathetic tone of continued and growing estrangement. In these letters he seems to have given her no news of the child, the only bond between them. On 13th November 1901, seven months after the testator's death, Mrs Barker wrote to her husband—"I have now not seen my own baby for over sixteen months, and I feel it most keenly." I go on the contemporary letters of the testator, the spouses, and Mrs Barker's relatives, rather than on the oral evidence of the spouses, which, however uncon-

sciously, is necessarily affected by a desire to prevent what they naturally consider injustice to the children of both families, and a tendency to minimise the intensity of the estrangement between the spouses, and to magnify the expectation on Dr Barker's part, and on the part of others, of reconciliation. Reading these letters I do not think Mrs Barker greatly exaggerated when writing to her sister, Mrs Fraser Campbell, on 12th May 1901, a month after the testator's death, she thus described her husband's conduct during the whole crucial period in this case—"He has not stuck to me, but threw me over when our first trouble came."

The question is not one of approval or disapproval of Dr Barker's feelings or conduct. I am disposed to make much greater allowance for him than the Lord Ordinary does, and, differing from the Lord Ordinary, I find exasperated human nature strained beyond the breaking-point amply sufficient to explain all his actings. But the question is one of fact in relation to a condition in a settlement, which, however unreasonable and ill-considered, the testator was entitled to prescribe, and which therefore we are bound to enforce. I am prepared to take any stateable construction of the word "reconciled," and of the phrase "living together as husband and wife," which has been suggested by any of the parties, except the literal one contended for by the defenders in one part of their argument, and I hold that on any construction, and making every allowance for the peculiar circumstances of Dr Barker—a physician struggling single-handed to build up a practice involving close and continuous personal attention, and to live down injurious and unfounded stories circulated against him by his wife—the parties were not in any reasonable sense reconciled, and, in particular, taking the testator's gloss or test of living together as husband and wife, they were not so living at the dates of either of the codicils or at the date of the testator's death.

As to the pursuers' plea sustained by the Lord Ordinary, that the condition of living together as husband and wife must in the circumstances be disregarded as an impossible one, I adopt the views of Lord Dundas both in fact and in law.

The Court recalled the interlocutor reclaimed against, and assoilzied the defenders from the conclusions of the summons.

Counsel for the Pursuers (Respondents)—Lord Advocate (Clyde, K.C.) — Wilton. Agents—J. & R. A. Robertson, W.S.

Counsel for the Defenders (Reclaimers)—Solicitor-General (Morison, K.C.) — Maclaren. Agents—Cumming & Duff, W.S.

Friday, November 15.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'LELLAND *v.* J. & P. HUTCHISON AND OTHERS.

Master and Servant—Workmen's Compensation—"Contract of Service"—Deserter from Army—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 1 (1) *and* (13).

A deserter from the army was employed by shipowners, who did not know that he was a deserter, as a marine fireman or trimmer. He was drowned by the loss at sea of the vessel on which he was employed. *Held* that his widow was entitled to recover compensation in respect that the contract of employment with her deceased husband was not void but voidable, and had not been avoided at the date of the accident.

Mrs Robertson or M'Lelland, widow of Samuel M'Lelland, *appellant*, being dissatisfied with an award of the Sheriff-Substitute (MACKENZIE) at Glasgow in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) brought by the appellant against J. & P. Hutchison and others, the trustees of the late Thomas Holt Hutchison, *respondents*, appealed by Stated Case.

The Case stated—"The arbitrator having heard parties' procurators and considered the cause, found—1. That the [appellant is] the wife . . . of the deceased Samuel M'Lelland, sometime dock labourer in Glasgow, and that the s.s. 'Dartmoor' was owned by the deceased Thomas Holt Hutchison, whose trustees have been sisted as parties to this action. 2. That in February 1917 the deceased Samuel M'Lelland was engaged by the respondents under the name of John Fitzsimmons to sail as a fireman or trimmer on board said ship; that the said Samuel M'Lelland, who was a deserter from the army, sailed on said ship under the name of John Fitzsimmons. 3. That the said deceased Samuel M'Lelland while on board the s.s. 'Dartmoor' was drowned owing to the loss at sea of the said vessel in or about the month of May 1917. 4. That the wages of the said deceased when in the employment of the respondents were at the rate of £9, 10s. per month with his food, which would amount to about £4 per month; that his service in the army was in accordance with the particulars contained in No. 2 of process, and that he deserted therefrom for the second time on 30th December 1915. 5. That the . . . appellant Mrs M'Lelland was married to the deceased Samuel M'Lelland on 14th October 1907; that they lived together until August 1914, with the exception of a period of two months in 1908, a period of three months in 1910, and a period of six weeks in 1914, when they lived separately owing to domestic quarrels; that during all this time the . . . appellant was supported by her husband; that in August 1914 the spouses again quarrelled, and the